

## MEXICO'S EMERGENT NEW LAW OF SECURED TRANSACTIONS: RECENT DEVELOPMENTS 2000-2010

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### I. INTRODUCTION<sup>#</sup>

In 2010, Mexico added another chapter to a decade-long reform of its secured transactions laws.<sup>1</sup> Whether the reform will accomplish all that is

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1. The reform took place by legislative and regulatory action in 2000, 2003, 2009, and 2010.

First, the Mexican Congress enacted the *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 that Amends, Adds, and Repeals Various Provisions of the General Law of Credit Instruments and Operations, the Commercial Code, and the Law of Credit Institutions], Diario Oficial de la Federación [DO], 23 de Mayo de 2000 [hereinafter Reform Law of 2000].

As part of that initial reform, the Mexican Congress passed the *Decreto por el que se reforman, adicionan y derogan diversas disposiciones del Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, del Código Federal de Procedimientos Civiles, del Código de Comercio y de la Ley Federal de Protección al Consumidor* [Decree that Amends, Adds, and Repeals Various Provisions of the Civil Code for the Federal District in Common Matters and for the Whole Country in Federal Matters, the Federal Code of Civil Procedure, the Commercial Code and the Federal Consumer Protection Law], DO, 29 de Mayo de 2000 [hereinafter Commercial Registry Law of 2000]. This law created a broad commercial law reform, of which the Commercial Registry Law was the chief part.

Subsequently, the Mexican Congress enacted *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 that Amends, Adds, and Repeals Various Provisions of the General Law of Credit Instruments and Operations, 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 the General Law of Organizations and Activities Ancillary to Credit], DO, 13 de Junio de 2003 [hereinafter Reform Law of 2003].

Regulations reforming the Public Commercial Registry to incorporate the changes of the Reform Laws of 2000 and 2003 followed. Reglamento del Registro Público de Comercio [RRPC] [Regulations for the Public Registry of Commerce], as amended, DO, 24 de Octubre de 2003 [hereinafter the Regs or the Regulations of 2003]. The Reform Law of 2000 and the Reform Law of 2003 had both contemplated the issuance of the

necessary for a full-blown, modern secured transactions system remains to be seen, but by any measure, the Mexican process has come a long and arduous way since its initiation before 2000. As trade between Mexico and the United States picks up along the border, and Mexican and U.S. businesses become more integrated under the aegis of the North American Free Trade Agreement,<sup>2</sup> the Mexican law of secured transactions takes on surpassing interest. A generation ago, as U.S.-Canadian trade blossomed and the country's commercial relations grew intertwined, the Canadian provinces enacted "personal property security acts" modeled after the Uniform Commercial Code's Article 9 on Secured Transactions.<sup>3</sup> If all three member countries of NAFTA could harmonize their laws of secured transactions, it would expedite credit transactions throughout North America.

Thousands of credit transactions involve cross-border lenders, typically U.S. creditors who loan to Mexican debtors and seek to secure their loans against

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Regulations of 2003. See generally Dale Beck Furnish, *Accommodating Registry Systems for the OAS Model Law: Mexico's New Registry Regulations*, 37 No. 4 UCC L.J. 3 (2005) [hereinafter Furnish, *Registry Systems*].

Finally, in 2009, the Mexican Congress returned to the reform process once more with its *Decreto por el que se reforman y adicionan diversas disposiciones del Código de Comercio* [Decree that Amends and Adds Various Provisions of the Commercial Code], DO, 27 de Agosto de 2009 [hereinafter Reform Law of 2009]. Curiously, the delay between legislative approval of the Reform Law of 2009 and its official publication, which established its effective date, was much longer than usual.

The Public Commercial Registry accommodated the new law in three final executive regulatory actions: 1) the *Decreto por el que Se Reforman y Adicionan Diversas Disposiciones del Reglamento del Registro Público de Comercio* [Decree that Amends and Adds Various Provisions of the Regulations of the Public Commercial Registry], DO, 23 de Septiembre de 2010 [hereinafter RUG Regulations]; 2) the *Acuerdo por el que se establecen las formas para llevar a cabo las inscripciones y anotaciones en el Registro Público de Comercio y en el Registro Único de Garantías Mobiliarias* [Accord Establishing the Forms by Which to Carry Out Registrations and Annotations in the Public Commercial Registry and the Single Registry of Security Interests], DO, 12 de Octubre de 2010 [hereinafter Forms Reg]; and 3) *Aclaración al Acuerdo por el que se establece las formas para llevar a cabo las inscripciones y anotaciones en el Registro Público de Comercio y en el Registro Único de Garantías Mobiliarias, publicado el 12 de octubre de 2010* [Clarification of the Accord Establishing the Forms by Which to Carry Out Registrations and Annotations in the Public Commercial Registry and the Single Registry of Security Interests, published October 12, 2010], DO, 19 de Octubre de 2010 [hereinafter Clarification Reg]. This article refers to the three regulations promulgated in 2010 collectively as Regs or Regulations of 2010.

2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. The agreement entered into force among the parties on Jan. 1, 1994. See *North American Free Trade Agreement (NAFTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Dec. 30, 2011).

3. See RON C.C. CUMING, C. WALSH & R. WOOD, *PERSONAL PROPERTY SECURITY LAW* (2005).

assets originating in Mexico.<sup>4</sup> I originally prepared this article for a symposium growing out of a panel discussion that focused on one such area of major activity: the financing of Mexican crops for export. More often than not, U.S. lenders provide crop loans to the large-scale Mexican growers who push a cornucopia of fruits and vegetables north across the border each year. Typically, such lenders also function as the wholesalers who buy such products and market them in the United States. As the process moves from farm field to ultimate consumer, the Mexican debtor will possess assets on the U.S. side of the border, ranging from the agricultural products themselves after export, to invoices and accounts receivable after their sale, to U.S. bank accounts maintained by many Mexican growers. But before the goods cross the border, can a U.S. lender take a security interest in the Mexican crop, secure in the knowledge that if the Mexican farmer defaults, the lender can proceed against the crop in Mexico without losing his claim to other, undiscovered claimants?

Heretofore, the Mexican law of secured transactions made such transactions precarious because it did not provide a transparent system of clear priorities on which secured creditors could rely.<sup>5</sup> Similar business loans take place constantly, in giddy variety and stupefying amounts, between states throughout the United States, and between the United States and Canada.<sup>6</sup> The difference is that the United States and Canada have harmonized their secured transactions laws in a way that creates a common credit market between the two countries by assuring creditors that they can secure loans against movable goods in either country by a simple and transparent process, with full assurance of the validity and priority of their liens.

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4. This is reflected in filings against Mexican debtors at the Office of the Secretary of the District of Columbia under UCC Section 9-307(C), which deems D.C. the location for foreign debtors whose home countries' laws do not "generally require information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system," which was the case for Mexico until recently.

5. See Dale Beck Furnish, *Mexican Law of Secured Transactions*, in *DOING BUSINESS IN MEXICO* (Philip von Mehren, gen. ed., 2000), reprinted in *DOING BUSINESS IN MEXICO* (Leon E. Trakman et al. eds., 2004) [hereinafter *Furnish, Mexican Law*].

6. Some idea of the amount of these loans may be derived from the chart provided for commercial banks by the Federal Reserve Bank of St. Louis. *Commercial and Business Loans at All Commercial Banks (BUSLOANS)*, FED. RESERVE BANK OF ST. LOUIS, <http://research.stlouisfed.org/fred2/series/BUSLOANS?cid=49> (last visited Dec. 26, 2011). Such loans have surpassed \$1.6 trillion. *Id.* The recent growing interest in international bankruptcy also indicates the increasing movement of credit across borders. See, e.g., Jenny Clift, *The UNICTRAL Model Law on Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 355 (2004); Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 6 (2002); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L.REV. 2177 (2000).

Mexican policymakers and legislators recognized the benefits of such a system to their economy some time ago.<sup>7</sup> Effective reform should unleash increased offers of credit that could drive development of Mexican commerce and industry; help Mexican merchants compete with their counterparts in the United States, Canada, and beyond; and provide needed employment opportunities throughout the country. The process of instigating legislative reforms that would make the Mexican law consistent with that of the United States and Canada has encountered obstacles, however. The Mexican political system has proved a difficult horse for the reform process to ride. This short article shall evaluate the course of that process and to what extent it has succeeded in transforming the Mexican law of secured transactions into a system that will provide a common footing with the United States and Canada, so that credit operations secured by movable goods may occur freely throughout the three countries.

## II. PERSPECTIVE ON THE DEVELOPMENT OF SECURED TRANSACTIONS LAW

The world has long known legal devices for securing loans against the assets of the borrower. If the debtor does not pay, then the secured lender may take the asset offered in guaranty, greatly reducing the risk of a default in repayment and thereby reducing the price (or interest rate) on the loan.

Early in history, the Roman legal system fixed on real estate as the favored form of guaranty. Landowners possess wealth in a limited resource. Real estate's value remains relatively stable and tends to appreciate over time (recent experience to the contrary notwithstanding). Land does not move. Surveys may fix its metes and bounds. European states set up land registries, which accommodated taxes against the land but also gave certainty to title and ownership. Loans against land enjoyed an honorable tradition in the law. A simple notification in a land registry provided a lien for the lender, while the borrower could continue to use the land and all permanent improvements on it. By checking against a given parcel in that single land registry, potential lenders could assess the risk of making a loan against their borrower's land collateral relatively quickly and with substantial certainty as to where their claim would rank should their debtor default. This system persisted over millennia while real estate provided the bulk of the world's wealth, well into the nineteenth century.

Movable goods, or personal property, present a more diverse class of assets whose value, composition, and location tend to change constantly. Still, due to the industrial revolution in the nineteenth century, more of the world's wealth today lies in movable goods, belying the traditional prejudice against them. Immovable real estate has not lost its value, but movable goods' value has overtaken it as a source of collateral for secured lending, especially insofar as

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7. See Boris Kozolchyk, *Secured Lending and Its Poverty Reduction Effect*, 42 TEX. INT'L L.J. 727 (2007).

business loans are concerned.<sup>8</sup> Consider a company like Microsoft. It has relatively little real estate, but a vast fortune in intellectual property, accounts receivable, bank deposits, equipment, and inventory.

Registry systems for movable goods have developed only recently, coming in on the coattails of the industrial revolution and the change it worked in business and consumer assets. Such registries may seem more difficult in concept than land registries because they must accommodate many distinct legal mechanisms and forms of guaranty. Ultimately, however, registries for movables prove simpler in implementation because all such forms may be registered together as simple security interests in a single registry. As usual, the law does not assimilate change swiftly or easily, and often even resists it, stumbling forward until it hits its stride. Mexico demonstrates a classic case of this process, as the United States did more than a half-century before.

### **A. Legal Traditions Create Stumbling Blocks to Change**

Ancient legal regimes required that when a guaranty ran against movable goods (such as livestock, trade goods, and other inventory), personal jewelry, money, bank accounts, negotiable instruments, or equipment, the lender perfected his guaranty by taking possession of the collateral until repayment.<sup>9</sup> This system, while virtually risk free for the lender, took the asset out of use until the debtor could repay the loan. If the asset put at guaranty played a role in the debtor's livelihood, the debtor might experience a dilemma: he may have needed the money from the loan, but the only way he could get it was to put up in guaranty his means of earning the money to pay it back.

Over the course of several millennia, given their problematic nature and the fact that movable goods generally did not account for most of the wealth in society anyway, lenders did not favor such assets as collateral for loans. The prejudice in favor of land as collateral extended to a prejudice against merchants—dealers in movable goods—in general. Not surprisingly, those who had no land to offer in guaranty did not make much use of credit, perhaps because they had little or no access to it. They tended to live hand to mouth, often in a barter economy. Of course, without credit to expand their enterprises, they had little hope of growth.

The advent of the industrial revolution changed things. Agriculturally based societies began to give way to industry, manufacturing, and commerce. A greater portion of the world's wealth shifted to movable assets as the age of specialization and trade took off, and the population moved off the land into the

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8. An individual consumer's most valuable asset may still be real estate, specifically, a home. Still, a consumer often has a number of valuable movable goods, beginning with cars. Even real estate-based businesses often depend on a flow of rental income, a movable good.

