



**Asia-Pacific  
Economic Cooperation**

**Advancing** Free Trade  
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# **Study on Techniques to Implement International Secured Transactions Standards in Civil and Common Law Jurisdictions**

**APEC Economic Committee**

December 2023





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*The information and recommendations provided in this study were developed using information available at the time and through dialogue with economies.*

*The views expressed in this document are those of the authors and do not necessarily represent those of the APEC member economies. The recommendations provided may be further considered by the APEC Economic Committee.*

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# STUDY ON TECHNIQUES TO IMPLEMENT INTERNATIONAL SECURED TRANSACTIONS STANDARDS IN CIVIL AND COMMON LAW JURISDICTIONS

## I. Introduction

This Study is part of the APEC Economic Committee's (EC) long-standing effort to help member economies enhance their business- and investment-enabling legal environments. The APEC EC Ease of Doing Business initiative—which includes credit and secured transaction reform, resolving insolvency, and enforcing contracts—has been central to this effort. The Study is also directly linked to the EC Strengthening the Economic Legal Infrastructure Friends of The Chair (SELI FoTC). The SELI FoTC's activities include promoting the implementation of international instruments (including those of the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Hague Conference on Private International Law (HCCH) in areas of secured transactions, insolvency, enforcing contracts, and the APEC Online Dispute Resolution (ODR) Collaborative Framework. The Study will also help boost the implementation of the EC Enhanced APEC Agenda for Structural Reform (EAASR), including pillars (i) creating an enabling environment for open, transparent, and competitive markets; (ii) boosting business recovery and resilience against future shocks; and (iii) ensuring that all groups in society have equal access to opportunities for more inclusive, sustainable growth, and greater well-being.

APEC member economies started reforming their secured transaction regimes over two decades ago and recently increased pace. The Asian Development Bank (ADB) and USAID started supporting modernization of secured transactions frameworks as a tool to accelerate economic development in APEC lower-income member economies in 1999, including in Viet Nam. Recent reform projects in the region (Brunei Darussalam; Indonesia; Malaysia; The Philippines; and Thailand) were spearheaded by the World Bank Group through partnerships with regional bodies such as APEC and the Association of Southeast Asian Nations (ASEAN).<sup>1</sup>

Reforms have largely been championed by Ministries of Finance, Commerce, or Justice, or by Central Banks, including through National Development Plans related to financial inclusion. For example, Indonesia; Malaysia; The Philippines; and Viet Nam have all identified secured transactions law reform in their respective National Development Plans. In the case of Viet Nam, a specific agency under the Ministry of Finance was tasked with implementing secured transactions reform. Additionally, the APEC Finance Ministers' Financial Infrastructure Development Network (FIDN) promotes an enabling environment for micro, small, and medium sized enterprises (MSMEs) to improve access to finance, including through the implementation of international instruments adopted by UNCITRAL and UNIDROIT.

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<sup>1</sup> Elaine MacEachern, *Secured Transactions Reform in East Asia: Progress and Challenges* in Gullifer & Neo, *Secured Transactions Law in Asia Principles, Perspectives and Reform* (Hart 2021).

APEC member economies, especially those in Asia, are increasingly aware of the importance of following international standards to reform secured transactions laws.<sup>2</sup> While early reforms largely copied legislation from other jurisdictions, such as New Zealand and the United States (e.g., enacted by Brunei Darussalam), recent legislation (e.g., enacted by the Philippines) and proposed reforms (e.g., proposed by Malaysia) have generally tracked international standards. Some APEC economies, such as China, have instituted significant partial reforms that are based largely on international standards. Initiatives in other member economies, such as Japan, may result in laws that are less aligned with international standards.

As new international standards are adopted, another round of reforms is likely to follow. For example, the number of transactions involving electronic transferable records and digital assets has grown exponentially. In response, the 2017 UNCITRAL Model Law on Electronic Transferable Records was adopted providing for an electronic functional equivalent to paper-based negotiable instruments and negotiable documents, whereas the 2023 UNIDROIT Principles on Digital Assets and Private Law cover digital assets that do not have a “paper” equivalent, such as for negotiable instruments and negotiable documents.

Other recent and upcoming international standards concern receivables finance, digital assets, warehouse receipts, the law applicable to proprietary effects of transactions with digital assets, and security rights in voluntary carbon credits.

The United States recently revised its Uniform Commercial Code Article 9 (U.S. UCC 9) providing a concrete set of rules for the perfection, priority, and other aspects of security interests in digital assets (electronic controllable records). The reform includes amendments and a new Article 12 dealing with substantive aspects of transfers of electronic controllable records. This development may inspire another round of reforms to introduce specific rules for security rights in digital assets.

In sum, ongoing and future reforms in APEC member economies are expected to either i) attempt to replace disjointed and complex legislative and judicial rules with a unitary and comprehensive statutory regime or ii) build on previous reforms to align the frameworks more closely with international standards.

Civil law and common law jurisdictions face both similar and different challenges. Electronic registration systems that transparently allocate priorities may be uniformly accepted, but other aspects of international standards have been more difficult to implement, especially efficient enforcement mechanisms. Civil law jurisdictions are traditionally more concerned with protecting the debtor’s interest in enforcement and therefore more reluctant to embrace extrajudicial enforcement.<sup>3</sup> Civil law jurisdictions have historically also required more rigorous formalities for the execution of security agreements, such as writing, notarization, deeds, and specific language requirements.<sup>4</sup> Legislation in APEC economies impose different

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<sup>2</sup> Louise Gullifer and Dora Nero, *Secured Transactions Law in Asia: Principles, Perspectives and Reform* (Hart, 2021).

<sup>3</sup> Teresa Rodriguez de las Heras Ballell, *Secured Transactions Law Reform in Civil Law Jurisdictions: Challenging Tradition, Facing Reality, and Embracing Modernity in Secured Transactions Law in Asia: Principles, Perspectives and Reform* (Hart, 2021).

<sup>4</sup> *Id.*

requirements for the effectiveness of transfers of receivables, some requiring registration while in others outright transfers may be effective without any public notice. The UNIDROIT 2023 Model Law on Factoring applies to outright and security transfers of receivables, while factoring legislation (e.g., in China and Viet Nam) has been traditionally limited to outright transfers of receivables, which is also reflected in the applicable regulatory framework. Malaysia's proposed reform and the U.S. UCC 9 apply to both outright and security transfers. A divide between approaches to collateralizing warehouse receipts is reflected in the draft UNIDROIT-UNCITRAL Model Law on Warehouse Receipts, which includes a chapter on "pledge bonds" characteristic of civil law jurisdictions, although the recent trend is to move away from this approach even in civil law jurisdictions (e.g., in Japan). While many common law jurisdictions have not enacted a warehouse receipts law (e.g., Australia), U.S. UCC Article 7 follows the single-document approach where a warehouse receipt may be used as collateral without the requirement to issue a separate pledge bond.

Other than a desire to modernize private law frameworks, APEC economies are expected to finetune the associated regulatory frameworks that facilitate specific types of transactions, such as factoring. The underlying trend in both civil law and common law jurisdictions is to enact standalone laws that replace sections in broader codes. This provides a fulsome treatment for the relevant transactions and enables regulatory aspects to be included in the same law. Appropriate regulation that is efficiently coordinated with private law has become the focal point of reforms.<sup>5</sup> While international standard-setters pay more attention to regulatory aspects and include some explanations in guides to enactment, the standards themselves are limited to private law aspects.

Another driver for reforms is initiatives to ensure that women and women-led MSMEs have adequate access to credit. For instance, La Serena Roadmap on Women and Inclusive Growth (2019-2030) seeks to promote and facilitate cooperation in the public and private sector to achieve that goal. As highlighted in the APEC Women and the Economy Dashboard, greater inclusiveness in the financial sector has been instrumental in narrowing the gender gap in accessing financial services.<sup>6</sup> A modern secured transactions law can unlock financing opportunities of particular benefit to women, empowering them to overcome the lack of titled land and a lack of credit

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<sup>5</sup> Giuliano Castellano and Marek Dubovec, Credit Creation: Reconciling Legal and Regulatory Incentives, 81 LAW & CONTEMP. PROBS. 63 (2018); Giuliano Castellano and Marek Dubovec, Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad between Access to Credit and Financial Stability, 41(3) FORDHAM INT'L L.J. 531 (2018); Giuliano Castellano and Marek Dubovec, Bridging the Gap: The Regulatory Dimension of Secured Transactions Law Reforms, 22(4) UNIFORM L. REV. (2017) (discussing the intersection of secured transactions law and prudential regulation); Giuliano G. Castellano and Andrea Tosato, Commercial Law Intersections, 72(1) Hastings Law Journal (2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3558378](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558378); European Bank for Reconstruction and Development (EBRD), New Finance Support: Receivables Finance for MSME Resilience and Economic Growth (2023), available at <https://www.ebrd.com/what-we-do/sectors/legal-reform/access-to-finance.html>; and International Finance Corporation (IFC), Coordinating Prudential Regulation and Secured Transactions Frameworks: A Primer (2020), available at <http://documents.worldbank.org/curated/en/739451604998793072/Coordinating-Prudential-Regulation-and-Secured-Transactions-Frameworks-A-Primer>.

<sup>6</sup> APEC Women and the Economy Dashboard 2023, available at [https://www.apec.org/publications/2023/08/the-apec-women-and-the-economy-dashboard-2023\\_](https://www.apec.org/publications/2023/08/the-apec-women-and-the-economy-dashboard-2023_)



history. Such reform will enable women to use their assets to gain access to formal credit markets.<sup>7</sup>

Modernization of secured transactions frameworks is critical to creating enabling legal foundations for regional markets where actors from multiple APEC economies may engage in commercial transactions. The formation of regional markets and integration of APEC MSMEs into global supply chains is aided by the harmonization of laws along the lines of the international standards examined in this Study.

