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Report of Working Group VI (Security Interests) on the work of its twentieth session (Vienna, 12-16 December 2011)

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I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a text on the registration of security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session, in 2010.[1] The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of a security rights registry.[2]

2. At its forty-third session in 2010, the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at an international colloquium on secured transactions (Vienna, 1-3 March 2010), namely registration of notices with respect to security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions.[3] The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.[4] At that session, the Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *UNCITRAL Legislative Guide on Secured Transactions* (the "*Guide*"),[5] texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Guide*.[6]

3. At its eighteenth session (Vienna, 8-12 November 2010), the Working Group began its work on the preparation of a text on the registration of notices with respect to security rights in movable assets by considering a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Addenda 1 and 2). At that session, the Working Group adopted the working assumption that the text would take the form of a guide on the implementation of a registry of notices with respect to security rights in movable assets and that the text should be consistent with the *Guide*, while, at the same time, taking into account the approaches taken in modern security rights registration systems, national and international (A/CN.9/714, para. 13). Having agreed that the *Guide* was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 268.

[2] Ibid., para. 265.

[3] The papers presented at the colloquium are available at www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

[4] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

[5] United Nations publication, Sales No. E.09.V.12.

[6] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 266-267.

also considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the *Guide*, the text on registration would also be consistent with those principles (A/CN.9/714, paras. 34-47).

4. At the nineteenth session (New York, 11-15 April 2011), the Working Group considered a note by the Secretariat entitled "Draft Security Rights Registry Guide" (A/CN.9/WG.VI/WP.46 and Addenda 1 to 3). At that session, differing views were expressed as to the form and content of the text to be prepared (A/CN.9/719, paras. 13-14), as well as with respect to the question whether the text should include model regulations or recommendations (A/CN.9/719, para. 46). Upon completing the first reading of the draft Security Rights Registry Guide, the Working Group requested the Secretariat to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group (A/CN.9/719, para. 12).

5. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission emphasized the significance of the Working Group's work in particular in view of efforts undertaken by States towards establishing a registry, as well as the potential beneficial impact of such a registry on the availability and the cost of credit. With respect to the form and content of the text to be prepared, while a suggestion was made that the text should be formulated in the form of a guide with commentary and recommendations following the approach taken in the *Guide*, rather than as a text with model regulations and commentary thereon, the Commission agreed that the mandate of the Working Group, leaving the specific form and content of the text to the Working Group, did not need to be modified. It was further agreed, that, in any case, the Commission would make a final decision once the Working Group had completed its work and submitted the text to the Commission.[7]

6. After discussion, the Commission, noting the significant progress made by the Working Group in its work and the guidance urgently needed by a number of States, requested the Working Group to proceed with its work expeditiously and to try to complete its work, hopefully, and submit the text for final approval and adoption at its forty-fifth session of the Commission, in 2012.[8]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its twentieth session in Vienna from 12 to 16 December 2011. The session was attended by representatives of the following States members of the Working Group: Austria, Bahrain, Bolivia (Plurinational State of), Cameroon, Canada, Chile, Colombia, Egypt, El Salvador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Uganda, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Croatia, Democratic Republic of the Congo, Dominican Republic, Ghana, Indonesia, Romania, Slovakia, Switzerland and Syrian Arab Republic. The session was also attended by observers from Palestine and the European Union.

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[7] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 237.

[8] Ibid., para. 238.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: The World Bank;

(b) *Intergovernmental organizations*: Asian Clearing Union (ACU), Energy Charter Secretariat (ECS), Intergovernmental Organisation for International Carriage by Rail (OTIF) and Islamic Development Bank (IDB);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), International Insolvency Institute (III), National Law Centre for Inter-American Free Trade (NLCIFT) and New York State Bar Association (NYSBA).

10. The Working Group elected the following officers:

Chairman: Mr. Rodrigo LABARDINI FLORES (Mexico)

Rapporteur: Ms. Kaggwa Ann Margaret KASULE (Uganda)

11. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.47 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.48 and Addenda 1 to 3 (Draft Security Rights Registry Guide).

12. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Registration of security rights in movable assets.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered a note by the Secretariat entitled "Draft Security Right Registry Guide" (A/CN.9/WG.VI/WP.48/Add.3). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

IV. Registration of security rights in movable assets: Draft Security Rights Registry Guide

A. General

14. The Working Group first considered the form of the text to be prepared. At the outset, it was generally felt that the text should be a stand-alone comprehensive,

useful and reader-friendly text. The Working Group also recalled the agreement reached at its previous sessions that the text should be consistent with the *Guide* and in particular the recommendations of the *Guide*, while also offering options where necessary.

15. As to the form of the text though, differing views were expressed. One view was that the text should take the form of model regulations with commentary (or a guide to enactment) thereon. It was stated that model regulations would provide a set of rules that States enacting the law recommended in the *Guide* could easily adopt. In that connection, it was pointed out that the experience gained with the adoption of the Model Registry Regulations of the Organization of American States (OAS) by States implementing the OAS Model Law on Secured Transactions supported that conclusion. In addition, it was observed that a guide with commentary and recommendations might not necessarily have the impact model regulations might have, as indicated in secured transactions law reform projects currently underway in various jurisdictions. Moreover, it was said that model regulations could also provide flexibility by offering options and examples, and would be easier to prepare than a guide.

16. However, the prevailing view was that the text should take the form of a guide with commentary and recommendations. It was stated that such an approach would be consistent with the approach taken in the *Guide*, which was a text that allowed more discretion to the legislator than a model law or model regulations. In addition, it was observed that such an approach would be more beneficial to the legislator as it would combine the certainty of specific and detailed recommendations with the flexibility inherent in general commentary. Moreover, it was pointed out that a guide should be preferred to model regulations because it would provide more flexibility and would be easier than model regulations for the Working Group to reach consensus on.

