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Report of Working Group VI (Security Interests) on the work of its thirty-first session (New York, 13-17 February 2017)

Contents

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I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a draft guide to enactment (the "draft Guide to Enactment") of the UNCITRAL Model Law on Secured Transactions (the "Model Law"), pursuant to a decision taken by the Commission at its forty-eighth session (Vienna, 29 June-16 July 2015).[1] At that session, the Commission had noted that the Working Group, in preparing a draft model law, was mindful of the fact that it would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to assist States in considering it for enactment. In addition, the Commission noted that, in the preparation of a draft model law, the Working Group had assumed that it would be accompanied by such a guide and referred several matters to that guide for clarification.[2]

2. The Commission also agreed that the draft Guide to Enactment should: (a) be as short as possible; (b) include cross-references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and the other texts of the Commission on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide"); (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision or section of the Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions; (e) give guidance to States with respect to matters referred to them and in particular explain each option offered in various articles of the Model Law to assist enacting States in choosing one of the options offered.[3]

3. At its forty-ninth session (New York, 27 June-15 July 2016), the Commission adopted the Model Law.[4] At that session, the Commission had before it the draft Guide to Enactment (A/CN.9/885 and Add.1-4). The Commission noted that the draft Guide to Enactment provided background and explanatory information that could assist States in considering the Model Law for adoption. In addition, the Commission noted with appreciation that the draft Guide to Enactment was already at an advanced stage. Moreover, the Commission noted that several issues were referred to the draft Guide to Enactment even at its present session, and thus the draft Guide to Enactment was an extremely important text for the implementation and interpretation of the Model Law. After discussion, the Commission agreed to give the Working Group up to two sessions to complete its work and submit the draft Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session in 2017.[5]

4. In addition, the Commission agreed that, if the Working Group completed its work in less than two sessions it should use any time remaining to discuss its future work in a session or in a colloquium to be organized by the Secretariat. Moreover, the Commission agreed that, subject to further discussion of the overall future work of the Commission, a colloquium to discuss future work on security interests should be held even if the Working Group used the full time of the two sessions to complete its work on the draft Guide to Enactment.[6]

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 215.
[2] Ibid.
[3] Ibid., para. 216.
[4] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 119.
[5] Ibid., paras. 120-122.
[6] Ibid., paras. 122 and 356.

5. At its thirtieth session (Vienna, 5-9 December 2016), the Working Group commenced its work on the draft Guide to Enactment of the Model Law based on a note by the Secretariat entitled "Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.71 and Add.1-4 and part of Add.5) and requested the Secretariat to revise the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group (A/CN.9/899, para. 11).

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its thirty-first session in New York from 13 to 17 February 2017. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Belarus, Brazil, Burundi, Canada, China, Colombia, Czechia, El Salvador, France, Germany, India, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Namibia, Philippines, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland and United States of America.

7. The session was attended by observers from the following States: Afghanistan, Algeria, Belgium, Bolivia (Plurinational State of), Croatia, Cyprus, Iraq, Saudi Arabia and Syrian Arab Republic. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations system*: World Bank and World Intellectual Property Organization (WIPO);

(b) *International non-governmental organizations invited by the Commission*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), Centro de Estudios de Derecho, Economía y Política (CEDEP), Commercial Finance Association (CFA), European Banking Federation (EBF), European Investment Bank (EIB), European Law Students' Association (ELSA), Factors Chain International (FCI), Forum for International Conciliation and Arbitration (FICA), International Insolvency Institute (III), National Law Centre for Inter-American Free Trade (NLCIFT), New York State Bar Association (NYSBA), The Law Association for Asia and the Pacific (LAWASIA) and Union Internationale du Notariat (UINL).

9. The Working Group elected the following officers:

Chairperson: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Diana MUÑOZ FLOR (Mexico)

10. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.72 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.71/Add.5 and 6, as well as A/CN.9/WG.VI/WP.73 (Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions).

11. 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. Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions.
5. Future work.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered notes by the Secretariat entitled "Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.71/Add.5 and 6, as well as A/CN.9/WG.VI/WP.73) and its future work. The deliberations and decisions of the Working Group are set forth below in chapters IV and V respectively. The Secretariat was requested to revise the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group.

IV. Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions

A. Chapter VII. Enforcement of a security right (A/CN.9/WG.VI/WP.71/Add.5)

Article 75. Right of affected persons to terminate enforcement

13. As a general matter, it was agreed that the draft Guide to Enactment should avoid repeating and focus more on explaining the text of the Model Law.

14. With respect to paragraph 60, it was agreed that: (a) the second sentence should refer to "the grantor, any other person with a right in the encumbered asset or the debtor" (and perhaps define them as "affected persons"); (b) it should refer to the fact that the right to terminate enforcement was known in some jurisdictions as the right to "redeem an encumbered asset"; and (c) the last sentence should explain that, unlike recommendation 140 of the Secured Transactions Guide on which article 75 was based, article 75 did not refer to the extinguishment of a security right, as that matter was addressed in article 12.

15. With respect to paragraph 61, it was agreed that: (a) it should refer to "affected", rather than to "interested", persons; and (b) in the case of extrajudicial enforcement, if any affected person disputed the secured creditor's assertion that the cost of enforcement up to the time the assertion was made was reasonable, the court or other authority would determine whether that assertion was correct.