This Study is based on the authors' research and experience with economy legal reforms as well as comments provided by APEC economies on a draft of the Study. This Study was also reviewed at an APEC workshop on 'Secured Transaction Reform: Developing Tailored Approaches for Common Law and Civil Law Jurisdictions' held in Tokyo on 10-11 October 2023.<sup>8</sup> The Study was subsequently endorsed by the APEC Economic Committee in December 2023.

## II. Relevant International Standards

Over the past two decades, UNCITRAL, UNIDROIT, and HCCH have adopted significant international standards that have shaped the legal frameworks of many APEC member economies with respect to secured transactions in general and specific areas, such as factoring and digital assets. These institutions are undertaking initiatives to address new challenges, such as those concerning digital assets, that are expected to influence future reform activities. This Section provides a brief overview of these standards and initiatives and outlines how they affect secured transactions frameworks. It focuses on model laws that may be adapted when implemented into legislation in common law and civil law jurisdictions. Such adaptations may result in deviations from the standards.

In contrast, international treaties such as the 2001 Convention on International Interests in Mobile Equipment (Cape Town Convention), ratified by many APEC member economies, offer limited opportunities for adaptation and thus provide the basis for a uniform regime in civil law and common law jurisdictions. Notably, the Cape Town Convention and its Protocols provide for several options that economies may choose from to reflect their public policies, such as with respect to priorities of non-consensual interests (e.g., tax claims) and remedies (e.g., whether extra-judicial enforcement is permitted). The adoption of the 2019 Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment (MAC Protocol) provides new opportunities for APEC economies to address both global concerns, such as ensuring food security, as well as concerns specific to the financing and leasing of such equipment. The APEC Workshop on Secured

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<sup>7</sup> Workshop on Secured Transactions Reform: Developing Tailored Approaches for Common Law and Civil Law Jurisdictions, November 2023 [hereinafter APEC Workshop on Secured Transaction Reform] at 22 (Rhea Crisologo Hernando, APEC Policy Support Unit); Rhea Crisologo Hernando, Narrowing the Gender Gap in Access to Digital Finance Can Help Women to Thrive, available at <https://www.apec.org/press/blogs/2023/narrowing-the-gender-gap-in-access-to-digital-finance-can-help-women-to-thrive>.

<sup>8</sup> APEC Workshop on Secured Transactions Reform, *supra* note 7.

Transactions Reform: Developing Tailored Approaches for Common Law and Civil Law Jurisdictions, November 2023, recommended that these concerns should be explored at length.<sup>9</sup>

## **A. UNCITRAL Model Law on Secured Transactions**

The 2016 UNCITRAL Model Law on Secured Transactions provides a global standard for secured transactions regimes. It is accompanied by several guides to assist policymakers, legislators, and private parties in adopting and deploying the legal rules in practice. It builds on the 2001 United Nations Convention on the Assignment of Receivables in International Trade (UN Receivables Convention). The UN Receivables Convention sought to provide more certainty for cross-border receivables finance by setting out both substantive and choice-of-law rules for international assignments of receivables and assignments of international receivables. Unlike the 1988 UNIDROIT Convention on International Factoring, its scope of application is not limited to factoring transactions, and it applies to transfers of receivables in project finance, securitization, and other transactions. However, the UN Receivables Convention is yet to enter into force.

The anchor of the UNCITRAL Model Law on Secured Transactions is the functional approach that treats transactions that perform the same function, which is to secure the performance of an obligation with a right in movable property, equally. Accordingly, the many laws that have been enacted in APEC member economies, such as on retention of ownership, hire-purchase, financial lease, pledge, charge, and others, ought to be consolidated under a single framework that provides for the unitary concept of “security right.” This approach results in the application of a single set of rules governing the perfection, priority, and enforcement of security rights. In general, perfection is achieved by electronic notice registration that also determines the priorities. The Model Law includes a set of specific provisions for certain types of assets, such as bank accounts, intellectual property, or negotiable documents. Several APEC member economies have enacted laws or are in the process of reforming their laws to conform to this Model Law.

## **B. UNIDROIT Model Law on Factoring**

The 2023 UNIDROIT Model Law on Factoring is the international standard for receivables finance, including factoring. The Model Law is consistent with the UNCITRAL Model Law on Secured Transactions in that it covers both outright and security transfers and treats them equally, apart from enforcement rules. Only a few departures have been included, and the most significant one is the override of anti-assignment clauses that have no effect. The Model Law on Factoring was designed for jurisdictions that have not reformed their secured transactions regimes but wish to take an initial step toward a modern framework for receivables finance. It is also

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<sup>9</sup> APEC Workshop Report on Secured Transaction Reform, supra note 7 at 38 (recommending that APEC economies facilitate economic growth and improve food security as part of its SELI Workplan on Structural Reform under EAASR including by: preparing diagnostic studies of agriculture finance legal frameworks; holding workshops to examine the operation of international instruments such as the MAC Protocol and how their implementation will improve domestic frameworks; and providing technical assistance to help economies implement key instruments).

suitable for jurisdictions that have implemented the UNCITRAL Model Law but left out some provisions, such as on the rights and duties of debtors of receivables.

The Model Law on Factoring covers receivables generated from sales of goods and provision of services, which form the bedrock of traditional factoring. However, it defines “receivable” broadly to include rights to payment arising from data transactions, licenses, and assignments of intellectual property. Perfection (third-party effectiveness) may be achieved by registration only, and the time of registration also establishes the priority. Other methods of perfection, such as notification of the debtor of the receivable, were rejected. Its scope of application is limited to receivables and particular types of proceeds that receivables commonly turn into, such as funds deposited in bank accounts. However, it does not address many legal and practical aspects, such as the conflict between a factor that claims funds in a bank account as proceeds of a receivable it has financed and another lender who might have acquired a security right over the bank account. The UNIDROIT Working Group will develop a Guide to Enactment that is expected to be finalized in 2024. In addition to explaining the thrust of the articles included in the Model Law, the Guide will include guidance on regulatory aspects, such as licensing of factoring companies that have proven to be critical in modernizing receivables finance frameworks.

### **C. UNIDROIT Principles of Private Law for Digital Assets**

The 2023 UNIDROIT Principles of Private Law for Digital Assets set out a framework for transactions with digital assets, which is a relatively new phenomenon. Bitcoin, stablecoins, non-fungible tokens, and central bank digital currencies either did not exist or were sparsely used several years ago, and the commercial law frameworks generally do not contain any rules specific to these types of assets. The Principles address several aspects of transactions with digital assets, including whether they should be recognized as property when a custody relationship exists, their transfers and corresponding rights of transferees, security rights, applicable law, and treatment in insolvency. UNIDROIT and HCCH have already undertaken a follow-up project to develop guidance on applicable law to cross-border transactions with digital assets, building on the approaches set out in the Principles.

The Principles also deal with security rights, recognizing that digital assets may be used as collateral in lending transactions. They provide that a security right may be perfected by control, which is defined. This recognition reflects the market practice of lenders applying mechanisms that effectively prevent the grantor from disposing of the encumbered digital assets. However, such mechanisms are neither recognized in the UNCITRAL Model Law on Secured Transactions nor in domestic secured transactions frameworks, apart from the U.S. UCC Article 9, as perfecting a security right. Consequently, such lenders would be treated as unsecured creditors in insolvency. To provide legal certainty to transferees and secured creditors, the Principles address perfection, priority, and enforcement of security rights in digital assets.

## **D. UNCITRAL Guide on Access to Credit for MSMEs**

UNCITRAL undertook a series of projects to provide guidance on the establishment of an enabling legal framework for MSMEs, including their registration as businesses,<sup>10</sup> business form,<sup>11</sup> resolution of debts in insolvency,<sup>12</sup> and lastly access to credit. The Guide on Access to Credit for MSMEs was adopted by the Commission in 2023. Recognizing the challenges that MSMEs face in accessing credit as well as the direction of recent reforms, the Guide sets out recommendations to modernize various aspects of legal frameworks facilitating credit, including secured transactions. Those recommendations draw on the 2016 UNCITRAL Model Law on Secured Transactions highlighting the importance of its key features, such as notice-registration. While not advocating for any specific reforms in the area of immovable assets lending, the Guide highlights the importance of enabling regimes that facilitate the use of such assets as collateral.

The Guide addresses other “credit tools,” including personal guarantees, public state guarantees, and credit reporting. It also deals with resolution of disputes by judicial and extra-judicial means, and enforcement. The Guide recognizes ODR mechanisms as “easy-to-use, fast, and low cost,” and refers to the APEC ODR Collaborative Framework.<sup>13</sup> It notes that complex enforcement procedures hinder access to credit.

## **E. UNIDROIT-UNCITRAL Model Law on Warehouse Receipts**

UNIDROIT and UNCITRAL have undertaken a joint project to develop a model law on warehouse receipts. The UNIDROIT Working Group developed a draft that was considered by UNCITRAL at the 40<sup>th</sup> Session of Working Group I, in Vienna in September 2023, and is projected to be adopted by the Commission in the summer of 2024. The draft model law (and accompanying Guide to Enactment, currently under development) deals with the private law framework governing transfers of warehouse receipts, both paper-based and electronic. Warehouse receipts are commonly used in financing transactions, and the UNCITRAL Model Law on Secured Transactions provides a corresponding legal framework for collateralization of negotiable documents, including warehouse receipts.