17. In the discussion, the suggestion was made that, where the recommendations offered options, examples of model regulations could be included in an annex to the text.

18. After discussion, the Working Group agreed that the text should take the form of a guide with commentary and recommendations (the "draft Registry Guide") along the lines of the *Guide*. In addition, it was agreed that, where the text offered options, examples of model regulations could be included in an annex to the draft Registry Guide.

B. Draft recommendations (A/CN.9/WG.VI/WP.48/Add.3)

19. The Working Group then turned to the draft recommendations contained in document A/CN.9/WG.VI/WP.48/Add.3, on the understanding that, once it had completed its consideration of the draft recommendations, it could more easily finalize the commentary contained in documents A/CN.9/WG.VI/WP.48 and Add.1 and 2.

1. Article 1: Definitions

20. With regard to the definitions in article 1, it was suggested that:

(a) In the chapeau, the word "modifications" should be deleted, as subsidiary administrative rules such as those relating to registry regulations could not modify the applicable secured transactions law;

(b) In the definition of the term "address", reference should also be made to an electronic address, as it was as permanent or tentative as a physical address or a post office box;

(c) In the definition of the term "amendment": (i) consideration should be given to including reference to addition, deletion and modification of information; (ii) the list of examples should be deleted and included in the commentary (that would clarify, inter alia, that, under the *Guide*, it was not required to register a notice of an assignment of the secured obligation, a subrogation or a subordination, and the latter two and their legal effects were not discussed in the *Guide*); and (iii) the commentary should distinguish between the deletion of some information (such as the deletion of a grantor or encumbered asset, which could amount to cancellation) and cancellation of the entire notice;

(d) The definition of the term "registrant" should be revised to ensure that the registrant was the secured creditor or its representative, but not a courier or an employee (for subsequent decisions on that matter, see paras. 40, 64 and 89 below);

(e) From the definition of the term "registrar", the adjectives "natural or legal", qualifying the word "person", should be deleted as a person could be natural or legal (a matter that was left to other national law);

(f) From the definition of the term "registration", the bracketed text should be deleted as it repeated what was included in the definition of the term "notice", namely that, notice included an initial, a cancellation and an amendment notice;

(g) In the definition of the term "registration number", reference should be made to the number of the initial notice only, which should be assigned by the registry and provided by the registrant in the case of an amendment or cancellation of a notice, rather than multiple registration numbers;

(h) From the definition of the term "registry record", the words "electronically" or "manually in paper files of the registry" should be deleted as redundant, since the *Guide* recommended electronic registration, if possible;

(i) The definitions of the terms "serial number" and "serial number assets" should be deleted (since the use of serial number as an indexing and search criterion was not recommended in the *Guide* and, if they were to be retained, their scope should be broadened to encompass all types of asset that were serial number assets under the law of the enacting State), and the relevant matters should be discussed in the commentary.

21. Subject to the above-mentioned changes, the Working Group adopted the substance of the above-mentioned definitions. The Working Group also adopted the substance of the definitions of the terms "law" and "notice" unchanged. Noting that, as defined, the term "notice" encompassed an initial, a cancellation and an amendment notice and that not all uses of the term in the draft recommendations

were consistent with that definition, the Working Group also agreed that the draft recommendations should adequately distinguish among the three types of notice encompassed in that definition.

22. The Working Group next turned to the question of the function and placement of the definitions in the draft Registry Guide. Differing views were expressed. One view was that the definitions should appear together with the recommendations. It was stated that that approach was appropriate as the definitions were necessary for the reader to understand the draft recommendations (and any draft model regulations). It was also observed that the definitions did not necessarily apply to the entire draft Registry Guide, which fulfilled a different, educational function. It was also observed that, otherwise, the entire commentary of the draft Registry Guide should be reviewed with a view to ensuring that the terminology used throughout the draft Registry Guide was consistent with the definitions.

23. However, the prevailing view was that, in line with the approach followed in the *Guide*, the definitions should be reformulated as terminology to assist the reader of the entire draft Registry Guide and be placed in the introduction to the draft Registry Guide and in the annex together with the draft recommendations, but not in the form of draft recommendations. It was stated that definitions belonged in legislation but not in recommendations to the legislator. In addition, it was observed that, not only the terminology of the draft Registry Guide, but also the terminology of the *Guide* would apply to the entire draft Registry Guide. Moreover, it was said that the terminology in the draft Registry Guide could only supplement, but not modify, the terminology of the *Guide*.

24. In response to a question, it was noted that the draft Registry Guide used the term "notice" in the same sense as the *Guide* (see term "notice" in the introduction to the *Guide*, and recommendations 54, subparagraph (d), 57 and 72-75). It was observed, however, that the term "notice" in the draft recommendations had a narrower meaning than it had in the terminology of the *Guide*.

25. In the discussion about the function and the placement of the terminology, a fundamental question was raised as to whether the draft Registry Guide should be presented as a supplement to the *Guide* similar to the Supplement on Security Rights in Intellectual Property (the "Supplement") or a separate, stand-alone, comprehensive guide.

26. At the outset, it was generally agreed that the draft Registry Guide should complement the *Guide*, in particular, its chapter IV on the Registry System, and elaborate further on the various aspects of a general security rights registry to assist States in the establishment and operation of such a registry. It was also agreed that, while the draft Registry Guide should include cross-references to the commentary or recommendations of the *Guide*, it need not repeat all registration-related aspects of the *Guide*, as it was to be prepared as a reference tool to assist States in the implementation of the general security rights registry recommended in the *Guide*.