16. With respect to paragraph 62, it was agreed that: (a) it should clarify that, other than as provided in article 75, paragraph 2, under article 75, paragraph 3, the right of termination could be exercised even after the secured creditor had enforced its security right by entering into a lease or licence; (b) the rights of a lessee or a licensee should be respected; and (c) the reference to "residual value left in the encumbered asset" should be deleted, as it provided a practical, but not necessarily a legal, consideration to be taken into account and was already mentioned as a general matter in paragraph 60.

Article 76. Right of a higher-ranking secured creditor to take over enforcement

17. With respect to paragraph 63, it was agreed that: (a) the third sentence should be deleted and replaced by a succinct explanation of the reasons why a higher-ranking secured creditor should be entitled to take over enforcement, drawing a distinction between judicial and extrajudicial dispositions, and including cross-references to articles 79 and 81; and (b) the last sentence should include a reference to the "collection of an encumbered asset" and an explanation of the time limits for the exercise of the right of the higher-ranking secured creditor to take over enforcement.

18. With respect to paragraph 64, it was agreed that: (a) the words in parenthesis in the second sentence should be deleted, as article 76 did not apply to outright transfers of receivables and the matter should be addressed in the part of the draft Guide to Enactment that discussed article 1, paragraph 2, according to which

articles 72 to 82 did not apply to outright transfers of receivables by agreement; and (b) the last sentence should better explain the circumstances in which article 4 would be applicable.

Article 77. Right of the secured creditor to obtain possession of an encumbered asset

19. With respect to paragraph 65, it was agreed that: (a) it should clarify that article 77 applied only to tangible assets and refer to the fact that the concept of "possession", as defined in the Model Law (see art. 2, subpara. (z)), applied only to tangible assets (and not, for example to receivables); and (b) it should refer to "extrajudicial enforcement", rather than to "self-help remedies", which, as understood in some jurisdictions, did not require the grantor's consent (it was agreed that the same change should be made throughout the draft Guide to Enactment).

20. With respect to paragraph 66, it was agreed that: (a) the first sentence should be placed in paragraph 65; and (b) the second sentence should be revised to explain that the secured creditor's right to obtain possession would be subject to the rights of another person who had possession of the encumbered asset, such as a lessee or licensee, the rights of whom were addressed in article 34, paragraphs 3 and 5.

21. With respect to paragraph 67, it was agreed that it should clarify that: (a) once the person in possession of the encumbered asset objected to extrajudicial repossession at the time it was attempted, the secured creditor had no alternative but to apply to a court or other authority even if that person was the grantor and even if the grantor had previously agreed to allow the secured creditor to take possession without applying to a court or other authority; (b) the reason for that approach was to avoid disturbances of the public order (see Secured Transactions Guide, chap. VIII, para. 54); (c) if the objection was found by the court or other authority to be unfounded, the person objecting would have to bear the costs of enforcement (in particular as if that person was the grantor, an unfounded objection would amount to unilateral withdrawal of the consent given in the security agreement); and (d) both the secured creditor and the person in possession of the encumbered asset would have to act in good faith and in a commercially reasonable way, as provided in article 4.

22. With respect to paragraph 69, it was agreed that: (a) the first sentence should clarify that a lower-ranking secured creditor should not be entitled to obtain possession from a higher-ranking secured creditor, unless otherwise agreed; (b) subparagraph (b) of the second sentence was not clear and should be deleted; (c) the third sentence should be further explained by reference to the fact that the lower-ranking secured creditor could sell the encumbered asset (subject to the higher-ranking secured creditor's right) without obtaining possession on the understanding that the buyer could obtain such possession by paying off the higher-ranking secured creditor; and (d) the latter part of the third sentence ("and the buyer …") should be deleted, as it addressed a matter that was dealt with more accurately in article 81.

Article 78. Right of the secured creditor to dispose of an encumbered asset

23. With respect to paragraph 70, it was agreed that its last sentence should clarify that the enacting State should specify the rules applicable to judicial sales or other dispositions, leases or licences of encumbered assets.

24. With respect to paragraphs 71 and 72, it was agreed that: (a) paragraph 72 should be placed right after the second sentence of paragraph 71; (b) paragraph 71 should deal with each paragraph of article 78 in separate paragraphs and be further explained; (c) for the time periods referred to in article 78, paragraph 4 (b) and (c), one to five days should be suggested in the draft Guide to Enactment; (d) for the time period referred to in article 78, paragraph 5, ten to fifteen days should be suggested, while the reasons for those suggestions should be explained; and

(e) examples of "recognized markets" should be given, such as a securities stock exchange through which shares of publicly listed companies might be bought and sold at publicly-quoted prices.

Article 79. Distribution of the proceeds of a disposition of an encumbered asset and debtor's liability for any deficiency

25. With respect to paragraph 73 (distribution of proceeds in the case of a judicial disposition of an encumbered asset), it was agreed that it should explain that: (a) the enacting State should specify the rules that would govern the distribution of proceeds; (b) such distribution should take place in line with the priority rules of the Model Law; and (c) the enacting State should provide in article 81, paragraph 1, that the buyer or other transferee of an encumbered asset would acquire it free of all security rights, including security rights having priority over the security right of the enforcing creditor, on the basis that the proceeds of disposition would have been paid first to the prior-ranking secured creditors in accordance with article 79, paragraph 1.