The draft model law includes an article that deals with security rights in warehouse receipts, encouraging jurisdictions to ensure that their legal frameworks recognize the perfection of security rights in electronic warehouse receipts by control. This would provide a parallel treatment between paper-based and electronic warehouse receipts. After the September session, its reach is likely to be expanded. The draft model law also includes an optional chapter on pledge bonds, which feature in the legislation of many civil law jurisdictions. This is in recognition of the status of legislation rather than as an encouragement to provide for such systems, which are considered to be inferior. The draft model law includes comprehensive rules on transfers of warehouse receipts to “qualifying purchasers” who acquire their rights free of any competing claims and

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<sup>10</sup> UNCITRAL Legislative Guide on Key Principles of Business Registry (2018).

<sup>11</sup> UNCITRAL Legislative Guide on an UNCITRAL Limited Liability Enterprises (2021).

<sup>12</sup> UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises (2021).

<sup>13</sup> See further discussion below Section IV.

defenses. Secured creditors often take the necessary steps to acquire the status of qualifying purchaser.

## **F. Project on Voluntary Carbon Credits**

UNIDROIT has undertaken a project in collaboration with the World Bank Group to develop guidance on voluntary carbon credits (VCCs). The first meeting of the Working Group took place on 10-12 October 2023. The objective of this project is like that of the digital assets project, which is to provide guidance to legislators to develop an enabling legal framework for transactions with VCCs, including their use as collateral. The question of using VCCs as collateral hinges on their recognition as assets that could be made subject to proprietary rights. Given their digital nature, the project is likely to recommend to jurisdictions to provide for the perfection by control, as an alternative to registration. This will necessitate an amendment to secured transactions frameworks based on the UNCITRAL Model Law on Secured Transactions to carve out VCCs from the broader corpus of intangible assets and enable perfection by control. The reform approach would be like that for digital assets.

## **G. UNIDROIT – Best Practices for Efficient Enforcement**

UNIDROIT is developing a guidance instrument for legislators entitled Best Practices for Effective Enforcement. The instrument will contain a set of global standards and best practices for the effective enforcement of creditor rights. It is intended to help legislators reform or refine their domestic normative framework applicable to enforcing creditor rights and supporting well-functioning financial and lending markets.

The instrument will detail procedures and mechanisms for enforcing creditors' rights effectively in transnational and domestic civil proceedings. The UNIDROIT project includes best practices for the judicial and extrajudicial enforcement of secured claims that follow existing international standards, such as the UNCITRAL Model Law on Secured Transactions. The instrument will also address best practices for the enforcement of claims in digital assets and include standards relating to the impact of technology on enforcement. In the context of enforcement, technology:

- enhances collateral monitoring by identifying a change in location, value, or unauthorized asset use;
- streamlines enforcement procedures via automated notices; and
- enables digital auctions and irreversible automated enforcement through complaint-handling mechanisms and ODR platforms.<sup>14</sup>

The UNIDROIT Working Group is also developing guidance on expedited court procedures to resolve disputes where a secured creditor seeks to extra-judicially take possession of tangible collateral. One issue concerns the extent to which it would be desirable to utilize ODR mechanisms in either the judicial process or in an alternative

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<sup>14</sup> UNIDROIT Working Group on Best Practices for Effective Enforcement, Report of Sixth Meeting, 14-16 March 2023, at paras. 4, 147-158, available at, <https://www.unidroit.org/wp-content/uploads/2023/06/Study-LXXVIB-W.G.6-Doc.-7-Report.pdf>.

dispute resolution system.<sup>15</sup> The Working Group will also review the use of ODR and Alternative Dispute Resolution (ADR) in enforcement generally.<sup>16</sup>

### **III. Secured Transactions Reform Initiatives in Selected APEC Member Economies**

This Section of the Study provides an overview of some reforms and ongoing initiatives in selected APEC member economies that are representative of civil law and common law systems. The selected jurisdictions illustrate the approaches and challenges faced when undertaking reforms.

#### **A. China**

In May 2020, China enacted a new Civil Code, which affects the law of secured transactions. These aspects of the reform were influenced by the UNCITRAL and UNIDROIT instruments, as well as the U.S. UCC 9.<sup>17</sup> The Civil Code entered into force on 1 January 2021. To facilitate its implementation, the People's Bank of China published the Measures for Unified Registration of Security of Movable Assets and Rights, Order No. 7 (the 'Measures'),<sup>18</sup> which became effective on 1 February 2022, to support the implementation of an economy-wide system for the registration of security rights in movable assets. The Civil Code provides for rules governing the issuance and transfer of warehouse receipts, which may be pledged by endorsement and delivery.<sup>19</sup> China's warehouse receipts framework was awarded 3 out of a possible 5 points in the World Bank's Enabling the Business of Agriculture access to finance indicators.

The Credit Reference Center of the People's Bank of China has been designated the Registrar for the registration of security rights in movable assets and rights. According to Article 4 of the Measures, the Center "does not provide pre-transaction approval or perform substantive review of the registration information." This function of the registry is consistent with the UNCITRAL and UNIDROIT standards.

The Civil Code adopts the functional approach in Article 388(1) as a security agreement includes, in addition to traditional security rights, "other contracts having a function of security." Consequently, the rules concerning security rights are also applicable to reservation of ownership, financial lease, factoring, and functionally similar arrangements, unless a special law provides otherwise. The Civil Code thus requires reservation of ownership, financial lease, factoring, and other types of security rights to be registered to achieve effectiveness against third parties. Previously, only charge (hypothec) of tangible movable property and pledge of receivables could be

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<sup>15</sup> Id. at para. 114.

<sup>16</sup> Id. at paras. 116-17. See further discussion below, Section IV(C).

<sup>17</sup> Jing Zhang, Recent Developments in the Law of Secured Transactions of Movables under the New Chinese Civil Code, 26(1) Uniform Law Review, 191 (2021).

<sup>18</sup> See <http://www.pbc.gov.cn/en/3688253/3689009/4180845/4446043/2022011216142019025.pdf>.

<sup>19</sup> An English translation of the Chinese Civil Code is available at <http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf>.

registered.<sup>20</sup> The security transfer of ownership to tangible assets and the security assignment of receivables that were previously used in practice in the absence of an express statutory recognition now fall under the broad ambit of Article 388 and are considered registrable security rights. The functional approach is bolstered through Article 414(2) which provides that the distribution ranking for proceeds from the disposition of the collateral is applicable to all registrable proprietary security rights.

However, the Civil Code has not fully implemented the functional approach underlying the relevant international standards. Special rules are made for certain types of security rights, such as where the seller of goods is entitled to a right of recovery (*rei vindicatio*) if the buyer fails to pay the purchase price. Thus, the seller effectively remains the owner of the goods. Similarly, the financial lessor can, by virtue of ownership, reclaim the object by terminating the contract if the lessee fails to make a payment. It is also questionable whether sale and leaseback arrangements will be regarded or re-characterized as security rights under the new Civil Code.

In several other aspects, the Civil Code and the accompanying Measures have implemented an approach that is not fully aligned with the international standards. The Measures include a definition of accounts receivable, which is very broad and not aligned with the UNCITRAL and UNIDROIT standards in several aspects. For example, the definition includes claims arising from the provision of loans or other credits.

The contractual prohibition of assignment of a receivable is only effective *inter partes*. In this aspect, the Civil Code takes a similar approach to the UNCITRAL Model Law on Secured Transactions. It does not fully invalidate the effect of those clauses, similarly to the UNIDROIT Model Law on Factoring.

The Civil Code recognizes both a possessory security right and a registrable non-possessory security right. Pursuant to Article 415 of the Civil Code, priority is determined according to the date of delivery and that of registration. Article 416 provides for an acquisition security right that may be created in the goods supplied to secure the payment of the purchase price. It confers super-priority on this type of security right, thus implementing the approach of the UNCITRAL Model Law on Secured Transactions.

The Civil Code reflects other deviations from the UNCITRAL Model Law on Secured Transactions in addition to failing to fully implement the functional approach. For instance, grantors could be only enterprises, individual businesses, and agricultural producers under Article 396 of the Civil Code. Another example concerns the effect of delivery of the collateral. Generally, delivery of the collateral to a secured creditor will make the pledge 'effective against third parties,' but its creation is a result of the security agreement. In contrast, under the Civil Code, delivery is a prerequisite to the effectiveness of a pledge. This approach also applies to pledges of receivables, which have no effect whatsoever until a registration is completed. As mentioned above, assignment of receivables is a registrable security right, but only if the assignment is made in conjunction with factoring. Factoring is regulated as a specific contract in the sixteenth chapter of the third book (Contracts).

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<sup>20</sup> Zhang, *supra* note 17.

Where a receivable is subject to multiple factoring agreements, the priority of competing factors (assignees) is determined, first, according to registration and, in the absence of registration, by notification of the debtor under Article 768 of the Civil Code. In the situation where a factoring assignment conflicts with a non-factoring assignment, Article 768 is not applicable, and it is necessary to resort to the *nemo dat* rule. As a result, which assignment will prevail depends on the time of occurrence – that is, the date when the assignment agreement takes effect.

## B. Japan

The secured transactions framework evolved from the Civil Code through case law and special laws dealing with particular aspects of security rights. The creation, perfection and priority of mortgages, pledges, rights of retention, and liens are governed by the Civil Code.<sup>21</sup> Some types of movable property, such as construction machinery, may be mortgaged, which is the security device designed for immovable assets. The enforcement of security rights is regulated under the Civil Execution Act. Japan's Commercial Code contains provisions specific to the issuance and transfer of warehouse receipts, which may be pledged by indorsement and delivery. Japan's warehouse receipts framework was awarded 4 out of a possible 5 points in the World Bank's Enabling the Business of Agriculture access to finance indicators.