27. Differing views were expressed as to the exact title and the precise nature of the draft Registry Guide. One view was that, in line with its generally agreed overall objective, the draft Registry Guide should be presented in the form of a supplement to the *Guide*. It was stated that, as was the case with the Supplement, such a supplement could be consistent with the *Guide*, explain registration-related issues in a more detailed commentary and include recommendations with regard to registry

regulations. In addition, it was observed that, like the Supplement, such a supplement could complement the *Guide* and be, at the same time, a comprehensive, stand-alone text that would include extensive cross-references to the *Guide*. Moreover, it was pointed out that, to the extent the recommendations of the *Guide* dealt also with registration-related issues and the recommendations of the draft Registry Guide reiterated some of the most fundamental registration-related recommendations of the *Guide*, there was already a large degree of overlap between the two guides.

28. However, the prevailing view was that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive guide. It was stated that, from a promotion or commercial impact point of view, a guide would be more appropriate than a supplement. In addition, it was observed that, to the extent the draft Registry Guide referred to subsidiary legislation (that is, registry regulations) rather than to law, it differed from the Supplement that contained legislative recommendations. Moreover, it was pointed out that the *Guide* was lengthy and, therefore, the reader of the draft Registry Guide should not have to read the entire *Guide*. It was also said that the draft Registry Guide could include selective cross-references to the *Guide*, without paraphrasing or repeating the entire *Guide*.

29. Finally, it was mentioned that a separate, stand-alone, comprehensive text would allow States to implement the draft Registry Guide without necessarily having to also implement the law recommended in the *Guide*. In that connection, a note of caution was struck that, while the secured transactions law of a State enacting the draft Registry Guide did not need to be exactly the same as the law recommended in the *Guide*, that law needed to be in line, at least, with the key objectives, fundamental policies and general principles of the law recommended in the *Guide*. For example, it was noted, if a State had generally enacted the law recommended in the *Guide*, while providing for document- rather than notice-registration or registration for creation rather than for third-party effectiveness purposes, that State would not be able to implement the substance of the draft Registry Guide.

30. After discussion, the Working Group tentatively agreed that the draft Registry Guide should be presented in the form of a separate, stand-alone, comprehensive text that would be consistent with the *Guide*, refer selectively to the *Guide* and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry”. The Working Group also agreed to revisit the issue of the presentation of the material and its title once it had completed its work. In that connection, it was noted that, in taking a final decision, the Working Group might wish to take into account: (a) the mandate of UNCITRAL as a legislative body; (b) the types of guide prepared by UNCITRAL in the past (contractual guides, legislative guides and guides to enactment of a model law); and (c) that legislative guides related to legislation, irrespective of whether that legislation was to be enacted by a federal or state parliament, ministry or other body that had the authority to legislate under national law.

31. The Working Group proceeded with its discussions of the articles on the understanding that they would be reformulated in the form of draft recommendations with text along the following lines: “The regulations should provide that …” together with any other necessary adjustments.

2. Article 2: Registry

32. The suggestion was made that article 2 should refer to the need for the registry to be centralized. That suggestion was objected to. It was stated that, in line with the *Guide* (see recommendation 54, subparagraphs (e) and (k)), the "record of the registry" should be centralized, while users should be able to access the registry record online or through multiple points of access (see the *Guide*, chapter IV paragraphs 21-24 and 38-41). After discussion, the Working Group approved the substance of article 2, unchanged.

3. Article 3: Appointment [and duties] of registrar

33. As a matter of drafting, it was suggested that paragraph 1 should refer to the fact that the relevant Government authority "determined" the duties and "monitored" the performance of those duties by the registrar. It was also suggested that the heading of the article that referred to the "registrar" should be aligned with its contents that referred to the "registry". It was also suggested that paragraph 2 of alternative B should be deleted. It was stated that the issues of identification and verification of the identity of the registrant or authorization for registration were more appropriately dealt with in articles 6, subparagraph 1 (a), and 16. There was sufficient support for those suggestions.

34. Differing views were expressed, however, as to whether paragraph 3 of alternative B should be retained. One view was that it should be retained as it offered a useful overview of the duties of the registrar. It was stated that, if paragraph 3 were retained, the commentary should explain: (a) why a copy of any changes to a notice should be sent only to the person identified in the notice as the secured creditor; and (b) that the term "user" referred to a registrant or a searcher, but not to a grantor. Another view was that it should be deleted as it might inadvertently give the impression that it was an exclusive list of the duties of the registrar. After discussion, it was agreed that paragraph 3 should be retained in square brackets for the Working Group to revisit it once it had completed its consideration of all the articles that dealt with the duties of the registrar. It was also agreed that the word "duties" in the heading of the article should also be retained in square brackets, pending a decision of the Working Group with regard to paragraph 3.

35. Subject to the changes mentioned above, the Working Group approved the substance of article 3.

4. Article 4: Public access to the registry services

36. The Working Group approved the substance of article 4 unchanged.

5. Article 5: Operating hours of the registry

37. A suggestion was made that article 5 should be deleted. It was stated that the operating hours of the registry were a matter that should be left to the general rules in place in each State about normal business hours. It was also observed that article 4, which essentially dealt with the same matter, was sufficient to the extent that it enshrined the principle of public access to the registry. That suggestion was objected to. It was observed that article 4 dealt with the right of a person to have access to the registry service, while article 5 dealt with the way in which the registry

would permit a person to exercise that right. It was also stated that article 5 was also useful in clarifying, in line with recommendation 54, subparagraph (l), the continuous operation of an electronic registry, subject to limited exceptions. After discussion, it was agreed that article 5 should be retained. In addition, it was agreed paragraph 1 should be revised to make it clear that the words in square brackets meant that each enacting State could set the operating days and hours of the registry. Moreover, it was agreed that paragraph 2 should make reference to the continuous operation of electronic registries.

