RESOLVED, That the American Bar Association supports the efforts of the United States Department of State and other national and international bodies to promote the development and harmonization of international trade and commerce law and the establishment of predictable systems of secured lending in developing countries through the reform of commercial laws, including secured transactions laws.

FURTHER RESOLVED, That the American Bar Association supports the efforts of international and multinational bodies, development banks, and multilateral and bilateral aid agencies in their efforts to (1) encourage governments in developing countries to pass legislation that facilitates secured lending (that considers guides and model laws prepared by them) and (2) provide them technical assistance.

FURTHER RESOLVED, That the American Bar Association encourages lawyers to support and participate in efforts to have secured transactions reform adopted in developing countries and to participate in secured transactions reform education and training.
REPORT

1. The Economic Importance of Secured Transactions Reform

The United Nations (including the United Nations Commission on International Trade Law (UNCITRAL) and the General Assembly), the Organization of American States (OAS), Organization for the Harmonization of Business Law in Africa (OHADA), the European Union, the World Bank, the United States Agency for International Development, and other similar groups have identified secured transactions reform as a critical component in economic development in developing countries.

There is widespread recognition of the need for and support of secured transactions reform in developing countries. The United Nations General Assembly unanimously adopted a resolution on this subject (General Assembly Resolution 63/121 (January 15, 2009)) that “recommends that all States give favorable consideration to the [UNCITRAL] Legislative Guide [on Secured Transactions] when adopting or revising legislation relevant to secured transactions.”

The General Assembly noted:

“. . . the importance to all countries of efficient secured transactions regimes promoting access to secured credit, [and] . . . that access to secured credit is likely to assist all countries, in particular developing countries and countries with economies in transition, in their economic development and in fighting poverty.”

The General Assembly resolution further stated:

“. . . the need for reform in the field of secured transactions laws at both the national and international levels as demonstrated by the numerous current national law reform efforts and the work of international organizations, such as the Hague Conference on Private International Law, the International Institute for the Unification of Private Law and the Organization of American States, and of international financial institutions, such as the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, the International Monetary Fund and the World Bank.”

Similarly, the OAS has agreed upon model laws and regulations for a secured transactions system that can be adopted for use in both civil and common law countries in the Americas. An OAS Resolution (CIDIP-VII/RES.1/09, October 9, 2009):

“encourage[s] the member states of the Organization of American States to enact legislation consistent with the Model Inter-American Law on Secured Transactions adopted at CIDIP-VI, and to adopt administrative rules consistent with the Model Registry Regulations [adopted at CIDIP-VII].”
The OAS resolution notes that:

“enactment at the local level of the Model Inter-American Law on Secured Transactions by the member states of the Organization will significantly reduce the cost of loans, facilitate international trade in the region, and assist small and medium-sized businesses throughout the Hemisphere.”

Secured transactions reform in developing countries is a high priority for the United States and is recognized as an essential component of global economic development. Secretary of State Hillary Rodham Clinton has emphasized on several occasions the importance of secured transactions reform on the availability of credit for small businesses and the importance of secured transactions reform to developing economies:

“We’re also working on reforms with the OAS to update what is called the ‘secured transactions law.’ Now put simply, that is to allow small businesses and entrepreneurs to use assets like refrigerators or sewing machines as collateral for loans. Many of these businesses could grow and employ more people, but they don’t own the property that they work in or the home that they live in. But they have a refrigerator or a sewing machine, and we want to change the laws so that that can serve as collateral.”

Quito, Ecuador, June 8, 2010

“To that end, the United States will be focusing on several . . . initiatives [in the Americas] to support entrepreneurs across the hemisphere. . .

“. . . the United States is committed to working with our . . . partners [in the Americas] to modernize laws that govern lending so that small and medium size businesses can use assets other than real estate as collateral for loans. I visited the display that Honduras has, and they showed me the kind of equipment that can now serve as collateral in Honduras because Honduras has changed their laws: sewing machines, tool boxes, farm equipment.

“Small businesses are the backbone of our economy and the source of employment for many of our citizens. We must give them [small businesses in developing countries] the chance to borrow larger amounts at lower interest rates with longer repayment periods if we’re going to make it easier for these enterprises to thrive. And I commend Honduras for the model programs that they are implementing.”