9. ADOLF BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 630 (1953) (explaining *pignus*, or pledge).

cities. People began to work for wages and abandon subsistence self-sufficiency. While land remained important, individuals began to invest their wealth in things like automobiles, appliances, bank accounts, securities, and other movable goods. Enterprise echoed the change: businesses might lease rather than own their factories or buildings, and even if they owned the structures, the greater portion of their capital lay in inventory, equipment, bank deposits, accounts receivable, and other movable goods. Intellectual property in trademarks, patents, and licenses took on great value. Movable assets represented the factors of production for entrepreneurs, and the means of daily life for consumers. In the midst of industrial development, neither businesses nor individuals normally could tender their movables over to lenders to hold in guaranty until they could pay back a loan, lest their normal enterprise and activities cease.

Borrowers and lenders noticed the growth in movable assets, however, and credit practices sought ways to accommodate the use of them as collateral to finance the Industrial Revolution. Rather than the sort of unitary system so natural to land, the complexity and variety of movable property gave rise to a disaggregated system composed of multiple devices and mechanisms. In one common figure, the law recognized conditional sales or title-retention transactions, by which the "seller" gave an item over to the "buyer" but retained the title while the buyer paid for it over time. If the buyer failed to pay at any point, then the seller could recover "his" property. The parties might know it as a *de facto* loan with a lien on collateral, but in the eyes of the law, it masqueraded as something else.

Borrowers and lenders adapted many other legal mechanisms to the same ends. Goods might be placed in trust for the benefit of the lender, with the borrower as trustee. Field warehouses on a borrower's premises might hold inventory under the ostensible supervision and control of the lender, although the borrower could readily access the items as it sold them or transformed them by manufacture. "Leases" of equipment might carry rental fees equal to the price of the equipment over the life of the lease, with the "lessee" enjoying the right to keep the equipment at the end of the lease. Simple title documents known as warehouse receipts might represent tons of grain stored in silos or other warehoused goods, and possession of the title documents gave a guaranty against the goods that they represented. Consignments, assignments, trust receipts, letters of credit, pledges, chattel mortgages, and a whole assortment of other legal devices also emerged, all with the purpose of giving a lender a guaranty against movable collateral. The possibilities were limited only by the inventiveness of lawyers, lenders, and borrowers, but uncertainty haunted the system.

While multiple legal devices began to provide lenders with collateral interests in movable goods, they did not eliminate risk as much as they might have. The various devices appeared very different in their fundamental structures. Unlike the system for land, with its exclusive registry, no single registry seemed capable of comprehending the diversity of movable goods—or at least no jurist proved prescient enough to conceive of such a registry at the inception of the age. With collateral interests in land, priorities between competing claimants were

relatively clear and easy to determine and usually began with a consultation of the land registry to see who had registered liens against a given piece of land and in what order. With collateral interests in movables, where no single registry existed and most collateral interests were not subject to registration, a debtor's failure to pay often flushed out a gaggle of competing creditors—often unknown to each other until that moment—to make claims against a shifting asset base, frequently tendering multiple claims against the same assets.

### **B. The Great Depression Sparks Legal Change in the United States**

So long as debtors pay their debts, it does not matter what collateral interests their creditors may enjoy against what assets. Security interests against a solvent, responsible debtor never become subject to the hard reality of sorting out claims between competing creditors. The risk of such an event adds points to the interest rate or may prevent certain borrowers from getting any credit at all, but nothing exposes the fundamental infirmities of the system until a financial crisis provokes wholesale default in an economy with large credit exposure. The United States experienced such a moment of truth during the 1930s with the Great Depression. Bankruptcies abounded, and the system did not respond well, particularly with regard to deciding claims between competing creditors for the same movable collateral. Traumatized, society and the law responded to the challenge, although with some delay, by drafting a chapter (designated Article 9) on secured transactions for a new Uniform Commercial Code (UCC). The various states adopted Article 9 between 1952 and 1967.<sup>10</sup> In essence, the UCC's Article 9 set up a unitary system, classifying any kind of collateral interest in movable property, by whatever name or device, as a "security interest" that had to be registered in a single registry to have any effect against third parties. The drafters came to realize that the complex universe of collateral assets could fit in a single registry simpler than that for real estate.

While the new UCC system gained traction across the United States—by happy orchestration,<sup>11</sup> early adoption in important commercial jurisdictions such

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10. In fact, the various states each adopted the whole UCC. Pennsylvania was the first, and Arizona was the last, save only Louisiana. Due to its civil law traditions, Louisiana adopted the UCC piecemeal, beginning with Articles 1, 3, 4, and 5 in 1974. Louisiana adopted Article 9 in 2001.

11. The sponsoring organizations for the UCC were the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). At the time they had completed a final form of the UCC, lawyers with great influence in Pennsylvania headed both NCCUSL and the ALI. William Schnader, a Philadelphia lawyer, was president of NCCUSL. The president of the ALI was Herbert Goodrich, of the U.S. Court of Appeals for the Third Circuit. Their influence made Pennsylvania the first target for adoption, and their initiative was successful. New York presented a harder case, and the UCC was subjected to careful scrutiny before the New York Law Revision Commission. The NYLRC's careful studies of the proposed UCC resulted in a five-volume publication that led to some changes in the text, but ultimately justified it for other

as Pennsylvania and New York inspired other states to follow suit—an unintended socioeconomic effect emerged. The system clarified the cluttered landscape of priorities among creditors claiming the movable collateral assets of defaulting debtors, but it did more. Because it reduced the risks attendant to lending against such collateral, it made more credit available at lower rates at a time when the U.S. economy took off in the post-war boom. Credit exploded. Canadian policymakers, their economy progressively more and more integrated with that of the United States, took note, lest their growth be stunted by a lack of credit. Soon, Canada had adapted the basics of UCC Article 9 on Secured Transactions to its legal system, which shares its common law roots with the United States, and added substantial improvements, which the United States in turn picked up for a revised Article 9.

The law, even in an era of high-velocity technological change, does not move quickly. Witness the lag in time from the onset of the Industrial Revolution to the introduction of UCC Article 9, well over a century by even the more conservative estimates. It took the rest of the world, lacking the insight provided by the immediate exposure experienced by the Canadian economy, at least a generation to notice the change in the law and see its effect on credit markets. Even then, there is a deep-seated chauvinism to legal systems, and the U.S. and Canadian common law tradition does not predominate worldwide. Initially, Europe and those countries that follow the older (by about a thousand years) civil law, or Romano-European, tradition may have rejected anything conceived in the common law system as inapposite to theirs. In fact, there are aspects of the civil law that make the introduction of a registry-based regime for all security interests substantially more difficult than it proved to be in the United States and Canada, where it was difficult indeed.

### III. REFORM OF SECURED TRANSACTIONS IN MEXICO

More recently, the world moved to seek the benefits of modern secured transactions law as it emerged in the United States and Canada.<sup>12</sup> Mexico, the next Western Hemisphere nation to undertake the effort, presents an excellent example of the process. Its entry into NAFTA, which placed it in a trade partnership with the United States and Canada after 1994,<sup>13</sup> no doubt triggered the Mexican initiative.

Throughout the 1990s, Mexico worked on its secured transactions law reform, attempting to tie into a single regime the multiple devices its legal system

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states who were willing to accept that if the UCC passed muster in the commercial center of New York, then they could safely adopt it, too. See N.Y. LAW REVISION COMM'N, REPORT OF THE NEW YORK LAW REVISION COMMISSION FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE (1955).

12. See Boris Kozolchik, *Modernization of Commercial Law: International Uniformity and Economic Development*, 34 BROOK. J. INT'L L. 709 (2009).

13. See NAFTA, *supra* note 2 and accompanying text.



had developed over centuries. While Mexico's loan-guaranty landscape resembled that of the United States fifty years before,<sup>14</sup> its Romano-European legal tradition made the unification of such diversity more difficult than simply translating UCC Article 9 into Spanish. In brief, its tradition of notaries public—an elite corps of certified expert commercial lawyers who hold the exclusive right to draft and register many commercial documents, which otherwise are invalid—meant that Mexico had a more scattered system of registries and many vested interests built around them. Change, particularly to a modern system with a single secured transactions registry, threatened them, and they resisted.

Mexico nonetheless confronted the project with purpose and dedication. Mexican delegates played a leading role for almost a decade in drafting a Model Law on Secured Transactions for the Organization of American States' (OAS) Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI), culminating in ratification of the model law by the OAS in 2002.<sup>15</sup> While the CIDIP-VI forum produced a well-drafted model law faithful to virtually all of the basic principles of modern secured transactions law, the Mexican national political process proved much more difficult to negotiate.

The same Mexican experts who had played a leading role in drafting the Inter-American Model Law could not gain the ear, or perhaps the pen, of their national legislators. The tradition of centralized rule in the hands of the Mexican president had been transformed with the presidential election of 1994, moving toward real separation of powers, and the drafting process lay open to conflicting influences and voices from all sides in a newly empowered national Congress. As noted above, the question of loan guaranties against movable goods affects a number of vested interests in Mexico, and those interest groups mounted successful opposition to a secured transactions law like the OAS Model Law, vulnerable to characterization as a U.S.-Canadian product unsuitable to a legal system based on different traditions. In the actual event, it took two bites at the legislative apple, in 2000 and in 2003 (before and after the ratification of the OAS Model Law), for the first reform effort to take hold.

Perhaps the legislative process was complicated by Mexico's disastrous economy in the 1990s, when the country suffered through a protracted economic depression. The Congress experienced significant populist pressure to protect defaulting debtors, many of whom faced the loss of their residences, businesses, cars, and other assets. Rather than adopt an integral secured transactions law, such as the OAS Model Law on which Mexican jurists had labored so

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14. See Furnish, *Mexican Law*, *supra* note 5.

15. ORG. OF AM. STATES (OAS), MODEL INTER-AM. LAW ON SECURED TRANSACTIONS (2002), [http://www.oas.org/dil/cidip-vi-securedtransactions\\_eng.htm](http://www.oas.org/dil/cidip-vi-securedtransactions_eng.htm) [hereinafter OAS MODEL LAW] (adopted Feb. 8, 2002, by the Sixth Inter-American Specialized Conference on Private International Law, known as CIDIP-VI, for its Spanish acronym. See CIDIP-VI, Feb. 8, 2002, *Final Act* 3(f), OEA/Ser.K/XXI.6/ CIDIP-VI/doc.24/02 rev.3 (Mar. 5, 2002)). At the inaugural plenary session of CIDIP-VI, on February 4, 2002, the delegates elected Lic. José Luis Siquieros of Mexico as President of the Conference on the OAS Model Law.

effectively,<sup>16</sup> the Mexican legislature chose to attempt reform by peppering piecemeal amendments through existing laws, principally the General Law of Negotiable Instruments and Credit Transactions (LGTOC, *Ley General de Títulos y Operaciones de Crédito*).<sup>17</sup> Thus, one searches hard for a thread to the reform. Basic concepts are not set out anywhere; no “definitions” section provides orientation. Only by picking carefully through the provisions of the re-constituted LGTOC, the Code of Commerce,<sup>18</sup> and other laws can one begin to ferret out the dimensions of Mexico’s reform and to measure it against a modern paradigm like the OAS Model Law.<sup>19</sup> Only then can one begin to see which of the Mexican reforms conform to the principles of a modern functional secured transactions system. Whether by design or because the overall scheme got lost in the welter of amendments, Mexico’s legislative reformers left out several important principles.

### A. The Mexican Reform Laws of 2000 and 2003

Considering the process and the obstacles they had to overcome, Mexico’s secured transactions reforms of 2000 and 2003 made great strides. Although they did not bring about a coherent, functional, modern secured transactions regime, they did introduce many of the fundamental concepts of such a secured transactions regime into the Mexican legal system. Such concepts, often antagonistic to Mexican legal tradition, were not made generally applicable.

In effect, Mexico’s Congress sampled from the concepts and principles in the OAS Model Law, adopting parts of it first in May of 2000<sup>20</sup> (Reform Law of

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16. Other Latin American countries that share the same legal traditions as Mexico have adopted the OAS Model Law. See, e.g., Ley de Garantías Mobiliarias, Decreto No. 51-2007, 8 de noviembre de 2007, DIARIO OFICIAL [D.O.] [hereinafter Guatemala LGM]; Ley de Garantías Mobiliarias, Decreto No. 182-2009, 28 de enero del 2010, DIARIO OFICIAL [D.O.] [hereinafter Honduras LGM]; Ley de la Garantía Mobiliaria, Law No. 28677, 24 de febrero de 2006, GACETA OFICIAL [hereinafter Peru LGM].

17. In Mexico, unlike in the United States and Canada, commercial laws are federal in nature and are passed by the Congress for the entire republic.

18. The amendments to the *Código de Comercio* [CCo.] [Code of Commerce] dealt principally with provisions for registration. See text accompanying note 1 *supra* and note 20 *infra*.