38. Differing views were expressed as to whether paragraphs 2 and 3 should be merged. One view was that they should not be merged. It was stated that maintenance related not only to an electronic but also to a paper-based registry. It was also observed that force majeure events (earthquakes, fires, floods) could affect both electronic and paper-based registries. The prevailing view, however, was that paragraphs 2 and 3 should be merged. It was observed that maintenance was a matter that involved only an electronic registry in view of its continuous operation. In addition, it was stated that, under recommendation 54, subparagraph (l), a paper-based registry was to operate during normal business hours, which would normally make it possible for maintenance to take place outside business hours. Moreover, it was pointed out that force majeure was not addressed in the relevant recommendation 54, subparagraph (l), as that was a general matter left to other law. After discussion, the Working Group agreed that paragraphs 2 and 3 should be merged, while the introductory words of paragraph 3 ("notwithstanding … article") and the reference to force majeure should be deleted. It was also agreed that force majeure events and their potential impact on the operation of electronic or paper-based registries should be discussed in the commentary.

39. Subject to the above-mentioned changes, the Working Group approved the substance of article 5.

6. Article 6: Access to registration services

40. While there was general support for the substance of paragraph 1, a number of suggestions were made as to its precise formulation. One suggestion was that reference might be made in the chapeau to the "registrant", rather than to "a person entitled to register". It was stated that the term "registrant" meant the person effecting the registration that could be the secured creditor, its representative or a third party acting on behalf of the secured creditor or its representative. It was also observed that caution should be exercised in using the term "registrant" in the draft Registry Guide, particularly when reference should actually be made only to the secured creditor or its representative (see para. 20 (d), above and paras. 64 and 89 below). Another suggestion was that, in subparagraph 1 (a), reference should be made to the identifier of the secured creditor as required by law and article 21. Yet another suggestion was that, in subparagraph 1 (b), the words "if any" should be retained outside square brackets to account for the possibility provided in article 33 (in line with recommendation 54, subparagraph (i)) that no registration fees might be charged. There was sufficient support for those suggestions.

41. Differing views were expressed as to whether paragraphs 2-4 should be retained. One view was that paragraphs 2-4 should be retained. It was stated that: (a) paragraph 2 appropriately stated the principle that a notice could be in an electronic or paper form; (b) paragraph 3 referred to the useful concepts of a user

account and to the terms and conditions of use of the registry; and (c) paragraph 4 clarified how a natural person should identify himself or herself in a paper notice (as the registrant or as the registrant and the representative of a legal person).

42. However, the prevailing view was that paragraphs 2-4 should be deleted. With respect to paragraph 2, it was stated that it appeared as recommending a mixed, paper and electronic, registry system, thus inadvertently running counter to the *Guide* that recommended an electronic registry, if possible (see recommendation 54 (j)). With respect to paragraph 3, it was observed that: (a) the meaning and the purpose of a "user account" was not clear and, in any case, if it was a method of identifying the registrant or facilitating payment, those matters were already covered in paragraph 1; (b) there was no reason to limit the application of the concept of a user account to an electronic context; and (c) reference to a user account might inadvertently result in a violation of the principle of technology neutrality. With respect to paragraph 4, it was pointed out that it was superfluous as the identification of a natural person was already addressed in articles 6, paragraph 1, and 21.

43. Subject to the above-mentioned changes, the Working Group approved the substance of article 6.

7. Article 7: Access to searching services

44. There was general support for the substance of article 7. As to its formulation, a number of suggestions were made. One suggestion was that the reference to search certificate should be deleted. It was stated that, while article 32 made reference to search certificates and, in a paper-based registry system, a searcher might request a copy of the search results, reference to a search was sufficient in that regard. Another suggestion was that option A should be deleted and option B should be retained outside square brackets with a reference to search fees qualified, in line with recommendation 54, subparagraph (i), by the words "if any". Yet another suggestion was that reference should be made to the rule that, unlike a registrant, a searcher did not need to identify himself or herself. There was sufficient support for those suggestions.

45. Yet another suggestion was that the words "without having to provide reasons for the search" should be deleted as that was a matter for the law. That suggestion was objected to. It was widely felt that the rule that a searcher did not need to give reasons for the search was sufficiently important to justify its repetition in article 7 of the draft recommendations.

46. Subject to the above-mentioned changes, the Working Group approved the substance of article 7.

8. Article 8: Authorization and presumption as to the source of a notice

47. There was general support for the substance of paragraph 1. It was widely felt that registration had to be authorized by the grantor and that the registry could not request verification of such authorization. It was also agreed that the last two sentences of article 12 should be merged with article 8 as they also related to the authorization of registration (see recommendation 71; and para. 72 below).

48. As a matter of drafting, it was suggested that the word "however" might be deleted as the first and the second sentence of paragraph 1 addressed two distinct issues. It was also suggested that paragraph 1 should be aligned with recommendation 54, subparagraph (d), which referred to the fact that the registry did not require verification of the identity of the registrant. There was sufficient support for those suggestions.