San Jose, Costa Rica, March 4, 2010

Ambassador Charles S. Shapiro, Senior Advisor for Economic Initiatives in the Bureau of Western Hemisphere Affairs at the Department of State, explained the
importance of secured transaction reform in a March 25, 2011 article in the *Miami Herald*:

“American small business owners have been able to borrow against non-real-estate assets since the 1950s. In an increasing number of countries in Eastern Europe and Asia, businesses can use inventory, equipment, accounts receivable, warehouse receipts, intellectual property, crops — anything that has market value — as collateral. The banking community calls this type of loan a secured transaction. American business executives simply know it as ‘Article 9’ since it derives from Article 9 of the Uniform Commercial Code.

“In countries that have implemented secured transaction reforms — China, Bosnia, Romania, New Zealand, Albania — the results within the first year are dramatic: Small businesses can obtain commercial loans because banks have greater confidence the loans will be repaid; the loans are for larger amounts of money and with longer repayment periods; and the interest rate drops markedly because the loans are secured with collateral.

“Peru, Jamaica, El Salvador, and Colombia are working on bills to introduce in their legislatures. The Inter-American Development Bank (IDB) is working with Guatemala to digitize its registry. Other countries have asked the IDB or the International Finance Corporation of the World Bank for technical assistance. But everywhere I go in Latin America, cabinet ministers invariably ask for an example where these reforms have been implemented in this part of the world . . .

“. . . USAID and the World Bank agree that secured transaction reform is the single most important step that countries can take to help small businesses prosper. By replacing loan sharks with a transparent and accessible system of small business lending, the credit-starved and forgotten middle has a chance to compete and flourish.”

The World Bank has made the same point:

“Providing legal structures through which movable assets in emerging markets can be effectively used as collateral will significantly improve access to finance by those firms that need it the most . . .

“Well-functioning secured transactions systems enable businesses to use their assets as security to generate capital . . .

“In industrial countries, borrowers with collateral get nine times the level of credit given their cash flow compared to borrowers without collateral. They also benefit from longer repayment periods (11 times longer) and significantly lower interest rates (50 percent lower). Further economic analysis suggests that small and medium sized businesses in countries that have stronger secured transactions laws and registries have greater access
to credit, better ratings of financial system stability, lower rates of non-performing loans, and a lower cost of credit. The end result is higher productivity and more growth. . .

“Asset-based loans secured by movable assets disproportionately benefit small enterprises and new businesses. . .

“It is important to note that secured transactions reform can increase the accessibility of credit to women, and in particular to women entrepreneurs . . . Enabling movable assets—such as machinery, book debts, jewelry, and other household objects—to be used as collateral can benefit all businesses. But opening up this type of financing has the potential to be of particular benefit to land-poor women, enabling them to circumvent their lack of titled land in a number of countries and use the assets they do have to unlock access to formal credit markets.”  

Secured Transactions Systems and Collateral Registries (January 2010)

The House of Delegates adopted the following resolution (113C) at the Midyear Meeting of the American Bar Association in 2002:

RESOLVED, that the American Bar Association recommends that the United States sign and ratify the United Nations Convention on the Assignment of Receivables in International Trade.

Under the current situation in many of these developing countries, there is only unsecured credit available, which is significantly more expensive for the borrower and, as a result, impedes economic growth.

Secured transactions reform:

- Reduces the cost of credit for small and medium businesses by improving the predictability of the repayment of loans and the remedies available to a secured creditor; and

- Makes credit available to small and medium businesses, which might otherwise not have credit available in the absence of an ability to provide collateral.

2. The Meaning of Secured Transactions Reform

Secured transactions reform typically involves the adoption of legislation that includes the following types of clear rules:

- Defining the scope of the secured transactions law to permit the use of all kinds of movable assets as collateral for loans;

- Developing procedures for creating a security interest;
• Establishing a public registry for giving notice of security interests in order to perfect the security interest; and

• Setting out specific procedures for the enforcement of security interests by secured creditors, including protections for the rights of the borrowers.

This legislation is often based on the model laws and guides sponsored by the organizations noted above, including, in particular, the United Nations Commission on International Trade Law and, in Latin America, the Organization of American States. The model laws and guides make use of the secured transactions approaches and techniques that have been time tested in practice under Article 9 of the Uniform Commercial Code.

Forty-six countries (including the United States) have ratified the Convention on International Interests in Mobile Equipment (Cape Town Convention), which makes use of many of the secured transactions approaches and techniques implemented by Article 9 of the Uniform Commercial Code.