Since the pledge requires delivery of the collateral to the secured creditor, a device (*joto-tanpo*) emerged where ownership of a movable asset is transferred to a secured creditor to secure an obligation. This practice has been recognized in judicial precedent since 1910. This device may also be used to encumber fluctuating assets, such as inventory and receivables, and the security is perfected as soon as the grantor acquires new assets. Retentions of ownership have likewise been recognized by courts as a form of security. The Act on Special Provisions of the Civil Code regarding Registration of Transfer of Goods and Receivables (Act on Registration) provides a special registration system. The registration system co-exists with the Civil Code perfection methods, which are delivery in the case of goods and notification of, or acknowledgment by, the account debtor in the case of receivables.

The Civil Code does not require publication as a condition of perfection. As a result, parties are exposed to the risk of being subordinated to unknown prior interests. The Act on Registration provides for a public-notice registration system for assignments (both outright and for purposes of security) of goods and receivables, and pledges of receivables. The identification requirements for collateral are overly strict, and consequently, a security right over all assets of the grantor is practically unavailable. Enforcement is done by disposal of the collateral in an auction supervised by the court. The Civil Code prohibits self-help repossession, and any agreement entered into at the outset of the transaction permitting self-help is void (Article 349). However, once a default has occurred, the grantor may consent to out of court enforcement.

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<sup>21</sup> Megumi Hara, Navigating the Patchwork of Secured Transactions Rules in Japan: Towards a Framework Conducive to Asset Based Lending in Secured Transactions Law in Asia: Principles, Perspectives and Reform (Hart, 2021).



The proposed amendment to the Civil Code will revise the provisions governing secured transactions in Part II (Real Rights). It is not envisaged that the reformed framework will be included in a standalone act, and its effect will be limited to codifying the case law with some adaptations. For instance, presently the requirements to perfect *joto-tanpo*, which takes the form of the transfer of ownership to the movable collateral, are those generally applicable to the transfer of ownership. Under the Civil Code, delivery is required to render the transfer of ownership of movables effective against third parties. However, delivery is understood to include constructive delivery with retention of physical possession by the transferor. This means that *joto-tanpo* is perfected without any form of public notice. The interim draft does not prescribe that *joto-tanpo* may be perfected by registration only and recognizes constructive delivery as an alternative. Since constructive delivery does not provide public notice, it is not recognized as a perfection mechanism in the UNCITRAL Model Law on Secured Transactions. The priority rule of the interim draft subordinates constructive delivery to registration.

*Joto-tanpo* may also be used to secure an obligation with a right in a receivable. Delivery is achieved by notification and acknowledgment of the debtor of the receivable. The interim draft recognizes two perfection mechanisms – registration and notification/acknowledgment of the debtor of the receivable. But, unlike in the case of tangible assets, these perfection mechanisms have an equal strength in terms of producing legal effect. Accordingly, a prospective secured creditor would not only need to search the registry but also inquire whether debtors have been notified to determine confidently whether another person has an interest in the receivable. These approaches to priorities are not aligned with the international standards.

The proposed system would not apply to individual grantors. While each natural person is issued a unique number, there is a concern with using those numbers in publicly available systems. Again, this approach differs from the international standards that apply the security regime to natural persons and provide for an alternative of using names or unique numbers as an identifier in the registration system. Under the interim draft, a search of the registry is not expected to display the encumbered assets, which invites another inquiry from the prospective creditor.

The interim draft provides for extra-judicial enforcement of security rights. Naturally, if the proceeds of enforcement exceed the amount of the secured obligation and the expenses of enforcing the security right, the grantor will be entitled to the surplus.

### **C. Malaysia**

The proposal to introduce the Movable Property Security Interest (MPSI) Bill in Malaysia was inspired by the World Bank's Doing Business Report 2015 Getting Credit indicators, which identified several deficiencies in Malaysia's secured transactions framework, including (i) the absence of an integrated or unified legal framework for movable collateral, and (ii) the lack of a unified collateral registry for both incorporated entities and unincorporated borrowers. A joint study was conducted by the Central Bank of Malaysia and the Companies Commission of Malaysia (SSM) in 2015. The study confirmed the World Bank's findings and highlighted that introducing a new legal framework will significantly benefit the business sector, particularly SMEs. SSM was

then mandated to undertake the registry function and introduce a framework regulating the creation, registration, and enforcement of security rights.

Sections 352-364 of the Companies Act 2016 govern the registration of charges in immovable and movable property created by incorporated entities. The charges over the company's registrable assets are specified in section 353 and, among others, include (i) a charge to secure any issue of debenture, (ii) a charge on book debts of a company, (iii) a floating charge on the undertaking or property of a company, and (iv) a charge on a credit balance of a company in any deposit account.

As such, in Malaysia, in so far as unincorporated entities are concerned (sole proprietors and partnerships), no legal framework governs the creation and enforcement of security rights in movable assets. Consequently, no single collateral registry for security rights is created by both incorporated and unincorporated borrowers. Like English law, absolute assignments (outright transfers) of receivables, typical in factoring transactions, do not constitute a registrable charge and are perfected without public registration. There is no warehouse receipts law in Malaysia.

Currently, there are different registries for movable properties under the Ministry of Transport (ships and aircraft), the Road Transport Department (RTD) (motor vehicles), and the charges registry (under the Companies Act 2016) administered by the SSM. However, the primary purpose of these registries is registering, licensing, and regulating the related movable assets and companies in Malaysia and not registering rights or interests in movable assets when used as collateral.

From 2018 to 2022, SSM consulted with stakeholders comprising representatives from ministries or agencies that operate the relevant registries. SSM had also consulted with representatives from UNCITRAL to ensure that the draft Bill is in line with the international standard and incorporates the necessary recommendations from the UNCITRAL instruments. The fundamental approaches to the scope, perfection, priorities, and enforcement align with the UNCITRAL Model Law on Secured Transactions. The deviations from the standard included in the Bill are insignificant and concern Articles 4 and 5 of the Model Law that cover the requirement to act in good faith and a commercially reasonable manner and interpretation of the law. On top of this, SSM also issued consultative documents for feedback from the public. These consultations enabled SSM to further refine the provisions under the proposed legal framework and ensure the applicability of the policies to suit the current financing landscape and the business requirements in Malaysia. The Bill is in its draft stage and is expected to be tabled in Parliament in 2024.

#### **D. United States**

The U.S. UCC 9 has become a model for reforms in many jurisdictions around the globe and inspired the UNCITRAL Model Law on Secured Transactions. Since its first edition, it has undergone several revisions and amendments to conform the text with evolving practice.

In 2019, a Study Committee was formed to examine the impact of emerging technologies on various aspects of UCC, including Article 9. The work of the Committee was concluded in 2022 when the two sponsoring entities – the Uniform

Law Commission and the American Law Institute – approved a revised text that added a new Article 12 to the corpus of the UCC and substantially amended other articles, including Article 9.<sup>22</sup> These amendments are already being implemented. The amendments attempt to establish a legal framework not only for digital assets stored on distributed ledgers but also for those “that may be created using technologies that have yet to be developed....”<sup>23</sup>

The new UCC Article 12 provides a private law framework for transfers, holding, and other transactions with electronic transferable records (CERs). Examples of CERs include Bitcoin, ether, stablecoins, central bank digital currencies, and non-fungible tokens. They are defined as “records stored in an electronic medium that can be subjected to control.”<sup>24</sup> Control is achieved for purposes of Article 12 when a holder (i) can derive substantially all the benefit from the CER, (ii) has exclusive power to prevent others from availing themselves of substantially all the benefit from the CER, and (iii) is allowed to readily identify itself in any way, including by cryptographic key, as having these powers.<sup>25</sup> Practically, control over a CER may be achieved when a person has them in the digital wallet it controls and for which it has exclusive knowledge of the cryptographic key.<sup>26</sup>

Importantly, control under UCC Article 12 offers special protections to certain types of transferees of digital assets. A person who takes control of a CER for value, in good faith, and without notice of a claim of a property right in the controllable electronic record is considered a “qualifying purchaser” whose rights are superior to any other competing claimant. A qualifying purchaser receives a “super-priority” status over even a security interest perfected earlier by registration.<sup>27</sup> One of the reasons for assigning a high degree of negotiability to CERs is the pseudonymous nature of the systems.

Control serves multiple functions, including (i) delineating the scope of UCC Article 12, (ii) providing protections to qualifying purchasers, and (iii) functioning as a perfection method for security interests. The primary purpose of revising UCC Article 9 was to conform it with UCC Article 12. Several significant changes have been introduced that inspired the UNIDROIT Principles for Digital Assets. First, UCC Article 9 introduces two new collateral types – controllable accounts and controllable payment intangibles. Controllable accounts are created when an account receivable is evidenced in a record – CER. Second, UCC Article 12 provides for perfection by control for CERs, controllable accounts, and controllable payment intangibles as an alternative to registration. Third, if a security interest is perfected by control, it would have priority over a security interest perfected by another method. Fourth, a new connecting factor is introduced to determine the law applicable to perfection and priority of a security interest perfected by control, which is based on party autonomy, as the identity and location of a person is often difficult to establish in transactions with digital assets. This

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<sup>22</sup> See <https://www.uniformlaws.org/viewdocument/final-act-164?CommunityKey=1457c422-ddb7-40b0-8c76-39a1991651ac&tab=librarydocuments>.