49. However, there was no support for the bracketed text in paragraph 1, dealing with evidence matters. It was generally agreed that that matter was a matter of law and could be discussed in the commentary. It was also agreed that the commentary could discuss the burden of proof and provide guidance, in particular, in view of the fact that, under the law recommended in the *Guide*, registration was permitted in advance of the creation of a security right or the conclusion of a security agreement. In that connection, reference was made to article 30, paragraph 1, subparagraph (c), which dealt with the compulsory cancellation when the registration had not been authorized by the grantor.

50. Differing views were expressed as to whether paragraph 2 should be retained. One view was that it should be retained to clarify, for example, that registration by a branch of a bank using the bank's master user account details was a registration by the bank. The prevailing view, however, was that paragraph 2 should be deleted. It was stated that that matter was a matter for procedural or material law, but not the draft recommendations. In addition, it was observed that no presumption flowed from registration by a person using the assigned user account details, as a user account was simply meant to facilitate payment of fees. Moreover, it was pointed out that the matter required a more nuanced approach, possibly along the lines of article 13 of the UNCITRAL Model Law on Electronic Commerce. It was agreed, however, that the matter could possibly be discussed in the commentary. Further to the deletion of paragraph 2, the Working Group agreed that the reference word "presumption" in the heading of the article should also be deleted.

51. Subject to the above-mentioned changes, the Working Group approved the substance of article 8.

9. Article 9: Rejection of a notice or search request

52. It was noted that paragraph 1 was intended to provide an exhaustive list of reasons permitting the registry to reject a registration of a notice or a search request. In order to further clarify that point, it was agreed that the chapeau of paragraph 1 should include language along the lines "only if". As a matter of drafting, it was also suggested that: (a) reference might be made in the chapeau of paragraph 1 to the rejection of a notice as a fact, rather than as a possibility; (b) the words "paper or electronic" in subparagraph 1 (a) were superfluous and could be deleted. There was sufficient support for those suggestions.

53. With respect to subparagraph 1 (b), while the view was expressed that the term "illegible" might apply only to information in a paper notice, the prevailing view was that it was equally relevant with respect to information in an electronic notice. It was widely felt data might be illegible because the electronic registry might not recognize certain characters or because data might be corrupted.

54. With respect to subparagraph 1 (c), various suggestions were made. One suggestion was that it should be confined to the failure to pay any required

fees. It was stated that failure to communicate a notice in one of the authorized media, incompleteness or illegibility of the information in the notice and failure to pay any required fees were the only reasons justifying rejection of a registration or search request. That suggestion was objected to. It was observed that there might be other reasons justifying rejection of a registration or a search request by the registry (for example, information in a notice was not expressed in the language specified in the law; see article 17, paragraph 2).

55. As to paragraph 2, while there was support for its substance, as a matter of drafting, the suggestion was made that it should be revised to refer to the obligation of the registry to communicate to the registrant or the searcher the grounds for rejection as soon as practicable.

56. Subject to the above-mentioned changes, the Working Group approved the substance of article 9.

10. Article 10: Date and time of registration

57. It was generally agreed that the main objective of article 10 was to implement recommendation 70 of the *Guide* (providing that the registration of a notice was effective when the information contained in the notice was entered into the registry record so as to be available to searchers). However, differing views were expressed as to how that result might be best achieved. One view was that article 10 should be confined to stating the rule contained in recommendation 70. It was stated that the time of effectiveness of a registration determined priority, not only as between competing secured creditors, but also between a secured creditor and a competing claimant that did not need to register a notice (for example, a transferee of an encumbered asset, a judgement creditor or the administrator in the grantor's insolvency). In that connection, it was pointed out that the priority of a security right as against the rights of those competing claimants was not addressed in paragraph 2. In addition, it was observed that any reference to the time a notice was received could create confusion as to the actual time of effectiveness of the registration, in particular as, in an electronic context, there would be no or little time difference between the time when a notice was received and the time it became available to searchers.

58. Moreover, it was said that paragraph 2 contributed to that confusion to the extent that it referred to an internal matter of the registry, namely the order in which paper notices were entered into the record by the registry staff. As a result, it was suggested that paragraph 1 should refer to the time when registration of a notice became effective and paragraph 2 should be deleted. That suggestion received sufficient support.

59. Another view was that article 10 should be restructured to deal first with the time of effectiveness of a registration and then with the order in which paper notices were entered into the record by the registry staff. It was stated that the former matter was more important and the latter should be confined to situations in which several paper notices were submitted. In that connection, it was pointed out that an error by the registry staff in entering notices into the record in the order they were received could affect the priority of the relevant security rights and also result in liability for the registry.

60. In the discussion, it was suggested that in the second part of paragraph 1, reference should be made to the initial notice, as the registration number that would control all subsequent registrations would be the registration number of the initial notice (see para. 20 (g) above). It was also suggested that the words within square brackets in paragraph 2 ("or otherwise organize") should be retained outside square brackets and revised to refer to retention of information in a way that would allow a searcher to find it. It was stated that, while indexing of information was widely used (initially in paper and then in electronic registries), it was possible to organize information so as to allow searches without an index (for example, by using free text or key words). There was sufficient support for those suggestions.

61. After discussion, the Working Group agreed that article 10 should be recast to deal in the first part with the date and time of effectiveness (implementing recommendation 70) and in the second part with the order in which paper notices should be entered into the record by the registry staff. It was also agreed that the first part of paragraph 1 should refer to the date and time registration of a notice became effective and the second part should refer to the registration number of the initial notice. Moreover, it was agreed that the substance of paragraph 3 could be retained unchanged. It was also agreed that the matters addressed in article 10, including the situation where paper notices were received by mail on the same date and time, should be further explained in the commentary.

