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Draft legislative guide on secured transactions

Note by the Secretariat

Background remarks

1. At its thirty-third session in 2000, the Commission considered a report of the Secretary-General on possible future work in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable. Furthermore, in order to ensure the optimal benefits from law reform, including financial-crisis prevention, poverty reduction and facilitation of debt financing as an engine for economic growth, any effort on security interests would need to be coordinated with efforts on insolvency law.¹

2. At its thirty-fourth session in 2001, the Commission considered a further report by the Secretariat (A/CN.9/496). At that session, the Commission agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial



system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.²

3. While some concerns were expressed with respect to the feasibility of work in the field of secured credit law, the Commission noted that those concerns were not widely shared and went on to consider the scope of work.³ It was widely felt that work should focus on security interests in goods involved in a commercial activity, including inventory. It was also agreed that securities and intellectual property should not be dealt with. As to intellectual property, it was stated that there was less need for work in that area, the issues were extremely complex and any efforts to address them should be coordinated with other organizations, such as the World Intellectual Property Organization (WIPO).⁴ As to the form of work, the Commission considered that a model law might be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include, where feasible, model legislative provisions.⁵

4. After discussion, the Commission decided to entrust a working group with the task of developing “an efficient legal regime for security rights in goods involved in a commercial activity, including inventory, to identify the issues to be addressed, such as the form of the instrument, the exact scope of the assets that can serve as collateral ...”.⁶ Emphasizing the importance of the matter and the need to consult with representatives of the relevant industry and practice, the Commission recommended that a two- to three-day colloquium be held.⁷

5. At its first session (New York, 20-24 May 2002), Working Group VI (Security Interests) had before it a first, preliminary draft legislative guide on secured transactions, prepared by the Secretariat (A/CN.9/WG.VI/WP.2 and Add.1-12), a report on an UNCITRAL-CFA international colloquium, held in Vienna from 20 to 22 March 2002 (A/CN.9/WG.VI/WP.3), and comments by the European Bank for Reconstruction and Development (EBRD) (A/CN.9/WG.VI/WP.4). At that session, the Working Group considered chapters I to V and X (A/CN.9/WG.VI/WP.2 and Add.1-5 and 10), and requested the Secretariat to revise these chapters (A/CN.9/512, para. 12). At the same session, the Working Group agreed on the need to ensure, in cooperation with Working Group V (Insolvency Law), that issues relating to the treatment of security rights in insolvency proceedings would be addressed consistently with the conclusions of Working Group V on the intersection of the work of Working Group V and Working Group VI (see A/CN.9/512, para. 88 and A/CN.9/511, paras. 126-127).

6. At its thirty-fifth session in 2002, the Commission had before it the report of Working Group VI (Security Interests) on the work of its first session (A/CN.9/512). The Commission expressed its appreciation to the Working Group for the progress

made in its work. It was widely felt that, with that legislative guide, the Commission had a great opportunity to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among nations.⁸

7. In addition, the feeling was widely shared that the timing of the Commission's initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission's own initiative in the field of insolvency law. In that connection, the Commission noted with particular satisfaction the efforts undertaken by Working Group V (Insolvency Law) and Working Group VI towards coordinating their work on a subject of common interest such as the treatment of security interests in the case of insolvency proceedings. Strong support was expressed for such coordination, which was generally thought to be of crucial importance for providing States with comprehensive and consistent guidance with respect to the treatment of security interests in insolvency proceedings. The Commission endorsed a suggestion made to revise the insolvency chapter of the draft legislative guide on secured transactions in light of the core principles agreed by Working Groups V and VI (see A/CN.9/511, paras. 126-127 and A/CN.9/512, para. 88). The Commission stressed the need for continued coordination and requested the secretariat to consider organizing a joint session of the two Working Groups in December 2002.⁹

8. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security interests in goods, including inventory. The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.¹⁰