<sup>23</sup> See *Securing Interests in Digital Assets—The Proposed UCC Article 12* (ABA, 2023), available at <https://www.americanbar.org/groups/litigation/committees/corporate-counsel/articles/2023/spring2023-crypto-part-iii-securing-interests-digital-assets-proposed-ucc-article-12/> - :~:text=Under Article 12, a party,to the extent allowable under.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

approach inspired the new joint project between UNIDROIT and the HCCH concerning the law applicable to cross-border transactions with digital assets.

Some changes concern aspects that are not dealt with in international standards and are unlikely to affect future reforms, such as for chattel paper transactions. Other changes are likely to become a source of inspiration, such as re-defining “money” that has traditionally been limited to bills and coins. The potential introduction of central bank digital currencies will necessitate a new approach, including making control available as a perfection mechanism for security interests over “digital money.” This would be an appropriate approach for digital money that circulates as tokens, while the rules on the perfection of security interests in deposit accounts will apply to digital money held in such accounts.

A few changes were introduced to UCC Article 7 that deals with documents of title, including warehouse receipts. One of those is the addition of a new safe harbor for when control over an electronic document of title is established. The approach was inspired by the definition of control over CERs. As a result, a secured creditor may take the steps set out in the new safe harbor and perfect a security interest in a negotiable or nonnegotiable electronic document of title.

## **E. Viet Nam**

Viet Nam’s secured transactions framework is defined in the 2015 Civil Code and regulations dealing with specific aspects such as registration and enforcement. The latest reform in 2022 modernizing the registration system has brought the current legal framework governing secured transactions into closer alignment with international standards. Factoring in Viet Nam is governed by the 2017 Circular on Factoring Activities of Credit Institutions and Foreign Bank Branches, which is limited to outright transfers of receivables arising from the sale or supply of goods and services. Notification of the debtor of the receivable is required. There is no warehouse receipts law in Viet Nam, such that transfers of warehouse receipts fall under the broader rules governing possessory pledges in the Civil Code. Notably, the World Bank’s Enabling the Business of Agriculture access to credit indicators awarded Viet Nam’s warehouse receipts framework 0 out of a possible 5 points.<sup>28</sup>

The concept of secured transactions in Viet Nam was codified in the Civil Code of 1995. However, situating the secured transactions regime within the body of contract law led to an absence of rules governing perfection, priority, and enforcement that are typically provided for under property law.<sup>29</sup> Rather than following international trends, Viet Nam consulted experts primarily from other civil law jurisdictions and incorporated their antiquated system into its laws.<sup>30</sup>

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<sup>28</sup> See World Bank Enabling the Business of Agriculture – Vietnam (World Bank Group, 2019), available at <https://eba.worldbank.org/en/eba>.

<sup>29</sup> See Huyen Pham, Secured Transactions Law in Vietnam: Prominent Achievements, Experiences, and Lessons Learned in Secured Transactions Law in Asia Principles, Perspectives and Reform (Hart, 2021). See also Xuan-Thao Nguyen Bich Thao Nguyen, Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries (NC Journal of International Law, 2023), available at <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=2024&context=ncilj>.

<sup>30</sup> *Id.*

The establishment of a registration system began in 2001 in the National Registration Agency for Secured Transactions (NRAST) under the Ministry of Justice of Viet Nam (MOJ). NRAST is responsible for facilitating the registration of security rights and supervising the implementation of secured transactions law in Viet Nam more broadly. The registration system was “paper-based” until 2010-2011 when IFC partnered with NRAST to implement secured transactions reform under the Viet Nam Financial Infrastructure Program.<sup>31</sup> In 2022, NRAST recorded over 450,000 new (initial) registrations and over 800,000 registrations total, which suggests the electronic registration system is widely used.

A new Civil Code, adopted in 2015, consists of six parts divided into 27 chapters. The Chapter on Securing the Performance of Obligations includes four sections that would typically be covered under a secured transactions law, including (i) general provisions on the creation, perfection, registration, priority, and enforcement of a security right, (ii) specific provisions on possessory pledge, and (iii) specific provisions on retention of ownership. The Chapter clarifies and expands the permissible scope of assets that could serve as collateral,<sup>32</sup> including future assets. Regarding creation of a security right, creditors can describe the collateral in general terms allowing for a single agreement to encompass multiple existing and future assets of the grantor.<sup>33</sup>

The Civil Code provides for two equal methods of perfection: (i) registration, and (ii) possession.<sup>34</sup> Although, it does not provide for control as a method of perfection, a control mechanism is used in practice by secured creditors in Viet Nam for securities, deposit account, and letter of credit financing.<sup>35</sup> Secured creditors ordinarily resort to control combined with registration.<sup>36</sup> The Civil Code also further strengthened priority rules based on the principle of “first to register or to perfect” creating a predictable regime for resolving third-party disputes.<sup>37</sup>

The Civil Code also provides for a robust enforcement regime that generally aligns with the international standards. In particular, it enables the parties to agree on the method of enforcement at the time of signing the security agreement, including disposal of the collateral by (i) public auction, (ii) private tender, (iii) acceptance of the collateral in full or partial satisfaction of the secured obligation, and (iv) other methods agreed upon by the parties.<sup>38</sup> Notably, the 2017 Resolution No. 42 on Enforcement of Non-Performing Loans of Credit Institutions permits extra-judicial seizure of the collateral if agreed upon in the security agreement.<sup>39</sup> The Resolution also permits courts to resolve disputes through a summary procedure.<sup>40</sup>

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<sup>31</sup> See IFC Helps Improve Vietnam’s Financial Infrastructure to Expand Access to Credit (IFC, 2010), <https://pressroom.ifc.org/all/pages/PressDetail.aspx?ID=23749>.

<sup>32</sup> See Arts. 293-295 of the Civil Code of 2015.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Arts. 297-298.

<sup>35</sup> See Huyen Pham, *supra* note 23.

<sup>36</sup> *Id.*

<sup>37</sup> See Art. 308 of the Civil Code of 2015.

<sup>38</sup> *Id.* Art. 303.

<sup>39</sup> Hong Hai Nguyen, *A Study on the Civil Code Revision: The 2015 Civil Code of Vietnam in Civil Law Reforms in Post-Colonial Asia* (2019), [https://link.springer.com/chapter/10.1007/978-981-13-6203-](https://link.springer.com/chapter/10.1007/978-981-13-6203-3_5)

<sup>40</sup> *Id.*

After the adoption of the 2015 Civil Code, Decree No. 102 on the Registration of Security Rights was enacted in 2017, further aligning the legal and institutional framework to the international standards.<sup>41</sup> The issuance of Decree No. 102 coincided with the adoption of Viet Nam's Financial Inclusion Strategy, which emphasized the importance of instituting a modern secured transactions system.<sup>42</sup>

The 2020 World Bank Doing Business indicators, before they were discontinued, found that the 2015-2017 reforms resulted in a comparatively strong legal environment for secured lending in Viet Nam. Viet Nam's secured transactions framework scored 8 out of a possible 12 points, which was the highest in the East Asia region.<sup>43</sup> However, Viet Nam lost points for not having a notice-based collateral registry in which all functional equivalents can be registered as well as a modern collateral registry in which registrations, amendments, cancellations and searches can be performed online.<sup>44</sup> These issues have been partly remedied by Decree No. 99, adopted in 2022, repealing and replacing Decree No. 102 of 2017 on the Registration of Security Rights. The new Decree provides for a more comprehensive treatment of registration aspects, including: (i) the validity and duration of registration, (ii) the effect of modification of an existing registration, and (iii) termination of a registration.

Despite these reforms, a number of issues continue to persist in Viet Nam's secured transactions framework, including: (i) lack of a standalone law on secured transactions that would replace the myriad amendments, decrees, and circulars that generate confusion and inconsistent application of rules, (ii) lack of clarity concerning the rights of creditors to proceeds upon sale or other disposition of the collateral, and (iii) inadequate priority rules as against non-consensual interests.

## IV. Enforcement Issues

As discussed above, one of the areas with the greatest differences in approach between civil law and common law jurisdictions in secured transactions reform concerns enforcement. Civil law jurisdictions are traditionally more concerned with protecting the debtor's interest in enforcement.

Under modern secured transactions law, a security right makes it possible for a secured creditor to apply the value of the encumbered asset to the secured obligation. The ability to effectively enforce a security right underlies the economic benefit of secured transactions reform—greater access to credit at a lower cost. As recognized in the UNCITRAL Model Law on Secured Transactions, a modern secured transactions framework should provide efficient remedies to enforce security rights in

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<sup>41</sup> Decree No. 102 of 2017 is available in English at <https://thuvienphapluat.vn/van-ban/EN/Quyendan-su/Decree-102-2017-ND-CP-on-registration-of-security-interests/362321/tieng-anh.aspx>.

<sup>42</sup> See PM approves national financial inclusion strategy until 2025 (Ministry of Finance), available at [https://mof.gov.vn/webcenter/portal/tttpen/pages\\_r//detail?dDocName=MOFUCM171877](https://mof.gov.vn/webcenter/portal/tttpen/pages_r//detail?dDocName=MOFUCM171877).

<sup>43</sup> See Doing Business Vietnam (World Bank Group, 2020), available at <https://www.doingbusiness.org/content/dam/doingBusiness/country/v/vietnam/VNM.pdf>.