62. Subject to the above-mentioned changes, the Working Group approved the substance of article 10 (as to the second change suggested in para. 60, see para. 74 below).

11. Article 11: Duration and extension of registration

63. At the outset, while some preference was expressed for option A only and option A together with option C, it was generally recognized that: (a) all options contained in article 11 could be retained; and (b) the commentary should clarify that an enacting State would have to choose one of them. It was also widely felt that the commentary should discuss all options and their advantages and disadvantages. It was stated that option A provided certainty but no flexibility, option B provided excessive flexibility to the extent the registrant could choose an infinite number of years and option C combined flexibility of choice by the parties with certainty to the extent that it contained a limit to the duration the registrant could choose.

64. A number of suggestions were made. One suggestion was that, as in paragraph 1 of option C, in paragraph 1 of options A and B, reference should be made to the duration of registration of the initial notice, as the duration of the renewal (amendment) notice was addressed in paragraph 2 of all three options. Another suggestion was that reference should be made to article 26 to clarify that a renewal of the duration of registration would take place by way of registration of an amendment notice. Yet another suggestion was that the term "registrant" in paragraph 2 of options A, B and C should be replaced by the terms "secured creditor or its representative". It was stated that the term "registrant" referred to the person that effected a registration and thus could encompass the secured creditor or its representative (that could be identified in the appropriate field in the notice), other than a courier, employee or service provider (see para. 20 (d), and para. 40 above, as well as para. 89 below). It was stated that the notice could include a field for a registrant other than a secured creditor or its representative. Yet another suggestion

was that the use of the term "registrant" in all articles should be reviewed with a view to determining whether its use was appropriate in each context.

65. Yet another suggestion was that, while, under article 17, if the registrant could choose the duration of registration and failed to do so, the registry would reject the notice, the commentary could discuss the possibility of the registry being designed so as to automatically insert a duration time. Yet another suggestion was that the problem of option B not setting any limit to the duration of registration could also be discussed in the commentary. It was stated that, as grantor authorization was always a requirement for the effectiveness of registration, the problem of the unlimited duration would be addressed as the grantor would not permit a notice to remain on record for an unlimited period of time. In addition, it was observed that the problem could be addressed by way of calculating registration fees on a per year basis, thus discouraging overreaching in the choice of the duration of registration. Moreover, it was pointed out that the problem would be addressed if a State chose to enact option C. In view of the above, the suggestion was made that the matter should be discussed in the commentary. There was sufficient support for all those suggestions.

66. Subject to the above-mentioned changes, the Working Group approved the substance of article 11.

12. Article 12: Time when notice may be registered

67. At the outset, the suggestion was made that article 12 and article 13 should be deleted as they reiterated recommendations of the *Guide* that addressed matters of law. It was stated that, as a general matter, articles that dealt with matters of law and were not addressed to registry designers did not belong in the draft recommendations. It was also observed that matters for the secured transactions law could be addressed in the commentary that fulfilled a different, general educational function.

68. That suggestion was objected to. It was stated that States followed different legislative techniques and the draft Registry Guide should leave it open for States to address registration-related matters in the law, the registry regulations, the registry terms and conditions of use, the contract between the supervising authority and the registry operator, or another text. In addition, it was observed that there was nothing inherently wrong with repeating in the draft recommendations of the draft Registry Guide (that were addressed to the legislator of registry regulations) recommendations of the *Guide* (that were addressed to the legislator of the relevant secured transactions law). Moreover, it was pointed out that the draft Registry Guide should be drafted in a reader-friendly way, not only for registry designers and registry staff that might not be lawyers, but also for legislators, judges and lawyers that would welcome some guidance on matters of law. It was also mentioned that the introduction to the draft Registry Guide could include a pedagogical part as to the function of the draft recommendations and how they could be enacted in law, regulations, contracts or other texts. It was also suggested that the introduction could also explain the background (including legal matters) and clarify that the registry regulations (to which the draft recommendations referred) could not modify the relevant secured transactions law of the enacting State (including the recommendations of the *Guide*).

69. The view was also expressed that dealing in the draft recommendations with matters of law raised a fundamental question as to the nature and the purpose of the instrument being prepared. It was stated that, if the text were to take the form of a guide with commentary and recommendations, there was no need to deal in the recommendations with matters of law. It was also observed that, if the text under preparation were to take the form of registry regulations, it could deal with matters of law as it would need to be comprehensive. In that connection, the Working Group recalled its decision that the text being prepared would take the form of a guide with commentary and recommendations, and possibly examples of model regulations on certain issues on which the draft recommendations would include options (see para. 18 above). It was noted that the form of the text under preparation did not preclude the inclusion of recommendations that would deal with matters of law and provided comprehensive guidance to the intended readers of the guide.

70. After discussion, the Working Group agreed that article 12 should be retained. As to the formulation of article 12, a number of suggestions were made. One suggestion was that it should include language along the following lines: "Where the law does not already provide, the regulations should provide that …". It was stated that such an approach would inform the reader that the matter addressed in article 12 was a matter of law and that it did not need to be addressed in the regulations if it had already been addressed in the law. That suggestion was objected to. It was stated that such an approach would inadvertently result in the conclusion that a State need not address a matter both in the law and in the regulations or other text. It was also observed that such an approach could have another unintended result, namely that a State might not need to implement the registration-related recommendations of the *Guide*, a result that could undermine the *Guide*.