26. With respect to paragraph 74 (distribution of proceeds in the case of an extrajudicial disposition of an encumbered asset), it was agreed that it should explain that: (a) the enforcing creditor should apply the proceeds to the secured obligation (see art. 79, para. 2 (a)), then pay any surplus to subordinate competing claimants, as the disposition would result in the extinguishment of their rights under article 81, paragraph 3, and, if any balance was left, to the grantor (see art. 79, para. 2 (b)); (b) in the case of doubt as to the priority of subordinate competing claimants, the enforcing creditor should pay the surplus to a judicial or other authority or fund specified by the enacting State for distribution in accordance with the provisions of the Model Law on priority (see art. 79, para. 2 (c)); and (c) creditors with rights that had priority over the right of the enforcing creditor did not need to be paid from the proceeds of the disposition (as their rights would not be extinguished by an extrajudicial disposition under art. 81, para. 3).

27. With respect to paragraph 75, it was agreed that it should explain that: (a) the Model Law did not address the question whether the debtor's obligation might be reduced or extinguished if the secured creditor failed to comply with the provisions of the enforcement chapter governing disposition or failed to exercise its post-default rights in good faith and in a commercially reasonable manner; (b) the question whether the debtor had a claim or counter-claim in those circumstances was a matter left to other law of the enacting State; and (c) as a practical matter, the enforcing secured creditor should provide an accounting indicating whether there was a surplus or shortfall upon disposition of the encumbered asset for the rules in article 79, paragraphs 2 and 3 to apply. It was also agreed that the reference to the fact that articles 72 to 82 did not apply to outright transfers of receivables by agreement should be deleted, as that matter was already dealt with in article 1, paragraph 2.

Article 80. Right to propose the acquisition of an encumbered asset by the secured creditor

28. With respect to paragraph 76, it was agreed that it should clarify that: (a) article 80 applied to both tangible and intangible assets (for example, all assets of the grantor or intellectual property of the grantor); (b) article 80, paragraph 2, contained a list of the persons to whom the secured creditor ought to send the proposal to acquire the encumbered asset; and (c) any person with a right in the encumbered asset or secured creditor of record should inform the enforcing secured creditor not later than a short period of time such as one to five days before the proposal was sent (see para. 24 (c) above).

29. With respect to paragraph 77, it was agreed that it should explain that: (a) any person entitled to receive the proposal should object or indicate its consent ten to fifteen days after that person received the proposal (see para. 24 (d) above); (b) if

one of the persons entitled to receive the proposal objected to it (in the case of art. 80, para. 4) or did not give its consent (in the case of art. 80, para. 5) and the secured creditor chose to continue with the enforcement, the secured creditor could only exercise one of the other post-default rights provided in the security agreement, the secured transactions law or another law (see art. 72, para. 1); and (c) in the case of a proposal of the secured creditor to acquire an encumbered asset in partial satisfaction of the secured obligation, the requirement for positive consent was intended to protect the debtor who would remain liable for the balance of the secured obligation and subordinate claimants whose rights would be extinguished (see art. 81, para. 3, and para. 32 below).

30. In that connection, the view was expressed that article 80, paragraphs 4 and 5 did not expressly address the consequences of the failure of the secured creditor to send the proposal to a person entitled to receive it under article 80, paragraph 2, or to send a proposal that met all the conditions set out in article 80, paragraph 3. Differing views were expressed as to the legal consequences of such mistakes of the secured creditor and as to whether they should be addressed explicitly in article 80. After discussion, the Working Group agreed that the draft Guide to Enactment should explain that, if the secured creditor, failed to send the proposal to one or more persons entitled to receive it, the secured creditor would not acquire the encumbered asset. It was also agreed that whether a defective proposal would have the same result would depend on whether the defect was material (e.g. a substantial misstatement of the secured obligation), a matter that should be left to other law.

31. With respect to paragraph 78, it was agreed that it should explain that article 80, paragraph 6, was merely facilitative in nature since the formal proposal process remained the same even where it was initially triggered by a request from the grantor to the secured creditor.

Article 81. Rights acquired in an encumbered asset

32. With respect to paragraph 79, it was agreed that it should clarify that: (a) article 81, paragraphs 1 and 2, addressed judicially-supervised dispositions and required the enacting State to specify, in the case of a sale or other transfer, whether or not the transferee acquired the encumbered asset free of any rights, and in the case of a lease or licence, whether or not the lessee or licensee was entitled to use the encumbered asset during the term of the lease or licence unaffected by the security right; (b) as already noted (see art. 79, para. 1, and para. 1 above), in the case of a sale or other disposition, the enacting State should specify that the buyer or other transferee acquired the encumbered asset free of any security rights, including security rights ranking higher in priority to that of the enforcing creditor; and (c) for the same reason, a similar rule should apply in the case of a lease or licence of the encumbered asset.

33. With respect to paragraph 80, it was agreed that it should explain that: (a) article 81, paragraphs 3 and 4, took a different approach in the case of an extrajudicial sale or other disposition, lease or licence of an encumbered asset; (b) the reason for the difference in approach was that higher-ranking secured creditors were not entitled to share in the proceeds of an extrajudicial enforcement initiated by a subordinate creditor (see para. 26 (c) above); (c) the enacting State might wish to consider providing that the rule in article 81, paragraph 3, applied also to the acquisition of an encumbered asset by the secured creditor (see Secured Transactions Guide, rec. 161, second sentence).

34. With respect to paragraph 81, it was agreed that it should clarify that article 81, paragraph 5, provided that the rights acquired by a buyer or other transferee, lessee or licensee would be affected by the enforcing creditor's failure to comply with the requirements of the enforcement chapter only if: (a) they had knowledge of the violation; and (b) the violation materially prejudiced the rights of the grantor or another person.