These reforms in developing countries will increase borrowers’ access to credit, reduce credit risk for lenders, and lower interest rates because:

• Borrowers have greater access to credit with improved terms to use in the growth of their businesses because the reforms make the use of collateral more practical;

• Lenders are more willing to make loans, at lower interest rates, because of the greater predictability of results under the reformed laws; and

• There is increased competition in the availability of credit, resulting in better credit terms, because more lenders are willing to enter the secured credit market due to increased predictability of the transactions and the transparency of information about secured credit.

3. Rule of Law

Secured transactions reform will also have a significant effect on improving the rule of law in developing countries, which is a key objective of the ABA. In the absence of secured transactions reform, banks, finance companies, and other institutional lenders will not make loans to small and medium sized businesses in developing countries because of the absence of a set of legal rules that give the potential lenders assurance that the credit will be repaid or that collateral will be available to satisfy the debt. In the absence of the availability of bank and similar credit, credit for small and medium sized businesses in developing countries is often provided through irregular means (lenders that might be referred to as “loan sharks”). Further, the enforcement of collection in these circumstances can be extra-judicial and not in conformance with the Rule of Law, unless done in accordance with modern secured transactions laws, which typically authorize certain non-judicial remedies and have protections for the rights of all involved.
4. What Can the ABA Members Do?

As noted above, many of the model laws and guides sponsored by the organizations noted above, including, in particular, the United Nations Commission on International Trade Law and the Organization of American States, use the secured transactions approaches and techniques that have been validated in practice under Article 9 of the Uniform Commercial Code. Many members of the ABA have extensive experience under the Uniform Commercial Code, including Article 9. As a result, members of the ABA can provide meaningful assistance in secured transactions reform.

Members of the ABA have:

• Played critical roles in the development of the model laws and legislative guides referred to above;

• MATERIALLY assisted countries to implement secured transactions reform, including through legislation that sets up related institutions, such as secured transactions registries; and

• Been instrumental in educating and training creditors, borrowers, and lawyers in developing countries in the area of secured transactions.

Given the current state of the world economy, it is imperative to encourage more members of the ABA to provide this assistance as soon as possible.

Respectfully Submitted,
Lynne Barr, Chair
ABA Business Law Section
August 2011
GENERAL INFORMATION FORM

Submitting Entity: Business Law Section

1. **Summary of Resolution.**

   The Resolution supports development and harmonization of international trade and commerce and the establishment of predictable systems of secured lending through the adoption of secured transactions reform in developing countries and encourages lawyers to support and participate in efforts to have secured transactions reform adopted in developing countries.

2. **Approval by Submitting Entity.**

   The Resolution is expected to be approved by the Council of the Business Law Section on August 6, 2011.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

   No.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

   Not Applicable.

5. **What urgency exists which requires action at this meeting of the House?**

   The United States Department of State is focused on secured transactions reform and is desirous of moving forward promptly. As noted in the Report, the United Nations and other international groups have identified secured transactions reform as a critical component in economic development in developing countries. Secured transactions reform will make credit more readily available and reduce the cost of that credit, thereby improving the economies of those countries that engage in that reform, as well as the economies of the developed countries who will have more opportunities to engage in international trade with the developing countries as a result of such reform. Anything that has the potential of improving the world economy should not be delayed.

6. **Status of Legislation.** (If applicable.)

   Not Applicable.

7. **Cost to the Association.** (Both direct and indirect costs.)

   None.
8. **Disclosure of Interest.** (If applicable.)

   Not applicable.

9. **Referrals.**

   Concurrently with the submission of this report to the House of Delegates, it is being circulated to all ABA entities and other interested parties for comment.

10. **Contact Person.** (Prior to the meeting.)

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11. **Contact Person.** (Who will present the report to the House.)

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EXECUTIVE SUMMARY

1. **Summary of Resolution.**

   The Resolution supports development and harmonization of international trade and commerce and the establishment of predictable systems of secured lending through the adoption of secured transactions reform in developing countries and encourages lawyers to support and participate in efforts to have secured transactions reform adopted in developing countries.

2. **Summary of the Issue which the Resolution Addresses**

   As indicated by Secretary of State Clinton in the quotations in the Report, the absence of modern secured transactions laws makes credit difficult to obtain and expensive for many small and medium businesses in development countries because those businesses cannot make use of their assets as collateral for loans to expand their business.

3. **Explanation of How the Proposed Policy Position Will Address the Issue.**

   Members of the ABA have extensive experience and expertise in secured transactions law and can assist (i) global and regional organizations in developing model laws and guides and (ii) countries in adapting and adopting those model laws and guides for use in particular countries.

4. **Summary of Any Minority Views or Opposition Which Have Been Identified.**

   None known.