71. Another suggestion was that articles 12 and 13 should be merged. That suggestion was also objected to. It was widely felt that articles 12 and 13 could not be merged as they dealt with different matters. Yet another suggestion was that article 12 should avoid referring to the "conclusion" of the security agreement as that term might be misinterpreted as meaning that the agreement had come to an end and the security right was extinguished. In that connection, the Working Group noted that the relevant recommendation 67 referred to "the conclusion of the security agreement".

72. Recalling its decision that the last two sentences of article 12 should be moved to article 8 (see para. 47 above), the Working Group approved the substance of article 12.

13. Article 13: Sufficiency of a single notice

73. The Working Group approved the substance of article 13 unchanged.

14. Article 14: Indexing of notices

74. There was general support in the Working Group for the substance of article 14. Recalling its decision with respect to article 10, paragraph 2 (see paras. 60 and 62 above), the Working Group agreed that the words within square brackets in paragraph 1 (referring to the organization of information so as to become searchable) should be retained outside square brackets and that paragraph 3 should be aligned with paragraph 1. It was reiterated that, while registry designers could

create an index, modern software came with search functions that did not require an index.

75. In addition, in line with its decision with respect to serial number assets (see para. 20 (i) above, as well as paras. 86 and 89 below), the Working Group agreed that paragraph 2 should be deleted and the matters addressed therein should be discussed in the commentary. Moreover, the Working Group agreed that the possibility of indexing notices so as to make them retrievable according to the secured creditor identifier for the internal use by the registry (for the purpose of making global amendments; see article 27), should be discussed in the commentary.

76. Subject to the above-mentioned changes, the Working Group approved the substance of article 14.

15. Article 15: Change, addition, deletion, removal or correction of information

77. A number of concerns were expressed with respect to article 15. One concern was that paragraph 1 appeared as dealing with a matter that was different from the matters addressed in paragraphs 2 to 5 and, therefore, the opening words "subject to paragraphs 2 to 5" were inappropriate and should be deleted or replaced with words, such as "except as provided in". Another concern was that, while paragraph 1 referred to the collective registry record, paragraphs 2 to 5 referred to information in a specific notice and that, therefore, paragraph 1 should be aligned in that respect with paragraphs 2 to 5. Yet another concern was that paragraph 3 was inconsistent with recommendation 74, and should be aligned with recommendation 74, which required not just the information in the notice but also the fact of expiration, cancellation or amendment to be archived. Yet another concern was that paragraph 3 appeared unnecessarily preventing registries from retaining information in their archives for more than twenty years, and should, therefore, be revised to provide that information could be retained for twenty years at a minimum. Yet another concern was that paragraph 4 was inconsistent with recommendation 74 in that it provided that information could be removed from the public record only upon its expiry and not also upon its cancellation, and, should, therefore, be aligned more closely with recommendation 74. With respect to paragraph 5, the concern was expressed that it dealt with corrections on the part of the registry that could affect the priority of the rights of competing claimants in the absence of recommendations of the *Guide* that would address that priority matter. The concern was also expressed that reference to a paper form might create a doubt as to whether paragraph 5 was meant to apply to notices transmitted, for example, by fax. It was, therefore, suggested that paragraph 5 should be deleted from the draft recommendations and the matter should be discussed in the commentary. There was support for those suggestions.

78. After discussion, it was agreed that that paragraph 1 should be formulated as a separate draft recommendation stating the general rule that the registry might not change the registry record except as provided in the regulations. It was also agreed that paragraphs 2 to 4, properly revised as mentioned above, should be reformulated as separate draft recommendations setting out the exceptions to the above-mentioned general rule. With respect to paragraph 5, it was agreed that the matter should be discussed in the commentary, indicating that States would need to provide rules on the legal consequences of correction of errors made by the registry in entering information in the registry record (generally, without referring to paper

forms). Further to the above-mentioned changes, the Working Group agreed that the headings of article 15 would need to be revised to fit its contents. Subject to those changes, the Working Group approved the substance of article 15.

16. Article 16: Responsibility with respect to the information in a notice

79. A number of concerns were expressed with respect to article 16. One concern was that paragraph 1 unnecessarily created an obligation for the registrant. Another concern was that paragraph 2 might overlap with articles 7 and 8. As a result, it was widely felt that article 16 should be confined to usefully stating the principle that the registry was not responsible to ensure that the information in the notice registered was accurate and complete. Subject to that change, the Working Group approved the substance of article 16.

17. Article 17: Information required in a notice

80. There was support in the Working Group for the substance of article 17. It was widely felt that article 17 dealt with an important matter and should be retained in the draft recommendations. However, a number of suggestions were made as to the formulation of article 17. One suggestion was that, in the chapeau to paragraph 1, reference should be made to the initial notice, as article 26 dealt with amendment notices and article 28 dealt with cancellation notices. Another suggestion was that, in subparagraphs 1 (a) and (b), reference should be made to the physical (street address, post office box or equivalent) and the electronic address of the grantor and the secured creditor or its representative. Yet another suggestion was that subparagraph 1 (d), should be placed within square brackets and the relevant footnote should be expanded to clarify that the subparagraph would apply only if the enacting State chose in article 11 option B or C, permitting the registrant to select the duration of registration.

81. Yet another suggestion was that the registrant's identifier and address should be added to the information to be provided in the notice. It was stated that such an approach would facilitate the registration process where the registration was effected by a third party other than the secured creditor or its representative (such as a law firm or other service provider). That suggestion was objected to. It was widely felt that, while the registry could request the identity and address of a third-party registrant, that information should not be part of the information required for the registration of the notice to be effective. It was also stated that such an approach did not appear to be consistent with recommendation 57 that set out all the information required for a notice to be effective ("the following information *only* is required").