35. In that connection, the Working Group noted that recommendation 163 of the Secured Transactions Guide, on which article 81, paragraph 5, was based, referred to recommendations 161 and 162, which were reflected in article 81, paragraphs 3 and 4. Thus, the Working Group agreed that the reference in article 81, paragraph 5, to paragraphs 1 and 2 was a typographical error and recommended to the Commission that a corrigendum be issued to refer in article 81, paragraph 5, to paragraphs 3 and 4 (for another typographical error to be corrected, see para. 41 below).

Article 82. Collection of payment

36. With respect to paragraph 82, it was agreed that it should: (a) clarify that collection was an additional enforcement right where the encumbered asset was a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security; and (b) give examples of rights securing or supporting payment of such encumbered assets (such as a guarantee or a stand-by letter of credit).

37. With respect to paragraph 83, it was agreed that it should explain that article 82, paragraph 4, limited the right of collection of a secured creditor if the encumbered asset was a right to payment of funds credited to a bank account and the security right was made effective against third parties solely by registration, but not if the security right was made effective against third parties by a method other than registration. It was also agreed that paragraph 83 should refer specifically to paragraph 107 of chapter VIII of the Secured Transactions Guide, which set out very clearly the reasons for the rule in article 82, paragraph 4.

Article 83. Collection of payment by an outright transferee of a receivable

38. With respect to paragraph 84, it was agreed that it should explain that: (a) article 83 provided that, in the case of an outright transfer of a receivable, the transferee was entitled to collect the receivable at any time provided that payment had become due; and (b) the overarching obligation of good faith and commercial reasonableness in article 4 also extended to the collection of receivables by an outright transferee; and (c) as a practical matter, where the receivable was transferred outright without recourse, the transferor could not by definition be prejudiced by the failure of the transferee to act in good faith and in a commercially reasonable manner in exercising its collection right.

39. Subject to the above-mentioned changes (see paras. 13-38 above), the Working Group approved the substance of paragraphs 60 to 84 of document A/CN.9/WG.VI/WP.71/Add.5.

B. Chapter VIII. Conflict of laws (A/CN.9/WG.VI/WP.71/Add.6)

Article 84. Mutual rights and obligations of the grantor and the secured creditor

40. With respect to paragraph 4, it was agreed that it should: (a) clarify that the only limitations to the party autonomy were the ones set out in article 93; (b) explain that other issues relating to party autonomy (such as how a choice of law could be made) were left to other law; and (c) examples should be given of rules governing party autonomy typically set out in the conflict-of-laws rules of various States.

Article 85. Security rights in tangible assets

41. With respect to paragraph 6, it was agreed that it should clarify that article 98 set out a limited exception to the *lex situs* rule contained in article 85, paragraph 1, as it provided a different rule only for the third-party effectiveness of certain types of, tangible and intangible, asset. In that connection, the Working Group noted that article 85, paragraph 1, made no reference to article 98 and agreed to recommend to

the Commission to issue a corrigendum to include in article 85, paragraph 1, a reference to article 98 (for another typographical error to be corrected see para. 35 above).

42. With respect to paragraph 8, it was agreed that it should explain that: (a) for the rule in article 85, paragraph 4, to apply the tangible assets in transit ought to have reached their destination forty-five to sixty days after the putative creation of the security right; (b) if those tangible assets reached their destination and the security right had been previously created and made effective under the law of the State of their destination, the security right would be effective; (c) if those tangible assets did not reach their destination within the prescribed time period, the security right would be governed by the law of the State of their origin, as stated in article 85, paragraph 1.

43. With respect to paragraph 10, recalling a decision it made at its thirtieth session (see A/CN.9/899, para. 86), the Working Group agreed that it should be moved to the place in the draft Guide to Enactment in which issues relating to specialized registries were discussed (see A/CN.9/WG.VI/WP.73, paras. 28-30).

Article 86. Security rights in intangible assets

44. With respect to paragraph 11, it was agreed that no reference needed to be made to a receivable being an intangible asset, as it was clear that, while article 86 set out the law applicable generally to security rights in intangible assets, subsequent articles provided asset-specific rules for several types of intangible asset.

Article 87. Security rights in receivables relating to immovable property

45. With respect to paragraph 13, it was agreed that it should explain that, even if a secured creditor or another person did not find out that a receivable arose from a sale or lease of immovable property or was secured by immovable property, article 87 would apply and subject the security right to the law of the State under whose authority the immovable property registry was maintained.

Article 88. Enforcement of security rights

46. With respect to paragraph 14, it was agreed that: (a) the reference to the *lex fori* as the law governing enforcement should be deleted as the forum might not be the State in which a tangible asset was located at the time enforcement commenced; and (b) the cross-reference to article 100 should be explained as article 100 applied but did not refer explicitly to certificated non-intermediated securities (same point for the cross-reference to article 100 in paragraph 16 in connection with uncertificated non-intermediated securities).

47. With respect to paragraph 15, it was agreed that the phrase “if a security right is created in several tangible assets that are located in different States or” in the third sentence should be deleted, as even under such circumstances enforcement might take place in one State.

48. With respect to paragraph 16, it was agreed that, for reasons of clarity, the second sentence should include a cross-reference to article 86 that dealt with the law applicable to security rights in intangible assets.

Article 89. Security right in proceeds

49. With respect to paragraph 17, it was agreed that: (a) an additional sentence should be inserted to explain article 89; and (b) the example provided in the second sentence should refer to instances where the laws of more than one State would be applicable.

50. With respect to paragraph 18, it was agreed the first sentence should further explain the difficulties that arose from the bifurcated rule contained in article 89.