9. At its second session (Vienna, 17-20 December 2002), the Working Group considered chapters VI, VII and IX (A/CN.9/WG.VI/WP.2 and Add.6, 7 and 9) of the first preliminary draft guide on secured transactions, prepared by the Secretariat. At that session, the Working Group requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/531, para. 15). In conjunction with that session and in accordance with suggestions made at the first session of the Working Group (see A/CN.9/512, para. 65), an informal presentation of the registration systems of security rights in movable property of New Zealand and Norway was held. Immediately before that session, Working Groups V (Insolvency Law) and VI (Security Interests) held their first joint session (Vienna, 16-17 December 2002), during which the revised version of former chapter X (new chapter IX; A/CN.9/WG.VI/WP.6/Add.5) on insolvency was considered. At that session, the Secretariat was requested to prepare a revised version of that chapter (see A/CN.9/535, para. 8).

10. At its third session (New York, 3-7 March 2003), the Working Group considered chapters VIII, XI and XII of the first preliminary draft guide on secured transactions and chapters II and III of the second version of the draft Guide (A/CN.9/WG.VI/WP.2/Add.8, A/CN.9/WG.VI/WP.2/Add.11, A/CN.9/WG.VI/WP.2/Add.12, A/CN.9/WG.VI/WP.6/Add.2 and A/CN.9/WG.VI/WP.6/Add.3) and requested the Secretariat to prepare revised versions (A/CN.9/532, para. 13). In

conjunction with that session, an informal presentation was made of the recently completed secured transactions law in the Slovak Republic, which was supported by the World Bank and by EBRD.

11. At its thirty-sixth session in 2003, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its second and third sessions (A/CN.9/531 and A/CN.9/532), as well as the report of the first joint session of Working Group V and VI (A/CN.9/535). The Commission commended the Working Group for the progress in its work and expressed its appreciation to Working Group V and Working Group VI for the coordination of their work in relation to the treatment of security rights in insolvency proceedings. The Commission also noted with appreciation the presentation of modern registration systems of security rights in movable property and the plan of the Secretariat to prepare a paper addressing technical registration-related issues.¹¹

12. In addition, the Commission emphasized the importance of coordination with organizations with interest and expertise in the field of secured transactions law, such as Unidroit, the Hague Conference on Private International Law, the World Bank, the International Monetary Fund, EBRD and the Asian Development Bank. Reference was made to the current work of Unidroit on security rights in securities, to the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems to the extent they concerned secured transactions, to the Model Law on Secured Transactions and the Principles of EBRD, to the Asian Development Bank's Guide to Movables Registries and to the Inter-American Model Law on Secured Transactions of 2002 prepared by the Organization of American States. Reference was also made to the need to coordinate with the Hague Conference with respect to the conflict-of-laws chapter of the draft legislative guide on secured transactions, in particular with respect to the law applicable to the enforcement of security rights in the case of insolvency.¹²

13. With respect to the scope of work, the Commission noted suggestions that the Working Group should consider covering, in addition to goods (including inventory), trade receivables, letters of credit, deposit accounts and intellectual property rights in view of their economic importance as security for credit. As to the substance of the draft legislative guide, the Commission noted statements that, while the draft guide should discuss various workable approaches, it should also include recommendations and, that if alternative recommendations had to be prepared, their relative merits, in particular for developing countries and for countries with economies in transition, should also be discussed.¹³

14. After discussion, the Commission confirmed the mandate given to Working Group VI at its thirty-fourth session to develop an efficient legal regime for security rights in goods, including inventory, and its decision at its thirty-fifth session that the mandate should be interpreted widely to ensure an appropriate work product, which should take the form of a legislative guide. The Commission also confirmed that it was up to the Working Group to consider the exact scope of its work and, in particular, whether trade receivables, letters of credit, deposit accounts and intellectual and industrial property rights should be covered in the draft legislative guide.¹⁴

15. At its fourth session (Vienna, 8-12 September 2003), the Working Group considered chapters I (Introduction), II (Key Objectives), IV (Creation),

IX (Insolvency) and paragraphs 1 to 41 of chapter VII (Priority), and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/543, para. 15).