19. For an excellent exercise in just such careful analysis on eight key points of comparison, see Alejandro López-Velarde & John M. Wilson, *A Practical Point-by-Point Comparison of Secured Transactions Law in the United States and Mexico*, 36 No. 4 UCC L.J. 3 (2004).

20. The Mexican reform process both fed the OAS Model Law drafting process and fed off that process. As noted earlier, Mexican jurists played a leading role in the drafting and ratification of the Model Law, and that process was well under way at the same time as Mexico’s national reform. Shortly after Mexico’s Reform Law of 2000 came out, a conference of experts from all over Latin America gathered in Miami to discuss an advanced draft of the OAS Model Law. Again, Mexican lawyers were present and played a major role in the Miami conference. See *Symposium: Meeting of OAS-CIDIP-VI Drafting*

2000) and then in June of 2003<sup>21</sup> (Reform Law of 2003). In October of 2003, the government issued regulations (Regulations of 2003)<sup>22</sup> setting up a national General Registry System (*Sistema Integral de Gestión Registral*, or SIGER) first contemplated in the Commercial Registry Law of 2000.<sup>23</sup> At the end of this first period of reform, Mexico had legislated an unsatisfactory, non-functioning system, at best mixed in its results, something akin to attempting to create an automobile by taking the engine and wheels while leaving off the steering wheel and the transmission.

The Mexican reforms did begin to break down conceptual barriers inherent in the Romano-European civil law tradition. The May 2000 reform created a new, special form of security interest called the *prenda sin transmisión de posesión*<sup>24</sup> (pledge without transfer of possession) and stated at the outset that the new form of pledge created by the Reform Law of 2000 “constitutes a real right over movable goods whose object is to guaranty an obligation and a preference in its payment.”<sup>25</sup> This simple statement broke a long tradition that

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*Committee on Secured Transactions*, 18 ARIZ. J. INT'L & COMP. L. 311 (2001) (including a transcript of four days of deliberations, at 334–604, and a copy of the OAS Model Law draft as it then stood, at 605). Sadly for Mexican national reform, the experts who represented Mexico—by executive appointment—at this and other international conferences did not play a significant role in amending the Mexican law.

Despite its label as a “decree,” the Reform Law of 2000 is a legislative act by the Mexican Congress and is referred to throughout this article as a “law.” The Reform Law of 2000 and subsequent reform laws of 2003 and of 2009—all styled “decrees”—each reformed existing laws, most dramatically the *Ley General de Títulos y Operaciones de Crédito* [LGTOC] [General Law on Credit Instruments and Operations], but also portions of the *Código de Comercio* for matters of registration. Regulations issued in late 2003 amended the CCo.’s procedures for the registration of security interests in movable property, and the Reform Law of 2009 then concentrated its reforms on the registration provisions of the CCo.

Over the years since the CCo.’s initial promulgation in 1889, modifications have left it a mere shell of its original content, with whole sections repealed in favor of free-standing organic laws such as the LGTOC or the *Ley de Instituciones Crediticias* [Law of Financial Institutions]. The CCo., however, still provides general provisions such as those that establish the *Registro Público de Comercio* [RPC] [Public Registry for Commerce] or define what constitutes an act of commerce. Extensive amendments to the articles of the CCo. referring to the RPC—currently contained in a chapter titled *Del Registro de Comercio* and comprising Sections 18-32 bis of the CCo.—have changed the law greatly in the last decade, in preparation for and in conjunction with the reform laws of secured transactions.

21. See Reform Law of 2003.

22. See Regulations of 2003. The Reform Law of 2000, the Commercial Registry Law of 2000 and the Reform Law of 2003 had all contemplated the issuance of the Regulations of 2003. See Furnish, *Registry Systems*, *supra* note 1, at 9.

23. See Commercial Registry Law of 2000 (issued at the same time as the Reform Law of 2000 and published about a week later).

24. LGTOC arts. 346–80, as amended, Reform Law of 2000.

25. *Id.* art. 346 (translation by author).

would have held that only interests in real property or guaranty rights exercised by actual possession of movable assets could constitute real rights in the secured party, and set down a clear statement of priority, something absent from the system until that time. The law's recognition of the new form of pledge meant that a security interest could hold a priority and rights of enforcement—a right to possess—directly against movable collateral held by the debtor, even when that collateral changed constantly and included after-acquired property. The Reform Law of 2000 may have opened only one small door in the system, but the implications were huge: if one such door may be opened, they all may be. Although it pertained only to the *prenda sin transmisión de posesión* in 2000, the law's description of that isolated figure provided a good general description of a security interest.

Taking such a conceptual leap with one new form of guaranty when none of the various old forms needed to respect it created a stepchild in the system. Why would anyone use the *prenda sin transmisión de posesión*? The Reform Law of 2000's express object may have been to "guaranty an obligation and a preference in its payment," but it gained a priority over none of the traditional forms. The law required no other guaranty to play by the same rules as the *prenda sin transmisión de posesión*. Did the drafters know what they were doing? Did they calculatedly plant time bombs so that they could subsequently explode and bring down the old system? It is impossible to know. One can only state that because the Reform Law of 2000 did not instigate a complete new system for all security interests, the Mexican law of secured transactions seemed to blend new elements tentatively into the old mix, leaving the reform ineffective but subversive of the existing order.

### **B. The Creation of a Predominant Device—the *Fideicomiso de Garantía* (Guarantee Trust)—Despite Initial Failure to Impose a Unitary System**

In fact, after that important conceptual leap to a single new type of security interest, Mexico failed to adopt a generic concept of security interest, which would have eliminated the risk of secret or unrecorded liens. Instead, the crazy quilt of legal mechanisms continued unabated, and a unifying concept of security interest (or *garantía mobiliaria*) did not enter the law. The Reform Law of 2000 required the *prenda sin transmisión de posesión* to be registered before it had priority against third parties,<sup>26</sup> but did not give it priority over other commonly used guaranty devices.<sup>27</sup> The Reform Law of 2000 did not impose a requirement that any and all consensual security devices had to register in a single, exclusive registry regardless of what they might be called or how constituted, yet

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26. *Id.* arts. 366–68.

27. *Id.* arts. 370–71.



that is the quintessential requirement for any functioning secured transactions system.<sup>28</sup>

The Reform Law of 2000 did add a much more functional device. In addition to the *prenda sin transmisión de posesión*, the Reform Law of 2000 added a “guarantee trust” (*fideicomiso de garantía*).<sup>29</sup> The *fideicomiso*, or trust, is well known in Mexican law, and had long been used as a security device, so much so that many Mexican jurists initially saw nothing new in the reform. The Reform Law of 2000 drew up new requirements for the device, however, sharpening its focus and tailoring it to a guaranty against movable collateral. The law allowed a debtor to turn over title to his property to a fiduciary<sup>30</sup> while continuing to use it in the normal course of his business,<sup>31</sup> in essence creating a floating lien against a changing body of collateral.

The *fideicomiso de garantía* must be registered in the Public Commercial Registry<sup>32</sup> under debtor-settlor's name. Creditors secured against the trust property did not perfect their liens against the debtor's collateral by filing anything in the registry. Instead, the debtor-settlor of the trust informed the fiduciary which creditors he wished to be the beneficiaries of the trust.<sup>33</sup> The debtor could designate multiple creditor-beneficiaries and establish at the outset which had priority or what percentage of the trust goods corresponded to each.<sup>34</sup> When a debtor paid off a creditor secured under a guarantee trust, the creditor had ten days to formally notify the fiduciary that the obligation no longer existed, so that the fiduciary could remove that creditor as a beneficiary.<sup>35</sup> Once the fiduciary had such notification, the debtor-settlor could designate another creditor-beneficiary or terminate the trust.<sup>36</sup>

Whereas the *prenda sin transmisión de posesión* did not enjoy widespread use in Mexico after the Reform Law of 2000, the *fideicomiso de garantía* did and does today. It carries a fair cost to set up<sup>37</sup>—enough to price it out of the range of small and medium-sized enterprises—but works like a charm

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28. See, e.g., U.C.C. § 1-201(35) (2011); OAS MODEL LAW arts. 1(1), 2(1).

29. LGTOC arts. 395–414, *as amended*, Reform Law of 2000.

30. *Id.* arts. 395, 401. The list of those parties who may serve as fiduciaries is limited to five types of entities serving in the financial sector. *Id.* art. 399.

31. See *id.* arts. 402, 404–06.

32. *Id.* art. 410.

33. LGTOC art. 397. This changed under the reforms of 2009, which now require the secured creditor to register a security interest against trust property in the *Registro Único de Garantías Mobiliarias*, or RUG. See *infra* text accompanying notes 132–34. In other words, following the most recent reforms, both the trust itself must be registered and so must any security interest against the property held in trust. See *id.*

34. LGTOC arts. 397–98.

35. *Id.* art. 398.

36. *Id.*

37. See *id.* art. 400. The list of fiduciaries is limited to the sort of financial-sector institutions who charge a substantial fee for their services, and they enjoy a monopoly under the law. *Id.* art. 399. Lenders secured under a *fideicomiso de garantía* arrangement and otherwise qualified may serve as fiduciaries for the trust. LGTOC art. 398.

for those who can afford it, providing excellent security with little or no risk, and absolute priority. Add to its virtues the fact that commercial players have long familiarity with the *fideicomiso* in general, and the *fideicomiso de garantía* serves as a ready, preferred form of security device, made more focused and reliable by the Reform Law of 2000.

Perhaps of greatest note, the *fideicomiso de garantía* provided a registry of liens by the debtor's name, which should assure priority of liens perfected by designation of secured creditors as beneficiaries. Unlike a classic registry, until the most recent reforms, the secured creditors' names did not appear on the face of the Mexican Public Commercial Registry when a *fideicomiso de garantía* was involved. To find out which creditors had a lien against the trust goods, a third party would have had to consult the fiduciary. In the meantime, however, no third party creditor of the debtor-settlor might have claimed against the trust goods, since title to them remained in the fiduciary.<sup>38</sup> Today, the registry reveals the whole transaction, who holds the property as trustee, and the secured creditors who have security interests against the property in trust.

### C. The Continuation of Covert Liens After the Reforms

The first two Mexican reform laws, of 2000 and 2003, did not pretend to impose a comprehensive system of secured transactions by introducing an all-inclusive concept of a generic security interest in movable goods, nor did they contemplate within their requirements security devices beyond the pledge without transfer of possession and the guaranty trust. A transitory article in the Reform Law of 2003 even exempted existing transactions that might otherwise have fallen under its provisions: "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."<sup>39</sup>

With the exception of the *fideicomiso de garantía*, the reforms made little change in the wide range of devices used by creditors to secure their claims against movable goods.<sup>40</sup> If anything, practice and usage had added some devices that are difficult to document. This author recently heard of the use of preventive judicial liens acquired with the acquiescence of the debtor at the outset of the loan, known as *tornillos* ("screws"), and of sales contracts held by the creditor to use against the debtor's assets in the event of a default. A well-known, well-documented device that accounts for financing large amounts of equipment and machinery in Mexico is the *arrendamiento financiero*, a commercial or financial

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38. *Id.* art. 402. The one possible evasion of this might be simulated sales of the trust goods to a third party creditor, allegedly in the ordinary course of debtor's business. See also *id.* art. 406 (providing for extensive contractual controls over the debtor's use of the trust goods, which should prevent that abuse).

39. Reform Law of 2003, Artículo Transitorio.

40. See Furnish, *Mexican Law*, *supra* note 5.

“lease.” While, according to the law, the *arrendamiento financiero* should be registered,<sup>41</sup> its registration operates not by the debtor’s (or lessee’s) name, but by reference to the machine or other item leased, making it extremely difficult for third parties to trace such filings. As a result, a substantial and important portion of the secured transactions in the Mexican credit market escapes disclosure of liens in any transparent system.

#### **D. A New Registry for the 2000-2003 Reforms**

The early Mexican reform package instituted a national system of registration,<sup>42</sup> the *Sistema Integral de Gestión Registral*, or SIGER.<sup>43</sup> Despite its title (Integrated Registry Management System), it did not pretend to require registration of all security devices. The regulations issued in 2003 instigated a simple, “pre-codified” form for electronic registration of the *prenda sin transmisión de posesión*,<sup>44</sup> but none of the other extant security devices had to register by using that form. While the *fideicomiso de garantía* might register in the same registry, it required inscription of the entire document, not a summary form.<sup>45</sup>

The introduction of a summary form for registration represented an enormous conceptual leap for Mexican registry law, regardless of its application to only one type of security agreement. Traditionally, all documents submitted for inscription in commercial registries had to undergo inspection by expert registrars to certify that they represented a complete and valid document setting out the terms and conditions of the transaction between the parties.<sup>46</sup> Until the document was registered, the obligation was not created, or “constituted,” in the eyes of the

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41. See Ley General de Organizaciones y Actividades Auxiliares de Crédito [LGOC] [General Law on Ancillary Credit Organizations and Activities], *as amended*, art. 25, DO, 28 de enero de 2004 (requiring 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 even be registered in the RPC, the registry most likely to be searched by secured creditors and bona fide purchasers.