<sup>44</sup> *Id.*

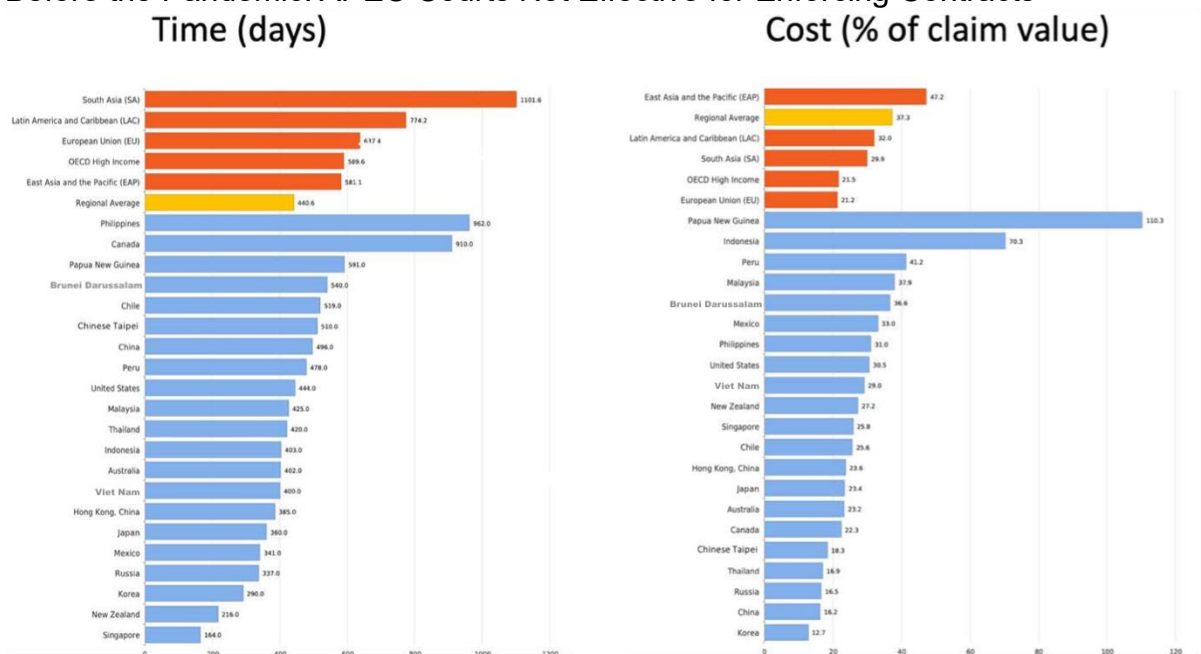
tangible (e.g., repossession and disposal of equipment) and intangible (e.g., collection of accounts receivable) collateral.<sup>45</sup>

Remedies in both common law and civil law jurisdictions may be in the form of (i) judicial enforcement; (ii) out-of-court enforcement, such as repossession and extra-judicial sale; and (iii) out-of-court enforcement using ADR and ODR.

## A. Judicial Enforcement

Most economies, both civil law and common law, have a mechanism to enforce security rights in courts through domestic civil procedure codes. These provisions vary substantially from economy to economy but are generally slow and expensive. APEC's work on Ease of Doing Business Enforcing Contracts shows that in 2020, it took on average 440 days to resolve a simple contract dispute at a cost of 37 percent of the claim's value.

Before the Pandemic: APEC Courts Not Effective for Enforcing Contracts<sup>46</sup>



In some jurisdictions it can take even longer for a foreign lender to obtain a judgment and enforce it against a debtor in default under a loan agreement even though the debtor has no defense to non-payment. For example, it has been reported that it could take 18 months in Japan; 2-4 years in Peru; and several years in Indonesia, especially if the debtor appeals.<sup>47</sup>

Speed is of the essence of secured transaction enforcement particularly when the collateral is tangible since it may depreciate rapidly. Article 73 of the UNCITRAL Model

<sup>45</sup> Article 73 of the UNCITRAL Model Law on Secured Transactions.

<sup>46</sup> APEC Doing Business 2020 at 54-55, available at <https://www.doingbusiness.org/content/dam/doingBusiness/media/Profiles/Regional/DB2020/APEC.pdf>.

<sup>47</sup> ICLG, Lending and Secured Finance Laws, available at <https://iclg.com/compare/lending-and-secured-finance>.

Law recommends that APEC economies consider alternative expeditious judicial or administrative mechanisms to enforce security rights. However, jurisdictions that have enacted a secured transactions law along the lines of the UNCITRAL Model Law have failed to provide expedited judicial remedies. This could be attributed to a lack of guidance on the remedies' procedural details.

The UNIDROIT Working Group on Best Practices in Effective Enforcement is considering ways to improve the enforcement of security rights, including expeditious judicial relief. Some jurisdictions provide a pre-judgment procedure where upon presentation of proof that a security agreement was validly executed and that a default has occurred, the court will issue an order authorizing the creditor to seek assistance from a law enforcement agency to repossess the collateral. The proof may be a sworn affidavit of the creditor.<sup>48</sup> For example, in some United States jurisdictions, a common law "replevin" rule allows enforcement of security interests in weeks rather than months.

## **B. Extrajudicial Enforcement**

Because of the slowness of courts, most APEC economies now permit the parties to agree to allow the secured creditor, upon the debtor's default, to obtain possession of the property extrajudicially.<sup>49</sup> The most significant difference between common law and civil law jurisdictions in self-enforcement is the means for obtaining repossession. For example, U.S. UCC Article 9 allows the secured creditor to take possession of the collateral extra-judicially upon the debtor's default so long as it is "without breach of peace."

Other jurisdictions, particularly civil law, restrict the parties' ability to agree to extrajudicial enforcement of security rights. This approach is reflected in Article 77 of the UNCITRAL Model Law Secured Transactions, which permits the parties to agree to the secured creditor obtaining possession of an encumbered asset upon default without going to court, but only if:

"(b) The secured creditor has given the grantor ...advance notice ... of the secured creditor's intent to obtain possession;" and

(c) At the time the secured creditor attempts to obtain possession of the encumbered asset, the person in possession of the encumbered asset does not object."

This standard may give the debtor the ability to paralyze the entire repossession process and jeopardize the ability of the secured creditor to obtain quick and speedy asset recovery. This ultimately increases the cost of credit and undermines secured transaction reform.<sup>50</sup>

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<sup>48</sup> World Bank, Knowledge Guide, Secured Transactions, Collateral Registries and Movable Asset-Based Financing at 68, (2019), available at <https://documents1.worldbank.org/curated/pt/193261570112901451/pdf/Knowledge-Guide.pdf>.

<sup>49</sup> See the World Bank Ease of Doing Business Legal Rights Index for 2020 reporting that 17 out of 21 APEC economies permit extrajudicial enforcement of security interests upon default.

<sup>50</sup> See Workshop Report on Secured Transaction Reform, *supra* note 7, at 23-24 (Neil Cohen).



The UNIDROIT Working Group on Best Practices in Effective Enforcement is considering the issue including whether a “breach of peace” standard (such as that used under the U.S. UCC 9-609) or a requirement that the debtor demonstrate active resistance would provide a more appropriate international standard.<sup>51</sup> The U.S. UCC 9 does not define breach of peace, leaving courts to decide on a case-by-case basis which may be difficult for civil law jurisdictions to implement. Recently, the Philippines adopted a “breach of peace” standard in its 2018 Personal Property Security Act (PPSA) with guidelines for its application that may also prove helpful in civil law jurisdictions. Under the Philippines PPSA: “The secured creditor may take possession of the collateral without judicial process if the security agreement so stipulates: Provided, That possession can take place without a breach of peace.”<sup>52</sup> The PPSA further lists the conditions under which a breach of peace occurs: “that breach of peace shall include entering the private residence of the grantor without permission, resorting to physical violence or intimidation, or being accompanied by a law enforcement officer when taking possession or confronting the grantor.”<sup>53</sup>

Notably, the Philippines PPSA, following U.S. UCC 9, does not require advance notice by the secured creditor of the intent to repossess.<sup>54</sup> Additionally, under the Philippines PPSA, like U.S. UCC 9-625, damages can be recovered from the secured creditor for violation of the “breach of peace standard.”<sup>55</sup>

Peru in its 2018 secured transaction law permits extrajudicial enforcement of security rights but requires that the secured creditor provide advance notice of its intent to repossess.<sup>56</sup> Unlike the Philippines PPSA and the U.S. UCC Article 9 it does not limit repossession by a breach of the peace standard. It permits the parties to a security agreement to agree on mechanisms that aid enforcement, such as the use of electronic means to prevent the asset from continuing to function and the retention of a key to the asset or the place where it is deposited or stored.<sup>57</sup>

Both the Philippines PPSA and the Peruvian Secured Transaction Law provide for an expedited summary judicial process if the property cannot be repossessed extrajudicially.<sup>58</sup>

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<sup>51</sup> See *Id.*; UNIDROIT Working Group on Best Practices for Effective Enforcement, Report of Sixth Meeting, *supra* note 14, paras. 21-22.

<sup>52</sup> Philippines Personal Property Security Act, Section 47(a), available at <https://www.officialgazette.gov.ph/downloads/2018/08aug/20180817-RA-11057-RRD.pdf>.

<sup>53</sup> *Id.*, Section 47(c)(3).

<sup>54</sup> See Section 7.03 of the Philippines Explanatory Notes to the Draft Implementing Rules and Regulations of the Personal Property Security Act.

<sup>55</sup> *Id.*, Section 7.14.

<sup>56</sup> Peruvian Secured Transactions Law, Article 48.1, available at <https://busquedas.elperuano.pe/dispositivo/NL/1689445-5>.