16. At its fifth session (New York, 22-25 March 2004), the Working Group considered the summary and recommendations of chapters V (Publicity), VI (Priority), X (Conflicts of Laws) and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/549, para. 16).

17. At their second joint session (New York, 26 and 29 March 2004), Working Groups V (Insolvency Law) and VI (Security Interests) considered the treatment of security interests in the draft Legislative Guide on Insolvency Law on the basis of document A/CN.9/WG.V/WP.71 (see A/CN.9/550, para. 11).

18. At its thirty-seventh session in 2004, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its fourth and fifth sessions (A/CN.9/543 and A/CN.9/549), as well as the report of the second joint session of Working Groups V and VI (A/CN.9/550). The Commission commended the Working Group for the progress achieved so far and expressed its appreciation to Working Groups V and VI for the progress made during their second joint session, at which they had considered pending issues of common interest.¹⁵

19. In addition, the Commission noted with appreciation the progress made by the Working Group in the coordination of its work on conflict of laws with the Hague Conference on Private International Law and in particular the plans for a joint meeting of experts. The Commission also commended the efforts to coordinate with the International Institute for the Unification of Private Law (Unidroit), which was preparing a text on security interests in securities. The Commission also expressed its appreciation for the coordination with the World Bank, which was preparing principles and guidelines for effective insolvency and creditor rights systems, and in particular for the agreement that the World Bank text would form with the draft legislative guide on secured transactions a single international standard.¹⁶

20. The Commission noted with interest that a preliminary consolidated set of recommendations might be ready by early 2005. The Commission also welcomed the preparation of additional chapters on various types of asset, such as negotiable instruments and documents, bank accounts, letters of credit and intellectual property rights. In that connection, while the importance of those types of asset was generally recognized, it was stated that including them in the draft guide should not be at the expense of slowing down work with respect to the core assets within the scope of the draft guide (i.e. goods, including inventory, and receivables).¹⁷

21. After discussion, the Commission confirmed the mandate given to Working Group VI at the thirty-fourth session of the Commission and subsequently confirmed at its thirty-fifth and thirty-sixth sessions. The Commission also requested the Working Group to expedite its work so as to submit the draft guide to the Commission for final adoption as soon as possible and, hopefully, in 2006.¹⁸

22. At its sixth session (Vienna, 27 September-1 October 2004), the Working Group considered chapters I and II (Introduction and key objectives), III (Basic approaches to security), IV (Creation), V (Effectiveness against third parties), VII (Pre-default rights and obligations), VIII (Default and enforcement), X (Conflict of laws) and XI (Transition) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/570,

para. 8). At that session, the Working Group noted with appreciation that the conflicts-of-laws chapter of the Guide was being prepared in close cooperation with the Hague Conference on Private International Law (A/CN.9/570, para. 75).

23. At its seventh session (New York, 24-28 January 2005), the Working Group considered chapters X (Conflict of laws), XII (Acquisition financing devices) and XVI (Security rights in bank accounts) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/574, para. 8).

Notes

¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

² *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 351.

³ *Ibid.*, paras. 352-354.

⁴ *Ibid.*, paras. 354-356.

⁵ *Ibid.*, para. 357.

⁶ *Ibid.*, para. 358.

⁷ *Ibid.*, para. 359.

⁸ *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 202.

⁹ *Ibid.*, para. 203.

¹⁰ *Ibid.*, para. 204.

¹¹ *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 217.

¹² *Ibid.*, para. 218.

¹³ *Ibid.*, paras. 220-221.

¹⁴ *Ibid.*, para. 222.

¹⁵ *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 75.

¹⁶ *Ibid.*, para. 76.

¹⁷ *Ibid.*, para. 77.

¹⁸ *Ibid.*, para. 78.