42. See Furnish, *Registry Systems*, *supra* note 1.

43. For references to registry reforms, see *supra* note 1.

44. Regulations of 2003 art. 2. The provision 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.” (translation by author).

45. See LGTOC art. 410, *as amended*, Reform Law of 2000.

46. See Dale Beck Furnish, *The Creation and Notice of Security Interests in Movable Property*, 36 No. 1 UCC L.J. 99, 111–18 (2003) [hereinafter Furnish, *Security Interests*].

law; i.e., without registration, the written obligation was not enforceable. Its registration validated the legal document, constituted the transaction it embodied, invested it with public faith, and publicized it to third parties.<sup>47</sup> Any such system must violently reject the idea of a summary form that includes only the basic information regarding the creditor, the debtor and the collateral;<sup>48</sup> i.e., a form that can serve only one of the several functions of traditional registration, and a subsidiary one, at that: publicity.

One can scarcely exaggerate the difficulties of attempting to accommodate a modern secured transactions system within such a registry tradition.<sup>49</sup> The registration of creditors' liens under the debtors' names made the system work. But the dynamics of modern credit practice—serial transactions based on the priority created by one filing and filing to establish priority even before a security agreement is consummated—clashed with the filing of static documents with the details of each transaction. One filing must establish priority not for a single secured transaction but, at least potentially, for many over a period of years. SIGER's summary electronic form for registering the *prenda sin transmisión de posesión* anticipated all of the issues and created an electronic filing system capable of serving modern secured transactions practice.

Even if the SIGER summary form had applied to all transactions in the nature of a security interest, it had an existing infrastructure to overcome. While Mexico's Commercial Code is national and its commercial registries may constitute a national system, it traditionally had fallen to the states to administer uncoordinated local offices of the "national" registry. To become effective as a national general system, SIGER began to install extensive software networks to link all the state registries into one national system.<sup>50</sup>

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47. See Furnish, *Registry Systems*, *supra* note 1, at 10–13; see also *id.* n.15 (discussing the nature of *fe pública*, or "public faith," in comparative light); Dale Beck Furnish, *El Concepto de la Fe Pública y su Posible Análogo en el Sistema Anglosajón*, 25 REVISTA MEXICANA DE DERECHO INTERNACIONAL PRIVADO Y COMPARADO 127 (2009) [hereinafter Furnish, *El Concepto*] (offering a more complete discussion of the concept, with reference to several analogous functions in U.S. law).

48. See Regulations of 2003 § 33(IV). Perhaps in anticipation of the reaction by veteran registrars used to scrutinizing all documents submitted for inscription and routinely rejecting those that failed in any detail, the Regulations of 2003 specified that the registrar had to accept the electronic form for a *prenda sin transmisión de posesión* and register it straightaway. The only proper objections might be for failure to pay the filing fee or fill in required data. *Id.* § 33(III).

49. The OAS Model Law, despite the need for summary, or notice, filing as a touchstone for its system, initially treated the issue of registries and publicity warily, by inserting the phrase "according to applicable norms" in articles 42–45. That qualifying language, which would not have required that summary filing had to be part of the registry, was removed from the final version.

50. That process depended on "Coordination and Cooperation" agreements between the Mexican Ministry of the Economy and each of the Mexican states, under whose auspices the "federal" registries were maintained. In fact, by 2004 all but one of the



The hallmark of a functional registry system for a secured transactions regime consists of a single, universal registry providing effective notice to prospective lenders of all prior creditors who might have a lien against certain of a given debtor's assets and in what order of priority.<sup>51</sup> Mexico's 2000 and 2003 reforms may have fallen short of that mark, but they ingeniously prepared the way with a sure hand. The Commercial Registry Law of 2000, the Regs of 2003, and the SIGER they established set in place concepts and technology that have since given rise to a universal registry system, by the simple expedient of making all transactions in the nature of credit guaranteed against movable collateral subject to the SIGER registry requirements.

### **E. After-Acquired Property**

Modern secured transactions law turns on the proposition that a creditor may take a security interest and set a priority against property that the debtor has not yet acquired, but acquires at some future date.<sup>52</sup> This possibility is what makes floating liens and lines of credit possible. Prior to the recent reforms, Mexican law presumed against security interests in after-acquired property, following the civil law tradition and precluding the possibility by requiring specific descriptions of all movable collateral.<sup>53</sup> It allowed an exception for after-acquired property created as the result of loans to farming and manufacturing operations.<sup>54</sup> The Reform Law of 2000 abandoned the negative presumption against security interests in after-acquired property. It first provided that a debtor could grant a security interest in "every class of rights and movable goods,"<sup>55</sup> 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."<sup>56</sup> Likewise, the secured creditor may take a lien on future proceeds derived from the original collateral.<sup>57</sup>

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Mexican states had signed such an agreement, although the actual implementation lagged behind. See López-Velarde & Wilson, *supra* note 19, n.152.

51. See *NLCIFT 12 Principles of Secured Transactions Law in the Americas*, princ. 7 (2006), <http://www.natlaw.com/bci9.pdf> [hereinafter *NLCIFT 12 Principles*]. (indicating the importance of the registry in any secured transactions system). Generally, principles 5–9 deal with the registry.

52. *Id.* princs. 3, 7.

53. See López-Velarde & Wilson, *supra* note 19.

54. See generally Furnish, *Mexican Law*, *supra* note 5, at 1-26 to 1-32 (referring to *habilitación*, *avío*, and *refaccionario* loans).

55. LGTOC art. 353, *as amended*, Reform Law of 2000.

56. *Id.* art. 355(I)–(II); see also *id.* art. 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." *Id.* art. 397.

57. *Id.* art. 355(III)–(V).

The Mexican reform embraced the concept of after-acquired property awkwardly, however, because of the way another part of the law set out its requirements for identifying collateral. The collateral description must "identify" the assets subject to the security interest, and the law appeared to allow a generic description only when it covered "all the movable goods that [the debtor] utilizes in carrying out its preponderant activity."<sup>58</sup> In other words, generic descriptions like "equipment" or "inventory" might be excluded. Aware that alert registrars might reject generic descriptions, the legislators included a provision that commanded them to "abstain" from doing so, but copied the language from the description article that would seem to limit generic descriptions.<sup>59</sup> An incisive court or lawyer could read other provisions of the law to reveal a purpose to permit after-acquired collateral, and therefore generic descriptions. The Reform Law of 2000 recognized the secured creditor's priority from the date his security interest was first registered,<sup>60</sup> even though it might undergo subsequent modifications or assignments,<sup>61</sup> provisions that seem to contemplate future advances. In addition, while no periodic renewal of the registration appeared necessary to maintain its priority, the Reform Law of 2000 imposed a duty on the creditor to terminate the registration of the security interest when it was paid in full.<sup>62</sup>

As before, the conceptual advance, whether for all security interests or for just those offering a preponderance of assets as collateral, applied only to the *prenda sin transmisión de posesión* and the *fideicomiso de garantía*.<sup>63</sup> It does not matter. The reforms of 2000 and 2003, by whatever measure, did adopt the concept of a standing priority against after-acquired property, taking it beyond the old farming and manufacturing limitations. They brought Mexico a step closer to enabling the financing of commercial credit with after-acquired assets and closer to the day when the concept would apply system-wide rather than as an exception.

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58. LGTOC art. 354. Apparently, the legislature struck the specificity requirement from the statute late in the process, leaving a sentence structure that could be read in this restrictive manner, although that had not been its intention. See López-Velarde & Wilson, *supra* note 19.

59. LGTOC art. 377.

60. *Id.* arts. 366, 368.

61. *Id.* art. 376.

62. *Id.* art. 364.

63. The analysis for the *fideicomiso* applies different sections of the law, but they seem to make a stronger case for including after-acquired property than those for the *prenda*. See *id.* arts. 395, 402, 414. Article 395 requires the transfer of "certain goods" to the fiduciary, but article 402 permits the debtor to utilize the trust goods in normal course of his business activities, and their proceeds fall under the trust. Article 414 makes several provisions for the *prenda* also applicable to the *fideicomiso*, but does not include any of those used in the analysis of after-acquired property under the *prenda*. See arts. 353–55, 366, 377.

### F. Priority From the Time of Filing

In the same vein, Mexico adopted the concept of notice filing by dating a lender's priority from the time of registration,<sup>64</sup> even if the actual transaction were consummated later.<sup>65</sup> Unfortunately, again, the new concept applied only to the *prenda sin transmisión de posesión*, inscribed by electronic filing of its summary "pre-codified" form in the SIGER registry.<sup>66</sup> Nonetheless, while the limited rule could not have much practical effect on financing arrangements or the possibility of establishing priorities among creditors, it implanted the kernel of a completely new possibility. At least for the *prenda sin transmisión de posesión*, a single electronic filing of a simple form, amenable to periodic modification, might fix the date of priority for a whole series of subsequent secured transactions between that creditor and that debtor. The *fideicomiso de garantía* presents the same possibility, because the debtor and the fiduciary may set up and register the trust before designating any secured creditors as beneficiaries<sup>67</sup> from the time the trust is constituted. However, as before, the law contained unresolved problems with implementing the unfamiliar concept.<sup>68</sup>

The Regulations of the Public Commercial Registry, promulgated on October 24, 2003,<sup>69</sup> distinguished between the document that constituted the transaction (the security agreement) and the document that publicized it, or gave notice of it, to third parties (the summary "pre-codified" form). The summary form established by the Regs applied exclusively to transactions involving the *prenda sin transmisión de posesión*, so the Regulations, in principle, did not include all possible security interests in a summary filing.<sup>70</sup> Even if a creditor secured with another form of legal guaranty had wished to register it with SIGER, presumably the pre-codified electronic form would not have been available. The *fideicomiso de garantía*, which must be registered, presented a good example: no summary form was available; the trust document itself must be registered.<sup>71</sup>

One must take into account that until the Regulations could be fully implemented by painstaking coordination of pre-existing state and federal offices,

64. This is consistent with NLCIFT Principle Six. See *NLCIFT 12 Principles*, *supra* note 51, princ. 6.

65. See LGTOC arts. 365–66 & 368, *as amended*, Reform Law of 2000. Articles 366 ("date of inscription in the registry") and 368 ("moment of registration") can be read as conflicting. See López-Velarde & Wilson, *supra* note 19. It appears to this author that the conflict that López-Velarde & Wilson see might be resolved by noting that Article 366 refers to the day when a *prenda* has "effects against third parties," while Article 368 refers directly to its time of "priority," or a specific moment within the date.

66. Regulations of 2003 art. 2. For the text of the provision, see *supra* note 44.

67. *Id.* arts. 397–98. In the case of a *fideicomiso de garantía*, the fiduciary rather than the registry may reveal the existence of security interests against trust property. *Id.*

68. See Furnish, *Security Interests*, *supra* note 46.

69. See Regulations of 2003.

70. *Id.* art. 30.

71. LGTOC arts. 407, 410, *as amended*, Reform Law of 2000.

especially where state and special registries were concerned, they could not operate meaningfully. According to long-standing legal tradition, in Mexico and throughout the civil law world, a properly constituted security agreement must be drafted by a notary public or public broker, include a series of essential terms that give it validity, be executed with a certain degree of formality, and finally must be registered in its entirety.<sup>72</sup> Because registration may establish its validity (i.e., constitute the transaction) the registrar reviews the document and may reject it if it fails in any necessary component. Traditionally, the successful registration of a valid document then becomes the act of declaration by which publicity is given to third parties. Prior to the proper implementation of the new Regulations, the constitutive and declarative effects of a filing could be achieved only by use of the full-blown document: a security agreement drafted and certified by a notary or public broker that cleared scrutiny by a registrar.