82. With respect to paragraph 2, it was suggested that reference should be made to: (a) "a language" (rather than "the language"), so as to take into account the possibility that the law might specify more than one language; and (b) the use of a character set specified and made known to the public by the registry. Yet another suggestion was that paragraphs 3 and 4 should be confined to stating the principle that, in the case of more than one grantor or secured creditor, the required information ought to be provided in the notice separately for each grantor or secured creditor. Yet another suggestion was that the second sentence of paragraph 4 should be reflected in a separate paragraph, as it dealt with a different issue than the issue of the identification of more than one secured creditor, which was addressed in paragraph 4. There was support for all those suggestions.

83. Yet another suggestion was that paragraph 5 should be deleted. It was stated that objective of paragraph 5 was different from the other paragraphs of article 17 in that it dealt with the legal consequences of a change in the identifier of the grantor or the secured creditor, a matter that was addressed in recommendation 61. While there was some doubt as to the correctness of that interpretation and whether recommendation 61 actually applied to such a change in the grantor's identifier (and it did not address a change in the secured creditor's identifier), the Working Group decided to delete paragraph 5.

84. Subject to the above-mentioned changes, the Working Group approved the substance of article 17.

18. Article 22: Description of encumbered assets

85. While there was support for the substance of article 22, it was suggested that the reference to proceeds should be deleted. It was stated that such a reference might inadvertently give the impression that the security right in an encumbered asset did not automatically continue in its proceeds, which would run counter to recommendation 19. While there was support for that suggestion, a note of caution was struck. It was explained that, under recommendation 40, with respect to some types of proceeds, for the security right in proceeds to continue being effective against third parties, reference to those proceeds should be included in the notice. Subject to that change, the Working Group approved the substance of article 22.

19. Article 23: Description of encumbered serial number assets

86. In line with the decision of the Working Group that matters relating to serial number assets should be discussed only in the commentary (see paras. 20 (i) and 75 above, as well as para. 89 below), the Working Group decided that article 23 should be deleted from the draft recommendations and discussed in the commentary.

20. Article 24: Description of encumbered attachments to immovable property

87. It was widely felt that article 24 was unnecessary and should be deleted. It was stated that its heading referred to the description of encumbered attachments to immovable property and its contents to the question where a notice of a security right in an attachment might be registered. In addition, it was observed that the former topic was already addressed in article 22, while the latter was a matter of secured transactions or immovable property law. Moreover, it was pointed out that those matters could usefully be discussed in the commentary. After discussion, the Working Group decided that article 24 should be deleted and the matters addressed therein should be discussed in the commentary.

21. Article 25: Incorrect or insufficient information

88. While there was support for the substance of article 25, a number of suggestions were made as to its formulation. One suggestion was that the formulation of paragraph 1 should be aligned with the formulation of the recommendations of the *Guide* that referred to the effectiveness of notice rather than of a registration. It was noted that the recommendations of the *Guide* referred to "the effectiveness of the registration of a notice" (see, for example, recommendation 70).

89. Another suggestion was that, in line with the decision of the Working Group that matters relating to serial number assets should be discussed only in the commentary (see paras. 20 (i), 75 and 86 above), paragraph 2 should be deleted and the matters addressed therein should be discussed in the commentary. Yet another suggestion was that paragraph 3 should be aligned more closely with recommendation 64, which dealt with the identifier of the secured creditor or its representative only and provided for the possibility that an error in the identifier would seriously mislead a searcher (but not that a searcher was actually misled). There was support for those suggestions. Subject to those changes, the Working Group approved the substance of article 25.

22. Article 26: Amendment of registered notice

90. With respect to article 26, the Working Group agreed that:

(a) The article should clarify that only the secured creditor or its representative (if shown in the secured creditor field in the notice; see recommendation 73) was entitled to amend the notice, leaving the matter of third-party service providers to the relevant agency law;

(b) In subparagraph 1 (a), reference should be made to the registration number of the initial notice (see paras. 20 (g), 60, 61, 65 and 80 above);

(c) Subparagraph 1 (b) should be deleted as the exact purpose or nature of the amendment would be evident from the amendment notice and need not be repeated;

(d) In subparagraph 1 (c), reference to the deletion of information should be deleted because, if information was deleted, there would be no new information added;

(e) Subparagraph 1 (e) should be deleted since, as a practical matter only an authorized person could have access to the initial notice and the registry could not verify online the authorization of the person amending an existing notice;

(f) Paragraph 2 should be retained and further explained in the commentary (see recommendation 62 and relevant commentary);

(g) Paragraph 3 should be retained and the commentary should explain that registration of an amendment notice to disclose a subordination agreement should not be required;

(h) Paragraph 4 should be retained and the commentary should explain that, in line with recommendation 75, an amendment notice may be registered to disclose the name of the new secured creditor, but absence of an amendment notice would not render the existing notice ineffective;

(i) Paragraph 5 should be deleted as if all information were deleted and was not replaced with other information, the notice would be incomplete under article 9 and thus be rejected by the registry;

(j) In paragraph 6, the use of the words “subject to” should be reconsidered and the second sentence should be deleted, as no notice other than a renewal notice could extend the duration of effectiveness of a registration; and

(k) Paragraph 7 should be retained.

91. Subject to the above-mentioned changes, the Working Group approved the substance of article 26.

V. Future work

92. The Working Group agreed that, while the draft Registry Guide was an important text that was urgently needed by States, it was premature at the current session to decide to submit it, in whole or in part, to the Commission for approval at its 2012 session. It was widely felt that the Working Group should be able to consider its future work at its next session, when it expected to have a more complete overview of all the material in the draft Registry Guide.