<sup>57</sup> *Id.*, Article 49.2. (Translation provided by Ms. Lourdes Chero Pacheco, Peru Ministry of Economy and Finance.)

<sup>58</sup> Philippines PPSA Article 47; Peruvian Secured Transactions Law, Article 56.

## C. ADR and ODR

A recent trend and more efficient alternative to court enforcement has been to use ADR and ODR for certain financial and secured transaction disputes.<sup>59</sup> Article 3(3) of the UNCITRAL Model Law on party autonomy states that: “Nothing in this Law affects any agreement to use alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution.”

The Guide to Enactment for the UNCITRAL Model Law on Secured Transactions (para. 75) further explains:

Paragraph 3 makes clear that if another law allows the parties to a security agreement to agree to resolve any dispute with respect to their security agreement or a security right created by that agreement by arbitration, mediation, conciliation, and online dispute resolution, nothing in the Model Law affects that agreement. The use of [ADR/ODR] mechanisms to resolve such disputes is important, particularly for [economies] with inefficient judicial enforcement mechanisms to attract investment, since the lack of efficient judicial enforcement mechanisms is likely to have a negative impact on the availability and the cost of credit.<sup>60</sup>

Article 68 of the OAS Inter-American Model Law on Secured Transactions similarly provides that: “Any controversy arising out of the interpretation and fulfillment of a security interest may be submitted to arbitration by the parties, acting by mutual agreement and according to the applicable legislation.”<sup>61</sup> The ICC Commission on Arbitration and ADR Task Force has endorsed the provision noting that “[w]hile an arbitral tribunal cannot replace a court with respect to enforcement matters that are exclusively attributed to the court by the relevant statutes, it can arbitrate private enforcement disputes, as agreed by the parties and permitted by the relevant enforcement statutes.”<sup>62</sup>

Some civil law economies, such as Peru, have enacted secured transactions laws expressly following the OAS Model Law,<sup>63</sup> even though legislation in every APEC economy (common law or civil law) already provides a legal framework for using ADR and ODR in commercial disputes. Arbitration (in person or online) is a contractual right that the grantor and secured creditor enjoy based on party autonomy (freedom of contract). This principle underlines the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (implemented in all APEC economies) and the UNCITRAL Model Law on International Commercial Arbitration (implemented in 17 out of the 21 APEC economies, including Peru). Under Article II of the New York Convention and Article 8 of the Model Law, arbitration

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<sup>59</sup> World Bank, Knowledge Guide, Secured Transactions, Collateral Registries and Movable Asset-Based Financing, *supra* note 48, at 67-68, (2019).

<sup>60</sup> Guide to Enactment for the UNCITRAL Model Law on Secured Transactions, para. 75, (2017).

<sup>61</sup> OAS Model Inter-American Law on Secured Transactions, Article 68, (2002).

<sup>62</sup> Report of the ICC Commission on Arbitration and ADR Task Force, Financial Institutions and International Arbitration, para. 65, 2016.

<sup>63</sup> See the Peruvian Secured Transaction Law, *supra* note 56, Article 61.

agreements are presumptively valid and enforceable, subject to only defined grounds for challenging the validity of such agreements.<sup>64</sup>

Internationally, arbitration is used in financing transactions and programs with cross-border implications to simplify and provide an efficient dispute resolution process across multiple parties and jurisdictions to a specific agreed venue.<sup>65</sup> This may be particularly attractive, given the general enforceability of foreign arbitrable awards under the New York Convention, the ability to appoint neutral arbitrators with specialized financial expertise, and the procedural flexibility provided by the arbitration process. The arbitration rules of most arbitration centers also provide for the joinder of additional parties and the consolidation of separate proceedings.

Limits on arbitration in secured transactions disputes may involve practical concerns. For example, if enforcing a security right is done through a domestic court under a procedure such as replevin in the United States, enforcing it through a court may be quicker, even where it is not a legal requirement. The ICC Commission on Arbitration and ADR Task Force explains:

“In secured transactions, the adequacy of arbitration as a means of resolving disputes concerning the enforcement of security rights over movables has been questioned, as it is thought that the intervention of a national court cannot be avoided. However, the belief that disputes relating to security agreements are not arbitrable is unfounded. Only a few types of procedure to enforce security require the intervention of a court (if not enforced voluntarily) and, typically, it will not make sense to choose arbitration in these cases.”<sup>66</sup>

Accordingly, while arbitration provisions are often incorporated into contracts in financing transactions, enforcement of tangible collateral is frequently carved out in certain jurisdictions.<sup>67</sup>

ADR or ODR may be used to assist in the statutory extra-judicial enforcement as well. As the ICC Commission on Arbitration and ADR Task Force has pointed out, “whenever the security at issue is [subject to extra-judicial enforcement], there is no

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<sup>64</sup> The other four APEC economies whose laws are not based on the UNCITRAL Model Law (Indonesia; Papua New Guinea; the United States; and Viet Nam), nonetheless recognize party autonomy in the formation of arbitration agreements. Papua New Guinea is in the process of modernizing its arbitration law, following the UNCITRAL Model Law.

<sup>65</sup> APEC Workshop Report on Secured Transaction Reform, *supra* note 7 at 24-25 (Chris Wohlert, APEC FIDN Co-Sherpa).

<sup>66</sup> Report of ICC Commission on Arbitration and ADR, *supra* note 62, para. 106. Another possible concern is whether arbitration can provide the necessary protections to the debtor and third parties as provided under the relevant secured transaction law and the replevin or repossession laws of the jurisdiction in question. If not, this may also raise arbitrability issues, depending on the arbitrability law of the jurisdiction. See Donald Rome and David Shaiken, Arbitration Carve-out Clauses in Commercial and Consumer Secured Loan Transactions, in *American Arbitration Association Handbook on Commercial Arbitration*, Chap. 38, (Juris, 2<sup>nd</sup> ed., 2010).

<sup>67</sup> See APEC Workshop Report on Secured Transaction Reform, *supra* note 7 at 24-25 (Chris Wohlert, APEC FIDN Co-Sherpa). Courts in several APEC economies in both common law and civil law jurisdictions permit the use of hybrid clauses in the contract giving the parties the right to opt for either arbitration or litigation as they see fit. See Baker and McKenzie, *Pacific Guide to Lending and Taking Security*.

inherent reason for disputes arising out of such security to be referred to a national court as opposed to an arbitral tribunal.”<sup>68</sup> Indeed, Peru under its law on secured transactions expressly provides in Article 52 concerning extra-judicial enforcement that disputes “concerning the amount or extent of any encumbrance during the sale of the collateral may be resolved by the Judge in a summary process or by alternative dispute resolution mechanisms provided for under this Legislative Decree without suspending the sale of the asset....”<sup>69</sup>

The use of ODR has gained traction in APEC, especially in a cross-border context. In 2022, APEC implemented the APEC ODR Collaborative Framework for cross-border commercial disputes involving MSMEs, including financial disputes. Five economies have opted into the Collaborative Framework thus far. However, every APEC economy provides a sufficient legal framework for implementing ODR.<sup>70</sup>

Under the Collaborative Framework, the APEC Economic Committee is partnering with ODR providers that agree to implement the APEC ODR procedural rules. The China International Economic and Trade Arbitration Commission (CIETAC), Guangzhou Arbitration Commission (GZAC), U&I Advisory Service, and eBRAM International Online Dispute Resolution Centre Limited (eBRAM) are listed as partnering ODR Providers on the APEC website and already have procedural rules for implementing the APEC ODR Collaborative Framework for various disputes, including in financial matters.<sup>71</sup>

The GZAC’s APEC-ODR platform has handled 770 domestic and international disputes totaling over CNY6.5 billion (more than USD900 million), including financial disputes, e-commerce cases and cases dealing with emerging industries such as live streaming and intelligent vehicle manufacturing. The average time to resolve a dispute is 37 days, with 69.4% of the disputes resolved during mediation.<sup>72</sup> The online negotiation and mediation stages are offered without charge.

These ODR providers may offer separate platforms for more complex financial disputes, which may include procedures on summary disposition, interim measures to protect assets, and joinder of third parties. For example, in 2022, the GZAC financial dispute platform resolved 7,039 disputes, including 129 factoring disputes. In most financial cases, the GZAC dealt with interim requests to protect assets under its rule. Most of the disputes were resolved virtually.<sup>73</sup> The GZAC financial disputes resolution platform used artificial intelligence in the ODR of financial disputes to improve

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<sup>68</sup> Report of ICC Commission on Arbitration and ADR, *supra* note 62, para. 106.

<sup>69</sup> Peruvian Secured Transaction Law, Article 52, *supra* note 56.

<sup>70</sup> See discussion *supra* note 64 and accompanying text; Stakeholder Engagement and Capacity Building on the APEC Collaborative Framework on ODR to Improve Cross-Border Trade in Indonesia, at 55-56, 75-76, September, 2023, available at <https://www.apec.org/publications/2023/09/stakeholder-engagement-and-capacity-building-on-the-apec-collaborative-framework-on-odr-to-improve-cross-border-trade-in-indonesia---final-report>.

<sup>71</sup> See ODR Providers of APEC ODR Collaborative Framework, available at <https://www.apec.org/seli/odr-providers>.

<sup>72</sup> Email from Chen Chen, GZAC dated, December 11, 2023.