The filing of a pre-codified summary form flies directly in the face of this tradition.<sup>73</sup> Not surprisingly, the Regulations of 2003 negotiated their small filing revolution carefully. The Regs stated that “[p]re-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.”<sup>74</sup> The same provision of the Regulations prohibited the Mexican registrar who reviewed a summary filing from requiring more information than that on the pre-codified form.<sup>75</sup> The Regulations of 2003 appear ambivalent as to whether the pre-codified summary forms must be utilized to file a *prenda sin transmisión de posesión*; while the first sentence states that the pre-codified forms “shall be utilized,” the second sentence provides only that when receiving a summary form, the registry may not solicit more information than it contains. This might imply that the registry should or could accept the full security agreement, which would 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 to the registry for inscription, the drafters of the Regulations of 2003 may have hesitated to penalize those who persisted in bringing the whole document for registration (rather than filling out a simple summary online) and those clerks who accepted it. Nonetheless, as both the registries and the registrants began to see the benefits to the summary forms, pressure should have built to utilize the summary in

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72. *Id.* art. 365, as amended, Reform Law of 2000 (creating an exception for the special *prenda*, which is “constituted upon the signing of the contract”).

73. The concept of a summary form is essential to the system; Principle Five of the *NLCIFT 12 Principles* states: “The filing, in standardized fashion, should contain only the essential data to identify the parties, the type of security interest, the amount of the loan or line of credit and collateral consistent with the needs of actual and potential third parties.” *NLCIFT 12 Principles*, *supra* note 51, princ. 5.

74. See Regulations of 2003 art. 30.

75. *Id.* art. 2.

preference to the whole document.<sup>76</sup> Registry authorities likewise should have begun to resist handling the full document when the registrant could fill out the summary form online or at the registry in a few minutes.<sup>77</sup>

Until the concept and the practice could overcome tradition and pre-reform logistics, the possibility of a priority from the time of an initial filing remained impossible for all security devices, save the *prenda sin transmisión de posesión*. The *fideicomiso de garantía* achieved the same effect, but only because actual security interests and their priority occurred behind the registry, with the fiduciary, after initial registration of the trust instrument. For most security devices, the priority gained by filing one complete document would terminate when it became necessary to file another complete document or even a modification to the original. The law encouraged this view by requiring that a creditor terminate the filing once the debtor satisfied the original debt, foreclosing the possibility of continuing subsequent credit operations with the same priority.<sup>78</sup>

The dilemma found an easy and effective outlet six years later. The reform available to the *prenda sin transmisión de posesión* prepared the way for more sweeping application of the principle. In 2009, a simple pen stroke opened the electronic pre-codified summary form to virtually all security devices, giving them a means to establish a durable priority with a single filing.<sup>79</sup> Today, Mexican security interests should enjoy priority from the time of filing a summary form, regardless of whether they occurred after that date. The system, with respect to this principle, seems prepared to function without the awkwardness or uncertainty that Mexican law showed in attending to other essential principles of secured transactions even after it adopted them.

### **G. Purchase-Money Security Interests**

Secured transactions schemes usually recognize an important exception to the principle of first in time, first in right: the purchase-money security interest, where the lender extends credit that allows the borrower to acquire the collateral.<sup>80</sup> Buying a car and granting the seller-creditor a lien on the title stands as one of the most common purchase-money security interests. The credit system is full of

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76. See Furnish, *Registry Systems*, *supra* note 1, at 33–34 (noting that this use apparently did happen early on in Monterrey, Nuevo León, perhaps Mexico's most active and astute commercial jurisdiction).

77. Change occurs slowly in the public bureaucracy, however. The advent of electronic filing of summary forms means that fewer employees are necessary to man the registry, an unpopular prospect for current jobholders. Registry officials accustomed to scrutinizing every document submitted for registration did not give up the practice overnight, no matter how clear the Regulations were. Nonetheless, the Regulations of 2003 and the de facto resistance to them laid important groundwork for the more definitive amendments worked by the later Reform Law of 2009.

78. LGTOC art. 364, *as amended*, Reform Law of 2000.

79. See *infra* notes 131–34, 146–56 and accompanying text.

80. *NLCIFT 12 Principles*, *supra* note 51, princ. 8.

them. The principles set out above—that a given creditor may take a priority security interest in virtually all of debtor's assets, including after-acquired property, by a simple registration—might foreclose all transactions by subsequent creditors with that debtor, who could offer priority in no assets, even when the second creditor loaned the money to acquire them. A financial lease, or title retention by a credit seller, or a conditional sale, are all forerunners of the purchase-money security interest. While they may be covert liens, they have much to commend their preemptive claim. It serves the system, however, to have all of the liens against a debtor's assets filed in a single registry, thus permitting a comprehensive view of the debtor's assets and the guaranty claims against them at any given moment.

The laws of Mexico generally acknowledge all of the earlier forms as having a special priority claim by virtue of their title to the specific collateral, ahead of even prior existing creditors, because their collateral never enters into the debtor's estate (i.e., the putative purchase-money creditor, whatever the legal formality of his arrangement, gets to take back his property if the debtor cannot complete his purchase).

The purchase-money security interest performs a salutary function by mitigating what otherwise might be a credit monopoly in favor of the first secured creditor to register its security interest. A secured debtor who can negotiate better credit terms from a subsequent lender need not terminate the original arrangement. A good example might be the department store that has placed its entire inventory as security for a lender who provides it a general line of credit. A new supplier may want to get its merchandise on the floor of the department store and offer particularly favorable credit terms as an incentive. Since the operation would create a purchase-money security interest in favor of the supplier only on the merchandise it supplies, it can take a priority on that collateral.

The Mexican reforms of 2000 and 2003 adopted the concept of a preemptive priority for purchase-money lenders,<sup>81</sup> but without much detail. The patchwork scheme appears unlikely to free debtors from existing priorities. Where a *prenda sin transmisión de posesión* existed, a purchase-money security interest technically may preempt its priority, so long as it was constituted as a new *prenda sin transmisión de posesión*.<sup>82</sup> The provisions on the *fideicomiso de garantía* did not address the possibility directly, but appeared to permit the mechanism by the debtor's specific designation of the items provided by the purchase-money lender.<sup>83</sup>

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81. LGTOC art. 358, *as amended*, Reform Law of 2000. This provision was quite rudimentary. It recognized the possibility of a preemptory priority for the purchase-money security interest, but neither this provision nor any other established procedures by which existing creditors might be notified. A second provision gave 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. *See id.* art. 367, ¶ 4.

82. *Id.* art. 358.

83. *See id.* arts. 397–98.

In other words, the Reform Laws of 2000 and 2003 did nothing to address the existing preferential categories of credits and quasi-credits that functioned as purchase-money security interests. Loans classified as *créditos refaccionarios* and *de avío* or *habilitación*, available to debtors who wished to acquire equipment to improve their installations or to acquire inventory to engage in manufacturing or agricultural operations, enjoyed preemptive priority over other loans, and were, by their nature, purchase-money loans.<sup>84</sup> Likewise, conditional sales,<sup>85</sup> financial leases,<sup>86</sup> and other title retention mechanisms<sup>87</sup> functioned as purchase-money security interests and had a legitimate claim to a preferential priority, but they created hidden liens undiscoverable by third parties. A complete secured transactions system should treat such claims not as outlying, covert liens but as part of the registry record.<sup>88</sup> Only a comprehensive, universal system of all security interests, under the concept of a unitary security interest including such title-retention devices, can prevent these claims from disrupting the system. Permitting *de facto* purchase-money security interests to enjoy preemptive priority prevents third parties from relying on the registry to reveal all existing liens against debtor's assets. Yet, once again, the concept entered the system, however incomplete its actual application.

#### **H. Buyers in the Ordinary Course**

Traditionally, a security interest, such as a conditional sale or retention of title, in movable goods follows the asset wherever it goes after the secured debtor handles it. Thus, any third party who buys a secured asset from the debtor later might have to give it up to the debtor's creditor. This is still the general rule, as stated in the UCC,<sup>89</sup> the OAS Model Law,<sup>90</sup> and the NLCIFT Principles,<sup>91</sup> but modern secured transactions law has carved out a major exception in favor of buyers in the ordinary course of debtor's business.<sup>92</sup> The asset that moves out of a debtor's estate in such a transaction, say, an item of inventory, is replaced by an asset of equal or greater value (cash payment, an account receivable, a bank deposit). Therefore, buyers in the ordinary course of secured debtor's business

84. See Furnish, *Mexican Law*, *supra* note 5, at 1-28.

85. See *id.* at 1-41 to 1-47.

86. See *id.* at 1-37 to 1-40.

87. See *id.* at 1-48 to 1-51.

88. *NLCIFT 12 Principles*, *supra* note 51, princs. 6, 8.

89. U.C.C. § 9-315(a)(1) (1999).

90. OAS MODEL LAW art. 47; see also *id.* art. 52.

91. *NLCIFT 12 Principles*, *supra* note 51, princ. 2.

92. See OAS MODEL LAW art. 48; U.C.C. § 9-320(a) (1999); cf. *NLCIFT 12 Principles*, *supra* note 51, princ. 9.

may take clear title to items of collateral free of the security interest without diminishing the creditor's overall collateral value.<sup>93</sup>

The Mexican reforms of 2000 and 2003 accepted this proposition for the *prenda sin transmisión de posesión*, departing from civil law tradition<sup>94</sup> by providing for clear title to the "good faith buyer," another designation for the buyer in the ordinary course of business.<sup>95</sup> Specifically, the statute permitted the "alienation" of the secured goods "in the normal course of [the debtor's] preponderant activity," thereby cutting off "the effects of the [*prenda sin transmisión de posesión*] interest" and the creditor's right to pursue the goods, so long as they were acquired in good faith.<sup>96</sup> The Reform Law of 2000 did not give the secured debtor unilateral discretion in conducting his preponderant activity. It required clauses in any *prenda sin transmisión de posesión* that set out: 1) where the collateral goods shall be kept; 2) the minimum consideration the 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.<sup>97</sup>

The Reform Law of 2000 was not so liberal for goods secured under the *fideicomiso de garantía*. The basic dispensation for good-faith purchasers of goods under a *prenda sin transmisión de posesión* did not apply.<sup>98</sup> On the other hand, definitions of bad-faith purchasers and a list of purchasers to whom the debtor could not sell collateral without prior written authorization from the creditor did apply.<sup>99</sup> Finally, the clauses required in every *fideicomiso de garantía* for the debtor's handling of collateral were more extensive and more onerous than for the *prenda sin transmisión de posesión*.<sup>100</sup>

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93. See NLCIFT 12 Principles, *supra* note 51, princ. 1. A transfer to a third party outside the ordinary course of debtor's business would not cut the creditor's security interest, because such disposition frequently would not replace equal value in the debtor's estate. See OAS MODEL LAW art. 47 (stating this general rule), art. 48 (providing for the buyer in ordinary course to take free of any security interest in the collateral).

94. The Reform Law of 2000 appears to retain the traditional rule. See LGTOC art. 357, *as amended*, Reform Law of 2000. The provision seems to assume retention of the tradition 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.

95. *Id.* arts. 356(III), 398(III); see also *id.* art. 373 (stating that a "bad faith purchaser" would not escape the security interest when purchasing collateral).

96. *Id.* art. 356(III).

97. *Id.* art. 357, *as amended*, Reform Law of 2000.

98. LGTOC art. 414 (specifying that many of the provisions for the *prenda sin transmisión de posesión* also applied to the *fideicomiso de garantía*. Article 356 was not among them).

99. *Id.* (listing articles 373 and 374 among those that applied to the *fideicomiso de garantía*).

100. Compare *id.* art. 406 with *id.* art. 357.



Even though they had significantly limited the good-faith purchaser exception, perhaps Mexican legislators repented and felt they had gone too far. The Reform Law of 2003 made it even harder to qualify as a good-faith purchaser by defining a bad-faith purchaser as one who, knowing of the security interest, acquired the collateral without the creditor's consent.<sup>101</sup> A further modification in 2003, to article 361, made that provision read: "The debtor shall not transfer possession without prior authorization of the creditor, save where a contrary agreement exists."<sup>102</sup> These restrictions, depending on how strictly they were applied and whether the creditor's authorization might be implicit in custom and usage, could virtually eliminate the possibility of a good-faith purchase from a secured debtor. But there was more. The same law also created suspect categories of purchasers for whom the debtor must obtain written authorization from the creditor before the purchaser could take free of the security interest.<sup>103</sup>

By the time one sums up the effects of the Reform Laws of 2000 and 2003, Mexico's embrace of the concept that a good-faith buyer in the normal course of the debtor's preponderant activity should take free of the security interest seems quite tentative. Although the basic article<sup>104</sup> appeared at first blush quite liberal, it was so attenuated by other provisions that the concept shrank almost out of the law. It would seem that the only sure way for a purchaser from the secured debtor to achieve good-faith status would be to obtain prior written authorization from the secured creditor. Conceivably, sufficient creditor's blessing might occur less formally, since the relevant provisions do not specify written consent or authorization.<sup>105</sup> But given the apparent hesitancy of the Mexican legislator to trust the secured debtor to adhere to good practices in the

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101. *Id.* art. 373, *as amended*, Reform Law of 2003, significantly tightened this provision, not necessarily for the better. In the version of the Reform Law of 2000, article 373 had provided that the 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, with no mention of creditor's consent.