Article 90. Meaning of "location" of the grantor

51. With respect to paragraph 19, it was agreed that it should explain: (a) the concepts of "place of business" and "habitual residence"; (b) that the concept of "place of business" meant place of activities of a natural or legal person (including, for example, of a non-profit foundation) and not only commercial activities; (c) that the concept of "habitual residence" would in most cases apply only to natural persons; (d) that the determination of the place of central administration of a person as a matter of fact was not a difficult exercise for a court; and (e) that the law that would most likely govern insolvency would be the law of the place in which a person had the centre of its main interests, which was generally interpreted to be the place in which that person had its central administration.

Article 91. Relevant time for determining location

52. With respect to paragraph 20, it was agreed that it should refer to the determination of the applicable law by reference to the location of the asset or the grantor.

53. With respect to paragraph 21, it was agreed that: (a) the second sentence should clarify that it was based on the assumption that State B had enacted the Model Law or its conflict-of-laws provisions; (b) the reference to "actual" location in the third sentence should be deleted and that sentence should be aligned more closely with article 91, paragraph 1 (b); and (c) the reference to the time an issue arose as the time of the occurrence of an event which triggered an inquiry as to what law would be applicable should be further clarified.

54. With respect to paragraph 23, it was agreed that it should explain that article 91, paragraph 2, required that the rights of *all* competing claimants should be established before the change of location (including judgement creditors) and not just the rights of secured creditors.

Article 92. Exclusion of renvoi

55. With respect to paragraph 24, it was agreed that it should clarify that: (a) the purpose of article 92 was to "exclude" (rather than "reject") the doctrine of renvoi; and (b) the result of article 92 would be to exclude the entire body of the private international law rules of the law of the State whose law was applicable under the conflict-of-laws rules of the Model Law.

Article 93. Overriding mandatory rules and public policy (*order public*)

56. With respect to paragraphs 25 to 29, it was agreed that: (a) examples could be provided relating to both overriding mandatory provisions and public policy; (b) with respect to article 93, paragraphs 2 and 4, an example that involved the enforcement (rather than the creation) of a security right should be given; and (c) the place of arbitration and the place of enforcement should be further explained.

Article 94. Impact of commencement of insolvency proceedings on the law applicable to a security right

57. With respect to paragraph 30, it was agreed that it should: (a) give a few more typical examples of matters left to the law governing insolvency by reference to recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law; and (b) draw the attention of enacting States of the need to ensure coordination between their secured transactions law and the insolvency law.

Articles 95 and 96

58. The Working Group was generally satisfied with the substance of paragraphs 31 to 35.

Article 97. Security rights in rights to payment of funds credited to a bank account

59. With respect to paragraph 36, it was agreed that: (a) the rules contained in article 97 should be explained by reference to the discussion in the Secured Transactions Guide (see chap. X, paras. 49 and 50) rather than with the overly broad and largely inaccurate words "to avoid interfering with banking law and practices".

60. With respect to paragraph 38, it was agreed that the reference to "receiving deposits" should be deleted to avoid giving the impression that that activity was separate from the activity of maintaining bank accounts (see the definition of "bank account" in art. 2, subpara. (c)).

61. With respect to article 97, paragraph 3, it was agreed that the draft Guide to Enactment should provide guidance, including possible drafting suggestions, as to how the fall-back rules of article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary could be implemented.

Article 98. Third-party effectiveness of a security right in certain types of asset by registration

62. With respect to paragraph 41, it was agreed that the last sentence should place the discussion of the priority of a security right over the rights of the insolvency representative or the mass of creditors and judgment creditors in the proper context of articles 35-37 of the Model Law.

Article 99. Security rights in intellectual property

63. With respect to paragraphs 42-44, it was agreed that they should clarify: (a) the different types of intellectual property rights that could be the subject of a security right; (b) the national treatment of intellectual property rights embodied in international conventions by reference to the Intellectual Property Supplement (see paras. 297 to 300); (c) that another benefit of the rule in article 99 was that a security right in a portfolio of intellectual property rights protected under the laws of several States could be created under a single law; (d) a licensee of intellectual property could grant a security right only in its rights under the licence agreement; and (e) that the effectiveness of a security right against intellectual property right holders that were not grantors was outside the scope of article 99.

Article 100. Security rights in non-intermediated securities

64. It was agreed that the order of paragraphs 45 to 50 should be reviewed to ensure a logical flow of the comments included in those paragraphs.

65. With respect to paragraph 46, it was agreed that it should avoid giving examples of entities that might be legal persons in some jurisdiction but not in others.

66. With respect to paragraph 47, it was agreed that it should: (a) refer to the "law of business organizations" rather than "corporate law", since many entities might not be corporations; (b) explain the term "preferred shares"; and (c) clarify that not only lenders but also regulators and tax authorities might view subordinated debt as equity.

67. With respect to paragraph 48, it was agreed that it should clarify that article 95 would apply only by analogy, as it did not directly address the scenario envisaged in paragraph 48.

68. With respect to paragraph 54, it was agreed that the last sentence should clarify that the law applicable to the third-party effectiveness of a security right in equity securities would be the law of the State of the issuer's location, while the law applicable to the third-party effectiveness of a security right in debt securities would be the law governing the securities.

69. Subject to the above-mentioned changes (see paras. 40-68 above), the Working Group approved the substance of paragraphs 1 to 54 of document A/CN.9/WG.VI/WP.71/Add.6.