<sup>73</sup> Email from Chen Chen, GZAC dated, September 18, 2023.

efficiency and reduce the cost of the process. Human neutrals were only used during the final stage to review the decisions.<sup>74</sup>

Similarly, in Hong Kong, China, eBRAM provides an ODR platform under the APEC ODR Collaborative Framework for simpler business-to-business cross-border disputes, while the Hong Kong International Arbitration Centre (HKIAC) has had a separate panel of arbitrators for more complex financial services disputes since 2018. Statistics in 2022 show that banking and financial disputes accounted for 36.9 percent of the HKIAC's 514 cases. In 2022, the HKIAC hosted a total of 93 hearings, of which 75 were fully or partially virtual, and conducted expedited proceedings in 16 cases.<sup>75</sup>

Private platforms that provide Fintech services in both common law and civil law jurisdictions also provide online dispute resolution for disputes involving receivables. These tend to be for lower-value transactions. Parties are accustomed to dealing with each other electronically, so it stands to reason that disputes involving receivables arising under such platforms will be increasingly resolved electronically through ODR.<sup>76</sup>

ODR may be particularly useful for disputes involving small businesses, consumers, or farmers who may benefit from an easily accessible online platform and an opportunity to better understand the options available in case of a default. Studies consistently show that mediation in debt defaults results in a high percentage of settlements, meaning businesses continue to operate, and banks get paid. The World Bank has also emphasized that ODR can accommodate multi-party, negotiation-based processes, such as pre-insolvency restructuring plans.<sup>77</sup>

### **Case Study on Mandatory Farm Debt Mediation in APEC Economies**

In 2020, New Zealand became the latest APEC economy to implement legislation providing for mandatory farm debt mediation.<sup>78</sup> Under the law if a farmer defaults on his or her loan the secured creditor must engage in mediation before it can take any enforcement action in relation to security interests over farm property including farmland, farm machinery, livestock, harvested crops, and wool. The legislation follows similar mandatory farm debt

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<sup>74</sup> APEC Workshop on Secured Transaction Reform, *supra* note 7, at 25 (Yongmin Bian).

<sup>75</sup> HKIAC Statistics for 2022, available at <https://www.hkiac.org/news/hkiac-releases-statistics-2022>.

<sup>76</sup> See e.g., Rapid Ruling, Benefits of Online Arbitration for Fintech Companies; Resolving Disputes and Recovering Debt, February 23, 2023; Brief, Financial Disputes, Alternatives to Court Action, available at <https://www.thinkbrief.com/alternatives-to-court-financial-disputes/#Document-Centric%20Online%20Arbitration%20with%20Brief> (reporting that “claims are resolved quickly, typically in 45 days or less under the ODR platform”).

<sup>77</sup> APEC Workshop on Secured Transactions Reform, *supra* note 7, at 26 (Nina Mocheva, World Bank).

<sup>78</sup> New Zealand Ministry for Primary Industries, The Farm Debt Mediation Scheme, available at <https://www.mpi.govt.nz/funding-rural-support/farming-funds-and-programmes/the-farm-debt-mediation-scheme-2/#:~:text=The%20Farm%20Debt%20>

mediation schemes enacted in Canada;<sup>79</sup> the United States;<sup>80</sup> and several states in Australia including New South Wales, Victoria, Queensland and South Australia<sup>81</sup> (with Tasmania in the process of enacting new legislation).<sup>82</sup> In each of these jurisdictions, creditors cannot proceed with an enforcement action against a farmer until an offer of mediation has been extended and, if the farmer so chooses, completed. Each jurisdiction typically provides a list of accredited mediators to the parties and may subsidize a part of the cost of the mediation. The farm debt mediation process is informal and confidential although the schemes typically can accommodate multiple secured creditors.

The debt mediation scheme has been highly successful. For example, in Australia estimates suggest that at least 90% of the mediations result in a settlement.<sup>83</sup> The farmer can elect whether the mediation is online, face-to-face, or a hybrid model -- partially face-to-face. Online access increases accessibility since many of the farms are in relatively remote areas far away from metropolitan centers. The process gives the farmer an opportunity to better understand the options available in case of a default which may include simply extending the time for repayment, agreed sell-downs of some or all land or stock, or the institution of business management plans with agreed milestones. This is especially important today, when the default may be beyond the debtor's control because of COVID, drought, or flood.

These schemes also permit mediation at very early stages, even before default. The Australian government has developed a National Better Practice Guide for Farm Debt Mediation recognizing in its Principle No.1 that "the earlier a farmer engages with their lender to address financial difficulty, the better the outcomes are likely to be."<sup>84</sup>

It is essential to note that using ADR and ODR need not be limited to implementation through private sector providers when considering enforcement reform. ODR and virtual hearings have been widely implemented through the courts in common law and

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<sup>79</sup> Government of Canada, 2021 Farm Debt Mediation Service Review, available at <https://agriculture.canada.ca/en/about-our-department/transparency-and-corporate-reporting/farm-debt-mediation-service-review>.

<sup>80</sup> In 1987, the U.S. created an economy-wide Farmer-Lender Mediation (FLM) Program that relies on a network of state-level FLM Programs to deliver mediation services. See U.S. Department of Agriculture, Certified Mediation Program.

<sup>81</sup> Australia Department of Agriculture, Fisheries, and Forestry, A nationally consistent approach to farm debt mediation, available at [https://www.agriculture.gov.au/agriculture-land/farm-food-drought/drought/approach\\_to\\_farm\\_debt\\_mediation](https://www.agriculture.gov.au/agriculture-land/farm-food-drought/drought/approach_to_farm_debt_mediation).

<sup>82</sup> Tasmania Department of Natural Resources and Environment, Farm Debt Mediation, available at <https://nre.tas.gov.au/agriculture/government-and-community-programs/farm-debt-mediation>.

<sup>83</sup> APEC Workshop on Secured Transaction Reform, *supra* note 7, at 27 (Nadja Alexander).

<sup>84</sup> Australian Department of Agriculture, Fisheries and Forestry, National Better Practice Guide for Farm Debt Mediation, at 5, available at <https://www.agriculture.gov.au/sites/default/files/documents/national-better-practice-guide-farm-debt-mediation.pdf>.

civil law jurisdictions, including Canada; China; and the United States.<sup>85</sup> In British Columbia, ODR, through the Civil Resolution Tribunal, has replaced its in-person small claims tribunal.

As the World Bank observed years ago, “When ADR structures are efficient, they may be the most effective way to recover secured assets.”<sup>86</sup> Economies that effectively adopt ADR and ODR mechanisms to enforce security interests may enjoy a significant competitive advantage in the post-pandemic global economy.

## v. Conclusion

APEC economies have made significant progress in modernizing their secured transactions frameworks. Realizing the benefits, particularly for MSMEs and women-owned businesses, several reform projects are ongoing and expected to be undertaken soon. Reforms have been challenged by i) new global phenomena, such as climate change and food insecurity, ii) digitalization of markets and transactions, and iii) evolving international standards. Solving these challenges requires implementing international standards to modernize legal frameworks and coordinating reform initiatives with existing laws and regulations.

Some APEC economies strive to align their laws with the international standards for secured transactions (e.g., Malaysia), while others adjust them to fit domestic public policies and specific approaches (e.g., Japan). The U.S. 2022 UCC revisions provide a model for emerging and future international standards. APEC economies also seek to improve governing frameworks for credit products, such as factoring of receivables (e.g., Viet Nam) and warehouse receipts (e.g., the Philippines). Civil law jurisdictions tend to reform their civil codes to incorporate international standards. In contrast, common law jurisdictions enact standalone laws. This is however not a uniform trend. The Philippines enacted a standalone PPSA while the United States introduced an article to govern secured transactions within a broad Uniform Commercial Code.

While in the past civil law jurisdictions might have faced more challenges recognizing extra-judicial remedies, Japan; Peru; and the Philippines show that this is no longer the case. Initiatives and reforms should continue to provide for efficient remedies, both extra-judicial and judicial, and digitalize the processes, including using ODR.

APEC economies should consider whether and how to implement new and emerging standards, particularly those on electronic transferable records, receivables, digital assets, and voluntary carbon credits. These standards overlap to some extent, and their implementation needs to be carefully thought through to avoid duplication in creating and perfecting security rights and increase the cost of credit. If properly

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<sup>85</sup> See APEC Study on the Best Practices in Using ODR (2023) at 17-18, 31, available at [https://www.apec.org/docs/default-source/publications/2023/1/study-on-best-practices-in-using-odr/223\\_ec\\_study-on-best-practices-in-using-odr.pdf?sfvrsn=1bb06f15\\_2](https://www.apec.org/docs/default-source/publications/2023/1/study-on-best-practices-in-using-odr/223_ec_study-on-best-practices-in-using-odr.pdf?sfvrsn=1bb06f15_2).

See also Nicolas Lozada and Diana Talero, ODR Arbitration for Secured Transactions in Colombia, 27 Uniform Law Review 174 (2022) (reviewing the establishment an ODR platform for secured transaction disputes through the local Chambers of Commerce).

<sup>86</sup> World Bank, Secured Transactions Systems and Collateral Registries, 2010 at 54.

implemented, the MAC Protocol and its interaction with the domestic secured transactions and leasing legislation could bring significant economic benefits.

Regional markets require not only a modern substantive framework but also predictable rules that determine the applicable law to various aspects of the transaction. Transactions and supply chains are increasingly regional and international. This requires a harmonized legal framework enabling the parties to determine which law applies to a transfer of a receivable, digital asset, or an electronic transferable record that exists solely as digital records. The international standards do not provide recommendations on the related regulatory framework leaving policymakers, legislators, and policymakers to grapple with institutionalizing a complementary regulatory framework that incentivizes financial institutions to provide credit to MSMEs.