102. LGTOC art. 361, *as amended*, Reform Law of 2003. 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.

103. *Id.* art. 374, *as amended*, Reform Law of 2003. After the 2000 reform, the statute provided that where the debtor sought such authorization and the creditor did not respond within ten calendar days, such authorization should 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. *Id.* The categories set up in the Mexican law correspond to "insiders" in U.S. bankruptcy law. See 11 U.S.C. §§ 101(31), 547(b)(4)(B).

104. LGTOC art. 356(III), *as amended*, Reform Law of 2003.

105. *Id.* art. 361, *as amended*, Reform Law of 2003 (specifying (*autorización previa*) (prior authorization)); *but see id.* art. 373 (using the simpler term *consentimiento* (consent)).

ordinary course of his business, that would seem to run counter to the spirit and purpose of the law.

The concept of the buyer in the ordinary course of business has a toehold in Mexican law, but little more. Defending such a buyer's title to items purchased out of secured creditor's collateral could be difficult, if not impossible. The drafters of Mexico's law seem reluctant to leave deeply ingrained traditions of distrust, and thereby have rejected the essential concept, leaving the vital immunity of ordinary-course sales at the discretion of the secured creditor.

### **I. Creditors Remedies Against the Collateral Upon Default**

Reducing the cost to the lender of debtor's default is the motivating purpose of secured transactions. The rules of foreclosure have a great deal to do with the cost and availability of credit. Cheap, effective execution against collateral upon default provides the surest form of reducing that cost at the most crucial time.<sup>106</sup> Extra-judicial or summary procedures provide the surest means for expeditious execution. The venerated constitutional guaranties of due process and the right to notice and a hearing, however, stand in strong opposition to that approach. When the UCC adopted its self-help remedies, breaking with legal tradition around the world, many lawsuits in the United States attacked them as unconstitutional.<sup>107</sup> Although self-help withstood constitutional scrutiny in the United States and has proved benign in application, throughout Latin America, whenever lawyers hear of extra-judicial creditors' remedies against collateral in the hands of debtors, their first reaction is, "Clearly unconstitutional!"<sup>108</sup> The Reform Law of 2000 came at the end of hard economic times in Mexico, when debtors enjoyed great sympathy in the legislature. Fears that creditors invested with liberal foreclosure powers might unleash a reign of abuse against defenseless debtors combined with deep-seated respect for due process to keep the reforms of 2000 and 2003 well short of providing expedited, clear procedures to repossessing or foreclosing creditors.<sup>109</sup>

The secured creditor's self-help repossession of collateral upon a debtor's default has become an article of faith in U.S. commercial practice. In general, it functions well and reduces creditors' risks, with the result that interest rates are lower and credit easier to obtain. Safeguards for debtors' rights seem sufficient to prevent abuse. First, creditors may not "breach the peace."<sup>110</sup> That simple requirement reins in the overzealous creditor and permits the debtor to halt the

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106. *NLCIFT 12 Principles*, *supra* note 51, princ. 10.

107. *See, e.g.*, 45 UCC DIG. 233, 245-47 (West 2006); 9 Hawkland, UCC SERIES, § 9:503(2) nn.7-8 (West 2001).

108. Based on the author's participation in and observations of multiple discussions of the issue over the last twenty-five years or so, including in UNCITRAL, the OAS's CIDIP, and several individual Latin American countries.

109. *See* CCo. arts. 1414 bis-1414 bis 20, *as amended*, DO, 26 de Enero de 2006.

110. *See* U.C.C. § 9-609(a)(1), (b)(2) (1999).

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extra-judicial remedy at any time by politely refusing to give the creditor access to the collateral<sup>111</sup> and throwing the foreclosure into the judicial forum and constitutional due process. Debtors frequently do not insist on their rights, but—faced with an efficient process and the fact that they are in default—debtors simply cooperate by turning over the collateral and settling the debt.<sup>112</sup> There is little financial incentive for the defaulting debtor to drag out the inevitable and add court and attorney costs to the process.<sup>113</sup> In practice, creditors usually do not want to foreclose, and do so only as a last resort. 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 trigger all the due process that the law provides.

As with so many of the fundamental concepts of secured transactions, Mexico could accept the concept of self-help repossession by the creditor, or “extra-judicial procedure of execution.”<sup>114</sup> As we shall see, however, the Mexican legislature was not prepared to accept the system developed in the United States and Canada, although it did introduce modifications in the Reform Law of 2003 that substantially improved the process first adopted in 2000. Most notably, in 2003 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.<sup>115</sup> Overall, however, the Mexican foreclosure procedure—nominally utilized to foreclose on both the *prenda sin transmisión de posesión* and the *fideicomiso de garantía*<sup>116</sup>—established excessive safeguards for the debtor, creating a high-cost, time-consuming process that favored the debtor at the expense of the creditor, thus raising the cost of credit by increasing the risks associated with default.

At the outset, the Reform Law of 2000 imposed a set of onerous preconditions to foreclosure: no dispute could exist over whether the debt was due and owing, the amount of the debt claimed, or the creditor's right to possess the goods in question.<sup>117</sup> Further, before goods could be sold, their value must be established, either by expert appraisal or according to terms included in the original security agreement between the parties.<sup>118</sup>

111. See, e.g., *Dixon v. Ford Motor Credit Co.*, 391 N.E.2d 493 (Ill. App. 1979).

112. See U.C.C. § 9-609(c) (1999).

113. See *id.* § 9-608 (a)(1)(A).

114. CCo. arts. 1414 bis–1414 bis 20, *as amended*, Reform Law of 2000, Reform Law of 2003.

115. *Id.* art. 1414 bis 17(II). 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.* art. 1414 bis 17(III).

116. *Id.* arts. 1414 bis–1414 bis 20.

117. *Id.* art. 1414 bis, *as amended*, 2000.

118. CCo. art. 1414 bis (I)–(II). Conceivably, the parties could agree that the value might be set by the price received at public sale.

Should the creditor see beyond these initial hurdles, the law required that he initiate the process by a formal request notified to the debtor to turn over the collateral.<sup>119</sup> The debtor could terminate all possibility of any extra-judicial remedy by the simple expedients of “oppos[ing] the material delivery of the goods or the payment of the respective debt,”<sup>120</sup> by failing to agree on the value of the collateral by designated expert appraisal, or by “any other procedure that the parties may agree to in writing.”<sup>121</sup>

Even if the creditor managed to proceed to repossess the collateral, he must do so by formal act officiated over by a notary or other public fiduciary charged with documenting the act and recording a detailed inventory of the goods involved,<sup>122</sup> thereby adding further delay and substantial cost. Only after negotiating this gauntlet of delays, costs, and debtor discretion could a Mexican secured creditor liquidate the collateral.<sup>123</sup> A Mexican secured debtor can with virtual impunity complicate his secured creditor’s life after default by simply throwing down in his path delays, costs, and complications written into the law in the name of due process. The Mexican law’s formalities seem to foreordain the debtor’s resistance and make probable the failure of any creditor’s attempt at extra-judicial foreclosure.

### 1. A Special, More Effective Foreclosure Regime for the *Fideicomiso de Garantía*

The Reform Law of 2003 brought relief for secured creditors operating under a *fideicomiso de garantía*, or guaranty trust, by creating an exemption from the normal foreclosure procedures. The 2003 reform allowed the parties to agree in their *fideicomiso* that “the fiduciary institution [which also may and often will be the secured creditor] shall proceed to liquidate the collateral under guaranty,” so long as their contract provided that such foreclosure may be initiated upon receipt of a written communication from the creditor to the fiduciary requesting foreclosure and specifying the debtor’s default.<sup>124</sup> The fiduciary gives the debtor written notification of the creditor’s request.<sup>125</sup>

Upon such notification, the onus passes to the debtor to offer payment of the debt, offer proof that he has already paid the debt, or present any document that establishes terms and conditions contrary to those claimed by the creditor.<sup>126</sup> Should the debtor fail to provide one of the permitted responses, the fiduciary may

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119. *Id.* art. 1414 bis 1.

120. *Id.* art. 1414 bis 2(I).

121. *Id.* art. 1414 bis(II).

122. *Id.* art. 1414 bis 3.

123. CCo. art. 1414 bis 4.

124. LGTOC art. 403(I), *as amended*, Reform Law of 2003.

125. *Id.* art. 403(II).

126. *Id.*

proceed to liquidate the collateral.<sup>127</sup> Specific, reasonable time periods are given for each step.<sup>128</sup> To activate the special procedures, the required terms shall appear in a "special section" of the *fideicomiso* agreement and must bear the debtor's signature, separate and apart from his signature on the document as a whole.<sup>129</sup> Absent agreement on such special foreclosure procedures in the *fideicomiso* itself, the general provisions of the law apply, as discussed above.<sup>130</sup> Needless to say, Mexican secured creditors and their attorneys have not wasted time in including the more favorable foreclosure terms as boilerplate in their *fideicomiso de garantía* agreements.

## 2. Summary of Foreclosure Reforms and the Destiny of Self-Help in Mexico

As with so many of the concepts basic to a functional secured transactions system, the Mexican reforms of 2000 and 2003 adopted extra-judicial, or self-help, repossession as a legal concept, but by halfway measures that sap its basic purpose. The Mexican legislator seems to harbor a fundamental distrust of the marketplace, wary of the secured creditor's capacity to restrain himself from abuses against his debtor if foreclosure is made too easy and of the debtor's capacity to assert himself when he has a valid defense or cooperate in an expeditious foreclosure when appropriate. The more liberal procedures available by agreement in a *fideicomiso de garantía* offer hope to parties who can afford to set up that device, which should function well for larger loans to more substantial debtors. For smaller debtors, however, the laborious foreclosure procedures open to their secured creditors will continue to raise the risks and prices of credit, and limit their access to it. It is a hard reality that the law does the debtor no favor when it limits the secured creditor's right to foreclose.

## **IV. THE SUM OF MEXICO'S SECURED TRANSACTIONS REFORMS OF 2000 AND 2003**

At the end of its initial run at secured transactions reform with the Reform Law of 2000, the Reform Law of 2003, and the Registry Regulations of 2003, Mexico had neither instigated a coherent overall system nor transformed many of the traditional rules and attitudes that handicapped its system before 2000. Perhaps there was one solid success: by all indications, the *fideicomiso de garantía* has emerged as a durable, widely used mechanism fostered by the reforms. Notably also, as detailed above, the reforms of 2000 and 2003 introduced into the Mexican legal system a series of quintessential concepts

127. *Id.* art. 403(III).

128. *Id.* art. 403(IV).

129. LGTOC art. 403, *as amended*, Reform Law of 2003.

130. *Id.*

subversive of the traditional stumbling blocks to a proper secured transactions regime. If the revolution did not succeed in ousting the old regime, at least it armed the populace and implanted revolutionary doctrine. In many ways, the reforms put in place enabling provisions, ineffective because they were limited to the special device of *prenda sin transmisión de posesión* and/or *fideicomiso de garantía*, or otherwise kept from universal application. Remove the limitations in their effect, however, and such concepts have the power to bring the whole system into line.

Observers and policymakers might have hoped that the Mexican Congress would try yet again to promulgate amendments that could bring the country's law into greater harmony with secured transactions laws in the United States and Canada. The six-year presidency of Vicente Fox (2000-2006) lost momentum, however, and could accomplish little with a rebellious Congress during his last years in office. Secured transactions languished. When President Felipe Calderón succeeded Fox, his administration noted the need to finish the reforms, but Mexico's drug wars began to occupy the new government's attention. It looked as if any further amendment would have to await a calmer time. Apparently, however, Calderón's office found time to push the reform forward, with impressive, if limited, results.

## V. THE REFORM LAW OF 2009

On August 27, 2009, to the surprise of some observers who had concluded that nothing would happen in this prosaic area of the law, Mexico's official gazette, the *Diario Oficial de la Federación*, published a new law<sup>131</sup> adding further reforms to the secured transactions provisions of the *Código de Comercio*, specifically to the part having to do with the national commercial registry and its dispositions on filing security interests. The Reform Law of 2009 was relatively short, with few provisions, but it worked powerful change in the area of secured transactions.