C. Chapter IX. Transition (A/CN.9/WG.VI/WP.71/Add.6)

Article 101. Amendment and repeal of other laws

70. With respect to paragraph 56, it was agreed that it should clarify that: (a) the Model Law was intended to be a complete system of secured transactions law "with respect to the assets subject to its scope", since the Model Law did not apply to certain types of movable asset; and (b) the enacting State ought to determine whether or not to address explicitly the issue of prior case law, as case law was not repealed.

71. With respect to paragraph 57, it was agreed that it should clarify that the enacting State should coordinate existing law with the new secured transactions law.

Article 102. General applicability of this Law

72. With respect to paragraph 58, it was agreed that it should: (a) follow more closely the language of article 102, paragraph 1 (a); and (b) be reviewed for clarity and coherence.

73. With respect to paragraph 59, it was agreed that it should clarify that the notion of "prior security right" in article 102, paragraph 1 (b), included: (a) rights, such as retention-of-title rights, that were not security rights under prior law but were treated as security rights under the new law; and (b) security rights in future assets (including assets acquired by the grantor after the entry into force of the new law enacting the Model Law), assuming that prior law permitted the creation of a security right in future assets (a matter that was to be determined under prior law in accordance with article 104).

74. With respect to paragraph 60, it was agreed that: (a) reference in the second sentence should be made to articles 103-106; and (b) its third sentence should be revised to better reflect the purpose of the remainder of the chapter. With respect to paragraph 61, it was agreed that it could be shortened.

Article 103. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law

75. With respect to paragraphs 62 and 63, it was agreed that: (a) they should explain the relationship between paragraphs 1 and 2 of article 103 more clearly; (b) ensure that no confusion arose from the distinction between substantive and procedural law issues; and (c) clarify that article 103, paragraph 2, referred to steps that constituted enforcement under prior law.

Article 104. Applicability of prior law to the creation of a prior security right

76. With respect to paragraphs 64 and 65, it was agreed that: (a) they should explain the relationship between article 102 and article 104 more clearly; and (b) the examples given therein should be simplified.

Article 105. Transitional rules for determining the third-party effectiveness of a prior security right

77. With respect to paragraphs 66-71, it was agreed that: (a) paragraph 67 should refer to a more typical example, such as a retention-of-title sale; (b) the transitional period in article 105, paragraph 1 (b), should be from one to two years, coordinated with the entry into force of the new law and determined on the basis of various considerations to be set out in the draft Guide to Enactment, such as the size and complexity of the economy and the extent of the changes introduced by the new law; and (c) they should be reviewed for clarity and coherence.

Article 106. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law

78. With respect to paragraph 72, it was agreed that the first sentence should be replicated in the commentary to articles 103-105.

79. With respect to paragraph 74, it was agreed that: (a) the words "and when no new competing rights arose after the new law became effective" should be added at the end of the last sentence; and (b) the revised sentence would be better placed in paragraph 73.

Article 107. Entry into force of this Law

80. The Working Group was generally satisfied with the substance of paragraphs 75 and 76.

81. Subject to the above-mentioned changes (see paras. 70-80 above), the Working Group approved the substance of paragraphs 55 to 76 of document A/CN.9/WG.VI/WP.71/Add.6.

D. General part of the draft Guide to Enactment (A/CN.9/WG.VI/WP.73, paras. 1-20)

Preface

82. The Working Group approved the substance of the preface unchanged.

Purpose of the draft Guide to Enactment

83. With respect to paragraph 3, it was agreed that it should clarify that information from the *travaux préparatoires* would be useful to legislators too, and not only to users of the text.

Purpose of the Model Law

84. The Working Group was generally satisfied with the substance of paragraph 4.

The Model Law as a tool for modernizing and harmonizing laws

85. With respect to paragraph 6, it was agreed that the reference to the term "deposit-taking institution" as an example of a term that might need to be adjusted could be retained on the understanding that reference would be made to the commentary on article 2, subparagraph (c), which clarified that the enacting State should use a term broad enough to include any institution authorized to receive deposits in any State whose law might be applicable (see A/CN.9/WG.VI/WP.73, para. 39).

Main features of the Model Law

86. With respect to paragraph 9, it was agreed that it should emphasize that one of the main reasons for preparing the Model Law was that it provided a higher degree of harmonization than the other UNCITRAL texts on which it was based.

87. With respect to paragraph 13, it was agreed that it should highlight that one of the main advantages of the Assignment Convention was that it was an instrument of unification of the law of States and provided a higher level of uniformity and transparency than a model law, which was an instrument of harmonization.

88. With respect to paragraph 14, it was agreed that: (a) paragraph 15 should be inserted right after the first sentence of paragraph 14 (as it dealt with the key objectives of the Model Law); and (b) the remaining part of paragraph 14 could be set out in a separate paragraph (as it dealt with the fundamental policies of the Model Law).

89. With respect to paragraph 17, it was agreed that: (a) the words "introduction of a case law reporting system" should be qualified with the words along the lines "when not already in place"; (b) the last sentence should highlight the need for the insolvency law to recognize in principle the effectiveness and priority of security rights; and (c) the revised paragraph 17 should be placed closer to paragraph 7, as both related to adjustments that needed to be made to the law implementing the Model Law or other law of the enacting State.

Assistance from the UNCITRAL Secretariat

90. The Working Group was generally satisfied with the substance of paragraphs 18-20.

91. Subject to the above-mentioned changes (see paras. 82-89 above), the Working Group approved the substance of paragraphs 1 to 20 of document A/CN.9/WG.VI/WP.73.

E. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.73, paras. 21-78)

Article 1. Scope of application

92. With respect to paragraph 22, it was agreed that: (a) it should further clarify the reasons for including outright transfers of receivables within the scope of the Model Law and for subjecting outright transfers of and security rights in receivables to the same rules (with the exception of enforcement); (b) the words "that are clearly not financing transactions" should be revised along the following lines "that did not function as financing transactions"; and (c) the term "agent" should be replaced with the more neutral term "representative".

93. With respect to paragraph 23, it was agreed that it should clarify that the reason for the exclusion of rights to receive payment under an independent undertaking was that the implementation of the relevant recommendations of the Secured Transactions Guide would have made the Model Law unduly complex.

94. With respect to paragraph 25, it was agreed that it should express more clearly the reasons for excluding intermediated securities along the lines provided for in the Secured Transaction Guide (see chap. I, para. 37).

95. With respect to paragraph 27, it was agreed that it should be aligned more closely with article 1, paragraph 3 (e), to convey the notion that certain types of asset were to be excluded to the extent that other laws governed such types of asset.

96. With respect to the placement of paragraphs 28-30 (on specialized secured transactions and registration regimes), it was agreed that they should be revised to refer to the relevant issues (third-party effectiveness, priority, registration and conflict of laws) in a summary fashion with cross-references to the relevant paragraphs and recommendations of the Secured Transactions Guide.

97. With respect to paragraph 33, it was agreed that additional examples should be provided to explain the relationship between secured transactions law and consumer-protection laws, such as in the case of enforcement, where the consumer-

protection law might prohibit enforcement against a grantor or a debtor of a receivable that was a consumer.

98. With respect to paragraph 34, it was agreed that: (a) a reference to it might be made in paragraph 33 as it dealt with the general issue of statutory limitations; (b) the second sentence should be retained to provide useful guidance; and (c) the third sentence should end after the words "does not apply to contractual limitations" as article 1, paragraph 6, only dealt with statutory limitations.

99. As a drafting matter, it was suggested that the draft Guide to Enactment should refer to the respective provision explained in each paragraph rather than generally to the Model Law.

Article 2. Definitions and rules of interpretation

Acquisition security right

100. With respect to paragraph 38, it was agreed that it should clarify that the holder of an acquisition security right could be either a bank or a seller.

Bank account

101. With respect to paragraph 39, it was agreed that the last sentence should refer to "any institution authorized to receive deposits in *any* State whose law may be applicable".

Competing claimant

102. With respect to paragraph 41, it was agreed that it should refer to "steps necessary under other law of the enacting State to acquire a right in an encumbered asset".

Default

103. With respect to paragraph 44, it was agreed that reference should be made to the debtor's (rather than the grantor's) failure to perform the secured obligation, as if the grantor was a different person, it would not necessarily owe payment of the secured obligation or commit any other act that would constitute default.

Grantor

104. With respect to paragraph 47, it was agreed that it should clarify that a person that was not the owner but had a right to use an asset under a lease agreement could create a security right in that right.

Proceeds

105. With respect to paragraph 58, it was agreed that it should be revised to address rights in and limitations to rights in proceeds (rather than in original encumbered assets).

Securities

106. With respect to paragraph 64, it was agreed that it should: (a) distinguish between payment obligations that were securities and payment obligations that were not; and (b) explain that the definition of the term "securities" in the Model Law might differ from the definition of that term in securities regulations, the purpose of which might be different from the purpose of the Model Law (i.e. not to regulate security rights but rather protect public markets).

Security agreement

107. With respect to paragraph 66, it was agreed that it should clarify that, while a retention-of-title sale would not *create* title, under the functional approach followed in the Model Law, it would "provide for the creation of a security right".

Article 3. Party autonomy

108. In the context of its discussion of paragraph 73, the Working Group agreed that the draft Guide to Enactment (e.g. in the context of article 13) should clarify that, while a grantor might be liable for breach of a negative pledge agreement, the security right created would not be ineffective on the sole ground that it was created in breach of a negative pledge agreement.

109. With respect to paragraph 74, it was agreed that it should clarify that: (a) if other law allowed parties to agree to resolve any dispute with respect to their security agreement or security right by one of the alternative dispute resolution methods set out in article 3, paragraph 3, nothing in the Model Law would affect such an agreement; (b) article 3, paragraph 3, was based on the understanding (rather than the assumption) that alternative dispute resolution was important in particular for developing countries; and (c) article 3, paragraph 3, was intended to recognize the importance of alternative dispute resolution and did not prejudice the discussion of arbitrability, the protection of the rights of third parties or access to justice.[7]

Article 4. General standards of conduct

110. With respect to paragraph 76, it was agreed that it should: (a) clarify that the standards of good faith and commercial reasonableness applied to the exercise of the rights and the performance of obligations that any person might have under the Model Law (and not just the grantor); (b) provide examples of commercially reasonable behaviour; and (c) avoid suggesting that the standard of "commercial reasonableness" was a subjective standard.

Article 5. International origin and general principles

111. With respect to paragraphs 77 and 78, it was agreed that they should be clarified by reference to appropriate explanations included in other texts of UNCITRAL that contained a provision like article 5.

112. Subject to the above-mentioned changes (see paras. 92-111 above), the Working Group approved the substance of paragraphs 21 to 78 of document A/CN.9/WG.VI/WP.73.

F. Chapter II. Creation of a security right (A/CN.9/WG.VI/WP.73, paras. 79-114)

General rules

113. With respect to paragraph 79 it was agreed that, in view of their importance, the provisions on security rights in non-intermediated securities should not be mentioned as an example of asset-specific provisions that might be omitted.