Its central reform added a new section to the law, titled *Del Registro Único de Garantías Mobiliarias*<sup>132</sup> (RUG, or Single Registry of Security Interests), which complemented Siger, the national registry system instigated by the 2000 and 2003 reforms. Siger had never quite gotten secured transactions filings off the ground since its inception, in large part because the *prenda sin transmisión de posesión* and the *fideicomiso de garantía* were the only security devices required to register there. The Reform Law of 2009 went right to the heart of Siger's failure to create a universal registry, stating at the outset:

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131. Reform Law of 2009. Curiously, the delay between legislative approval of the Reform Law of 2009 and its official publication, which established its effective date, was notably longer than usual.

132. *Id.* arts. 32 bis 1–32 bis 9.

The security interests created in compliance with this or other commercial laws, their modification, assignment or cancellation, as well as any other juridical act carried out in relation to them, shall be subject to registration under the terms of this Section. Security interests include, without prejudice to those which by their nature achieve the same effect, all commercial juridical acts by which one may create, modify, assign or cancel a special privilege or right of retention over movable goods in favor of third parties. Security interests granted in favor of a merchant are presumed to be commercial, and shall be subject to registration only under the terms of this Section.<sup>133</sup>

Lest the new legislation leave any doubt as to its purpose, its next provision stated:

The Single Registry of Security Interests, hereinafter the Registry, is hereby constituted as a section of the Public Registry of Commerce, in which all the security interests referred to in the preceding article shall be registered, thereby publicizing them [to third parties] for the purposes of this or other legal regulations.<sup>134</sup>

The Regs of 2003 had prepared the way by providing for the use of a summary form, *not* the security agreement itself, to register the security interest represented by the *prenda sin transmisión de posesión*, a little-used type of security interest that still has not caught on in Mexico. The Reform Law of 2009 turned the stepchild into the model of behavior for the whole family; all the unruly gang of other, more-favored security devices now had to use the same summary form or have no effect against third parties. Where anarchy reigned, a legislative stroke imposed order.

The Reform Law of 2009 contained several other provisions setting out the operation of the RUG,<sup>135</sup> delegated further details to regulations to be issued

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133. *Id.* art. 32 bis 1 (translation by author). The original Spanish reads: "Las garantías mobiliarias que se constituyan con apego a éste u otros ordenamientos jurídicos del orden mercantil, su modificación, transmisión o cancelación, así como cualquier acto jurídico que se realice con o respecto de ellas, serán susceptibles de inscripción en los términos de esta Sección. En las garantías mobiliarias quedan comprendidos, sin perjuicio de aquellos que por su naturaleza mantengan ese carácter, los actos jurídicos mercantiles por medio de los cuales se constituya, modifique, transmita o cancele un privilegio especial o derecho de retención sobre bienes muebles en favor de terceros. Se presumen mercantiles todas las garantías mobiliarias otorgadas en favor de un comerciante, las cuales únicamente estarán sujetas a inscripción en los términos de esta Sección."

134. *Id.* art. 32 bis 2 (translation by author).

135. *Id.* arts. 32 bis 3–32 bis 9.

by the Secretariat of the Economy,<sup>136</sup> and mandated that the RUG should be functioning within a year of the law's entry into effect (perhaps a reason to delay its official promulgation after the Congress passed it)<sup>137</sup> but that no registrations under it could be required until the RUG was fully operational.<sup>138</sup>

The Reform Law of 2009 thus attended to one major loose end in the fabric of Mexican secured transactions. Until 2009, a national SIGER electronic registry existed in theory, but even as it became fully operational, only two types of security interests—the *prenda sin transmisión de posesión* and the *fideicomiso de garantía*—had to file there, and the *fideicomiso* did not use the summary form. After the Reform Law of 2009 added the RUG as a special registry within SIGER, all legal mechanisms in Mexico that have the effect of creating a guaranty against movable collateral in favor a creditor must file with the RUG by summary form or forfeit any and all priorities over other creditors who claim the same assets.

The Reform Law of 2009 used a term that may appear strange to foreign lawyers, "special privilege or right of retention." It did so because the Mexican *Ley de Concursos Mercantiles* of 2000 (Mexico's bankruptcy law, an analog to the U.S. Bankruptcy Code's Chapter 11 on reorganization) had used the term to encompass all of the various forms and artifices in use at the time that might comprise potential claims to priority.<sup>139</sup> Thus, use of the strange term in the Reform Law of 2009 made its purpose crystal clear: call them whatever you may, from this point on, any legal transaction with the effect of creating a security interest—a lien against movable property—must be registered in a single national registry, the RUG.

### **A. The Reform Law of 2009 and UCC Section 9-307(c)**

The Reform Law of 2009 may have resolved an issue raised by UCC Section 9-307(c). The UCC provided a general rule on where to file in Section 9-301(1), specifying the jurisdiction where the debtor is located. Section 9-307 then set out rules for determining where the debtor was located, generally the debtor's "place of business." In contemplation of the large number of secured transactions taking place across international borders, however, the UCC took account of the fact that many secured debtors may have their place of business in a jurisdiction whose law does not "generally require information concerning the existence of a nonpossessory security interest to be made generally available in a filing,

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136. Reform Law of 2009 arts. 32 bis 3, 32 bis 5.

137. *Id.* Transitional Art. 2d.

138. *Id.* Transitional Art. 3d.

139. *Ley de Concursos Mercantiles*, [LCM] [Bankruptcy Law], arts. 153, 217, 220, *as amended*, DO, 12 de Mayo de 2000 (Mex.). While the law defines the term "special privilege or right of retention" in Article 220, that definition is frustratingly circular, a tautology, "[C]reditors with a special privilege are all those who, under the Code of Commerce or related laws, may have a special privilege or right of retention." *Id.* (translation by author).



recording or registration system.” In a jurisdiction without a universal registry for all security interests, UCC Section 9-307(c) deemed a debtor from such a jurisdiction to be “located in the District of Columbia.”

Initially, one might object that such a filing made little sense. The UCC provision may appear arrogantly presumptuous. It arrogated jurisdiction to the D.C. registry even though neither the debtor nor the movable assets may have any contact whatsoever with that jurisdiction. It should seem virtually impossible that any foreign jurisdiction would recognize the validity of a D.C. filing.

If the borrower and the collateral were both in Mexico, a Mexican court in such circumstances would be unlikely to enforce the D.C. filing. While a U.S. court might apply the D.C. filing, enforcement of such a judgment could create insurmountable problems in Mexico. Mexico would seem the better place to attempt perfection of a security interest against the Mexican assets of a Mexican debtor, even given the historical dysfunction of the Mexican system. Prior to 2009, a U.S. secured creditor could do the best it could in Mexico, consider it a better bet than D.C., and hope for a solvent, responsible debtor. After the reforms of 2009, that hope may prove much better founded.

This dynamic shifts, however, when the Mexican debtor's movable assets wind up in the United States. Crop loans to Mexican growers who export all of their produce to the United States—a huge sector worth billions of dollars annually—represent a significant example. The produce itself or the proceeds of its sale may be found physically in the United States. In application, then, a creditor who, prior to the reforms of 2009 and the advent of the RUG, loaned money to a Mexican borrower and wanted to perfect a security interest should have made a UCC filing in the D.C. registry, secure in the knowledge that such a filing would enable it to proceed against its collateral in the United States should debtor fail to pay. Foreclosing on a Mexican secured debtor's U.S. assets should have been direct, effective, and expeditious, much more than any filing or perfection in Mexico ever could have been. While discretion probably counseled perfecting to the extent possible under Mexican law as well, the UCC filing in D.C. should have proved fail-safe as long as the assets wound up in the United States.

The Reform Law of 2009 and its establishment of the RUG probably change this equation. The RUG entered into full functions in October 2010 as a central, national, electronic registry. Since then, Mexico has had a single, universal registry for all security interests in movable goods that easily fulfills the criteria of UCC Section 9-307(c) and should negate any necessity to deem Mexican debtors located in Washington, D.C. The Official Comment to Section 9-307(c), like many of the UCC's comments, offers a tautology, explaining the provision by citing it verbatim.<sup>140</sup> Nonetheless, the test seems clear: only when a potential creditor could not find all prior security interests by a search in a single registry in the jurisdiction in which the secured debtor is located, would the D.C. filing be appropriate. Since October 2010, all the potential creditor needs do is

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140. See U.C.C. § 9-307(c) cmt. 3 (2002).

search the RUG to find all prior perfected security interests against the movable collateral of his Mexican debtor. If a security interest did not appear in the RUG, it could neither affect him nor take priority over the secured claim he perfected by filing in the RUG.

U.S. creditors secured against Mexican debtors with Mexican assets may still be advised to file in D.C., against the possibility that a U.S. court might find that sufficient to perfect their security interests against assets that wind up in the United States. The D.C. filing should be regarded as superfluous, however. It cannot hurt and it might help. By proper application of the law, it should simply be thrown out. It is not the essential filing, the basis for successful perfection of the security interest. After the advent of the RUG in Mexico, our U.S. secured creditor relying on the Mexican assets of a debtor located in Mexico must file in Mexico, even if the U.S. creditor ultimately makes his claim in a U.S. court against assets located in the United States. Failure to file with the RUG in Mexico leaves him unperfected under UCC Section 9-307, an unsecured creditor in the eyes of the U.S. law, with no claim against such assets. His fate would certainly be no better in Mexico.

### **B. The RUG Implemented: The Regulations and Pre-Codified Electronic Forms of 2011**

In September 2010, Mexico issued regulations fully implementing the new regime established by the Reform Law of 2009, the RUG within the SIGER.<sup>141</sup> Less than a month later, a second set of regulations appeared in the *Diario Oficial*, this time publishing fifty-three different updated “pre-codified” forms to carry out the registration of commercial documents,<sup>142</sup> the first eight of which referred to secured transactions.

The Regulations of 2010 set about clarifying any ambiguity left by the Reform Law of 2009’s definition of security interests<sup>143</sup> by reiterating the earlier language with a small addition. The first set of Regs included, in Article 1, a Definitions section that defined a *garantía mobiliaria* (“security interest”) as:

The effect of a commercial juridical act by means of which one creates, modifies, assigns or cancels a *guaranty* or a special privilege or a right of retention in favor of a Creditor,<sup>144</sup> over a

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141. See RUG Regulations.

142. See Forms Reg. Almost immediately, the executive corrected two of the forms. The forms corrected did not deal with forms for secured transactions. See Clarification Reg.

143. See *supra* text accompanying notes 133–34, 139.

144. Also defined as, “the person in whose favor a Security Interest is granted.” RUG Regulations art. 1(I).

movable good or a group of moveable goods, to guaranty the fulfillment of an obligation.<sup>145</sup>

The Regs only tweak the Reform Law's 2009 definition, but they nudge it in the right direction, making it broader by using the word left out in 2009: "guaranty." Read together with the requirement that made all security interests subject to registration under the SIGER and its exclusive RUG for security interests, the Regs' definition should remove any possibility that any type of security interest against movable collateral—whatever its legal form—might escape registration in the RUG if it wishes to enjoy a priority against third parties.

The pre-codified forms for security interests consummated the approach. The standard form that should serve to make the initial registration of a security interest, known as G-2,<sup>146</sup> is three pages long and requires detail, including a reference to the "act or contract that creates the obligation guaranteed" and the date of its celebration.<sup>147</sup> This requirement subverts the principle that a single registration should serve notice and fix priority for any number of subsequent security agreements between the same parties covering the encumbered assets described in a single original filing. It seems to run against the possibility established by the Reform Law of 2000 of creating such a durable priority for the *prenda sin transmisión de posesión*.<sup>148</sup>

The Regulations of 2010 provided that potential secured creditors may fix a date of priority before they have an actual security agreement with their debtor by filing an *aviso preventivo*,<sup>149</sup> perhaps best translated as an "advisory notice." The *aviso preventivo* remains effective only for a fifteen-day grace period during which the parties must complete the transaction with a security agreement consummated and registered within that time.<sup>150</sup> Failure to complete inscription of the definitive security interest within the appointed time forfeits the priority date fixed by the *aviso preventivo*. While fifteen days may seem unduly short for working out an agreement embodying complex financing arrangements, it does give the secured creditor an opportunity to fix a date of priority before reaching final agreement, and thus be sure of that priority before committing to the secured loan.