Article 6. Creation of a security right and requirements for a security agreement

114. With respect to paragraph 83, it was agreed that: (a) it should clarify that article 6, paragraph 3, stated that a written agreement was required and set out the requirements for a written agreement; (b) it should explain that a written agreement was required because of the reasons mentioned in the Secured Transactions Guide

[7] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 98.

(see chap. II, para. 30); and (c) it should explain the situation in which written form might serve evidentiary purposes giving the example of an oral agreement that would subsequently be confirmed in writing.

115. With respect to paragraph 85, it was agreed that it should clarify that possession was a substitute of a written agreement.

Articles 7 and 8

116. The Working Group was generally satisfied with the substance of paragraphs 86 to 89.

Article 9. Description of encumbered assets and secured obligations

117. With respect to paragraph 91, it was agreed that it should clarify that article 9, paragraph 2, was an application of the principle in article 8, subparagraph (c), that a security right might encumber a generic category of movable assets.

Articles 10-12

118. The Working Group was generally satisfied with the substance of paragraphs 92 to 100.

Article 13. Contractual limitations on the creation of a security right in receivables

119. With respect to paragraph 102, it was agreed that examples should be given to clarify the different agreements envisaged therein.

Article 14. Personal or property rights securing or supporting payment or other performance of encumbered receivables or other intangible assets, or negotiable instruments

120. With respect to paragraph 107, it was agreed that it should refer to: (a) accessory or secondary guarantees or suretyships; (b) a security right in movable or immovable property; and (c) a secured creditor having to make further registration.

Article 15. Rights to payment of funds credited to a bank account

121. With respect to paragraph 111, it was agreed that it should clarify that the consent of the deposit-taking institution would not be required even if there was an agreement between the grantor and the deposit-taking institution limiting the grantor's right to create a security right in its right to payment of the funds credited to its bank account.

Articles 16-17

122. The Working Group was generally satisfied with the substance of paragraphs 112 to 114.

123. Subject to the above-mentioned changes (see paras. 113-122 above), the Working Group approved the substance of paragraphs 79 to 114 of document A/CN.9/WG.VI/WP.73.

G. Chapter III. Effectiveness of a security right against third parties (A/CN.9/WG.VI/WP.73, paras. 115-133)

Article 18. Primary methods for achieving third-party effectiveness

124. The Working Group was generally satisfied with the substance of paragraph 115.

Article 19. Proceeds

125. With respect to paragraph 119, it was agreed that it should clarify that article 18 or 19 or both would apply, depending on the description of the encumbered assets in the security agreement and the registered notice. In that connection, it was agreed that that matter should be also clarified in the commentary on article 10 that dealt with the creation of a security right in proceeds.

126. With respect to paragraph 120, it was agreed that it contained a rule of interpretation that applied to all time periods suggested in the draft Guide to Enactment and should thus be moved to the commentary on article 2 on definitions and rules of interpretation.

Article 20. Tangible assets commingled in a mass or transformed into a product

127. With respect to paragraph 121, it was agreed that it should refer to the automatic third-party effectiveness of the security right in the mass or product once the security right in the assets commingled was effective against third parties.

Articles 21-23

128. The Working Group was generally satisfied with the substance of paragraphs 122 to 125.

Article 24. Acquisition security rights in consumer goods

129. With respect to paragraph 126, it was agreed that the fourth sentence should refer to the circumstances in which it would be commercially practicable for the secured creditor to register, while the last part of the last sentence referring to the cost of enforcement could be deleted.

Article 25. Rights to payment of funds credited to a bank account

130. With respect to paragraph 127, it was agreed that it should clarify that the precise action for the secured creditor to become the account holder would depend on other law to which the deposit-taking institution was subject and practice, as well as on the terms of the account agreement.

Article 26. Negotiable documents and tangible assets covered by negotiable documents

131. With respect to paragraph 130, it was agreed that the suggested time period should be ten rather than five days for the security right to remain effective against third parties during the short period of time the grantor or other person needed in order to take actions with respect to the encumbered assets like loading and unloading.

Article 27. Uncertificated non-intermediated securities

132. With respect to paragraph 131, it was agreed that it should include a reference to the definition of control agreement in article 2, subparagraph (g) (i).

Additional third-party effectiveness and method for negotiable instruments and non-intermediated securities

133. The Working Group was generally satisfied with the substance of paragraphs 132 and 133.

134. Subject to the above-mentioned changes (see paras. 124-133 above), the Working Group approved the substance of paragraphs 115 to 133 of document A/CN.9/WG.VI/WP.73.

V. Future work

135. At the close of its considerations, having approved the substance of the draft Guide to Enactment as a whole, the Working Group decided to submit it to the Commission for final consideration and adoption at its fiftieth session, which was scheduled to take place in Vienna from 3 to 21 July 2017.

136. The Working Group noted with appreciation the draft programme of the Fourth International Colloquium on Secured Transactions, which was scheduled to take place in Vienna from 15 to 17 March 2017 (see www.uncitral.org/uncitral/en/commission/colloquia_security.html) pursuant to a request by the Commission at its forty-ninth session in 2016. The Working Group also noted that a report of the Colloquium would be submitted to the Commission for its consideration of future work in the area of secured transactions and related topics at its fiftieth session.[8] In the discussion, particular interest was expressed in the following topics of the Colloquium: contractual guide on secured transactions, warehouse receipt financing; ADR (including online dispute resolution) in secured transactions and technical assistance to States in the field of secured transactions.

[8] See footnote 6 above.