145. *Id.* art. 1(II) (emphasis added) (translation by author). The original Spanish reads: "Garantía Mobiliaria: Es el efecto de un acto jurídico mercantil por medio de lo cual se constituye, modifica, transmite o cancela una garantía o un privilegio especial o un derecho de retención a favor del Acreedor, sobre un bien o un conjunto de bienes muebles, para garantizar el cumplimiento de un obligación."

146. See Forms Reg, Anexo I, G-2 [hereinafter G-2]. The enabling provision is in the RUG Regulations, art. 33 bis 2 (providing a more general set of criteria, giving rise to the possibility of revising Form G-2 in the future).

147. See G-2, *supra* note 146, items 2, 8–12.

148. See *supra* note 65 and accompanying text.

149. See Forms Reg Anexo I, G-1.

150. See RUG Regulations arts. 33 bis, 33 bis 3.

The *aviso preventivo* cannot, however, protect later transactions between the same parties that might transform the original security agreement, a typical and salutary occurrence in a standing credit relationship. Such varying operations in reliance on an original, often decades-old, priority date occur routinely in the United States and Canada, should begin to do so in Honduras and Guatemala, and are endorsed by authoritative analyses of how secured transactions should function.<sup>151</sup>

Initially for the Mexican practice, the requirement under the 2010 Regs that the secured creditor needed a security agreement in place<sup>152</sup> to complete the G-2 Form, inscribe it in the RUG, and fix a priority,<sup>153</sup> with at most a fifteen-day reach back, might seem to prevent long-standing secured credit arrangements that rely on a single priority date good for all the security agreements that the parties may work out over years of loans involving the same category of collateral.

While this presents a speed bump to the flow of credit transactions, able commercial lawyers should quickly find their way over it by drafting broad security agreements good for the duration and then maintaining the original priority by working transactions under the umbrella of the original security agreement, modifying but neither rescinding nor terminating it. The secured creditor could thus preserve his original date of priority by filing modifications with Form G-5. The restriction also further commends the *fideicomiso de garantía* as the security agreement of choice because it naturally tends to involve an agreement—establishment of the trust—that predates registration.

The G-2 Form asks what kind of security interest the creditor has (offering a list of eleven, including *prenda sin transmisión de posesión*, “derived from” a *fideicomiso de garantía*, derived from a financing lease, and “other special privileges”)<sup>154</sup> and what type of goods serve as collateral (a list of nine, including machinery and equipment, inventory, agricultural products, rights of collection, and “others”)<sup>155</sup> along with their descriptions.<sup>156</sup> It also requires entry

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151. See, e.g., *NLCIFT 12 Principles*, *supra* note 51, princs. 1, 6; U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, at 31–97, 149–78, U.N. Sales No. E.09.V.12 (2010), available at [http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf) (covering basic approaches to secured transactions, creation of a security right, and registry systems).

152. The security agreement need not, however, be a registered public instrument, a requirement for the validity of most juridical acts. See G-2, *supra* note 146, item 7.

153. Apparently, priority dates from the instant that the party making a filing signs with an electronic signature, at which point registration is complete. See CCo. arts. 21 bis 1, 21 bis 29; RUG Regulations art. 30 bis. Nonetheless, the RUG states, “The security interests inscribed under the terms of the present Regulation, shall have effect against third parties in conformity with the applicable laws.” RUG Regulations art. 31. This may seem unduly vague, but, to cite one possible example, it leaves open the possibility of priority under a *fideicomiso de garantía* that dates from establishment of the trust, rather than from registration of the secured creditor claiming as a beneficiary under the trust.

154. See G-2, *supra* note 146, item 1 (repeating substantially the same criteria included in RUG Regulations art. 32(A)).

155. See *id.* item 4 (the same list may be found in RUG Regulations art. 32(B)).

of the maximum amount guaranteed<sup>157</sup> and whether the security agreement foresees “increases, reductions or substitutions” in the collateral goods or the amount secured.<sup>158</sup> Complete data on creditors<sup>159</sup> and debtors<sup>160</sup> must be set out.

Over time, practice and use will find the best ways to work within the new system. The RUG is envisioned as an electronic recipient system, organized by debtor's name<sup>161</sup> and transparent to the public,<sup>162</sup> involving no review of documents incoming under authorized electronic signature.<sup>163</sup> The RUG should also become a complete repository of all security interests, including those filed in special registries, such as for automobiles, which are charged with submitting “replicas” of their filings to the RUG.<sup>164</sup> All in all, Mexico now has what seems on paper an excellent, nationwide, exclusive registry system for security interests, fulfilling all of the criteria for best modern practices<sup>165</sup> and, to use one measure, easily surpassing the United States's state-by-state registry system in technology, convenience, and coverage.

## VI. FINAL WORD: SECURED TRANSACTIONS IS STILL A WORK IN PROGRESS IN MEXICO

Over the last decade, Mexico has legislated major changes in its laws on secured transactions on three separate occasions. Mexico still has not achieved a complete, well-functioning secured transactions system. It does have a system, and a pretty good one, where it had no system at all three years ago.

156. *See id.* item 5.

157. *Id.* item 3.

158. *Id.* item 6.

159. G-2, *supra* note 146, items 13–15, 21–23.

160. *Id.* items 16–20.

161. RUG Regulations art. 30 bis 1.

162. *Id.* art. 34. In fact, the RUG Regulations make the entire Siger open to public access. *Id.* art. 21.

163. Siger in general is converting to an electronic filing system, even for complete commercial documents, that accepts without review electronic filings from notaries or public brokers. *Id.* art. 10 bis. Documents may still be filed in paper form, but in that case, they will be reviewed as to proper form and validity. *Id.* art. 10.

164. RUG Regulations art. 31 bis. This may take some time to set up. *See id.* Transitional Art. 5th.

165. *See NLCIFT 12 Principles, supra* note 51, princs. 6, 7; OAS Model Registry Regulations Under the Model Inter-American Law on Secured Transactions (2009), [http://www.oas.org/dil/cidip-vii\\_doc\\_3-09\\_rev3\\_model\\_regulations.pdf](http://www.oas.org/dil/cidip-vii_doc_3-09_rev3_model_regulations.pdf) [hereinafter OAS Model Registry Regulations] (adopted Oct. 9, 2009, by the Seventh Inter-American Specialized Conference on Private International Law). The OAS Model Registry Regulations came too late for Mexico and Honduras—the countries nearest in time to promulgating similar regulations—to use them directly, but the Mexican and Honduran drafters clearly were aware of the OAS Model Registry Regulations, and some of them participated in the OAS process.

One hopes that Mexico has not reached the end of its legislative sojourn in this area of the law. In September 2011, this author had the privilege to participate in discussions with Jan Boker, General Director of National Commercial Regulation and the man in charge of the RUG, at the National Law Center for Inter-American Free Trade in Tucson, Ariz. Boker explained a set of proposed amendments to the LGTOC and the Code of Commerce that would further tighten up and clarify the Mexican system of secured transactions, principally the coverage and procedures of the RUG. The process of creating a proper modern secured transactions regime in Mexico continues, with functional utility the goal and willingness to make necessary changes to the resident attitude. That approach must prevail for some time, for the proposed amendments do not address most of the basic shortcomings of the Mexican system set out in this article, including its treatment of after-acquired property,<sup>166</sup> continuing priority from the time of original filing for subsequent transactions,<sup>167</sup> purchase-money security interests,<sup>168</sup> buyers in the ordinary course,<sup>169</sup> and a creditor's ability to execute against the collateral upon a debtor's default.<sup>170</sup>

Mexico has good models. Its two NAFTA partners, the United States and Canada, represent the two most developed secured transactions systems in the world today,<sup>171</sup> and they agree on virtually all aspects of their regimes. Mexico actively participated in the drafting and ratification of the OAS Model Law on Secured Transactions, a vision that contains all the essential principles and concepts practiced in United States and Canada, better and more concisely expressed than in either of the two nations' laws.

In a larger forum, the United Nations Commission on International Trade Law (UNCITRAL) recently spent several years debating and drafting its 539-page *UNCITRAL Legislative Guide on Secured Transactions*,<sup>172</sup> ratified by the General Assembly in 2008.<sup>173</sup> UNCITRAL's guide tracks and expounds the OAS Model Law and the NLCIFT Principles, adding greater currency to and discussion of the fundamental concepts of what a modern system of secured transactions should embody. The UNCITRAL guide provides a superb and definitive treatise on modern secured transactions, with recommendations for what a national system should include. Again, as in the OAS effort, Mexico's representatives were present and active throughout the sessions in UNCITRAL. Mexico has jurists who emphatically get it; they understand secured transactions, but they have not yet had the legislative power to bring their vision to ground in their own country.

166. See *supra* text accompanying notes 53–63.

167. See *supra* text accompanying notes 64–79, 148–49.

168. See *supra* text accompanying notes 80–88.

169. See *supra* text accompanying notes 89–105.

170. See *supra* text accompanying notes 106–23.

171. With the exception of the Honduran system, since 2011.

172. See UNCITRAL LEGISLATIVE GUIDE, *supra* note 151.

173. G.A. Res. 63/121, U.N. Doc. A/Res./63/121 (Dec. 11, 2008), <http://www.uncitral.org/pdf/english/assemblyresolutions/A-RES-63-121-e.pdf>.

Central American countries, specifically Guatemala<sup>174</sup> and Honduras,<sup>175</sup> have adapted faithful versions of the OAS Model Law for their countries, improving it substantially in the process. Honduras's model seems especially well drafted and applied, a legislative benchmark for the international community, with a state-of-the-art electronic registry.<sup>176</sup> Other Central American countries seem close to the same result, specifically El Salvador, with legislation expected to come before its legislature.

The Mexican process is thus not so much an attempt to define the proper law and its necessary elements. Those are well known and have now been adapted to civil law regimes in Latin America. Mexico has to surmount the stumbling blocks inherent in its complex political and legal systems, and the vested interests that inhabit them. Major changes to legal rules are seldom popular, no matter how salutary, but legal change struggles doubly hard in the Mexican context, with its powerful interest groups.

One should view the Mexican reforms of 2000, 2003, 2009, and 2010 as most remarkable for confronting traditional legal principles that go back millennia in the civil law, and supplanting some of them. While the reforms have recognized and placed in Mexican law new concepts that accurately reflect modern commercial reality and practice, those new concepts most often struggle in the midst of entrenched institutions, traditions, and principles that do not accommodate them, begrudging them their place in the mix and leaving them incapable of imposing their full effect. The new concepts have gained a foothold and jostle somewhat awkwardly with the venerable principles and traditions of times past for the right to define their system and make it work.

Make no mistake. Mexico has achieved signal success. The implementation of a modern electronic, national registry, in which all security interests of whatever cast must be registered, takes a huge step toward a true secured transactions system, a primordial concept first insinuated partially and now applied universally. Note that the reforms of 2000 and 2003 put the concept in place, ready for the Reform Law of 2009 to apply it and create a comprehensive, universal, exclusive national registry of security interests. All the 2009 law had to do was expand electronic registration by summary form from the *prenda sin transmisión de posesión* to include all legal acts that create a security interest in movables, regardless of what they might be called. A simple legislative change in the language of the law, a sea change in registry scope and practice in Mexico.

Notably, the change to a universal registry also should foster the concept of priority from the moment of registration and the companion concept of permitting a security interest in after-acquired property. These two concepts in

174. See Guatemala LGM.

175. See Honduras LGM.

176. See Reglamento del Registro de Garantías Mobiliarias [Regulations for the Secured Transactions Registry], 14 de marzo del 2011, D.O. (Hond.), available at <http://www.garantiasmobiliarias.hn/reglamento.pdf>.

turn enable a series of secured transactions between the same creditor and debtor to enjoy a fixed priority based on a single registration. If Mexico had to choose one conceptual switch to throw, then that of the universal registry—by design or by happy chance—clearly favors the advent of the overall system more than any other could have.

Much remains to be done. As pointed out above, many fundamental concepts are in place, but they occupy small, unobtrusive niches rather than defining the system. As the RUG requires registration of all security interests, it cannot help but call out the rest of the system. Refining details and issues that presently encumber concepts such as after-acquired property, purchase-money security interests, treatment of the buyer in the ordinary course, and extra-judicial foreclosure should follow as the system gains momentum. Commercial practice, the interplay between lawyers and courts in litigation, and critical commentary should expose and chafe against rough spots, pushing the system into more efficient applications. Perhaps socio-economic legal engineering in Mexico must always negotiate more unfriendly terrain than in other countries because of its ingrained national complexities of politics and society. The pathway has been marked by persistent, repeated labors at reform. It promises in the near future to develop into a thoroughfare for secured transactions in Mexico. Viva el RUG!

