United Nations A/62/17 (Part II)

General Assembly

Distr.: General
8 January 2008

Original: English

Sixty-second session

Report of the United Nations Commission on International Trade Law on the work of its resumed fortieth session*

Vienna, 10-14 December 2007

Contents

* The present document is an advance version of the report of the United Nations Commission on International Trade Law on the work of its resumed fortieth session, held in Vienna from 10 to 14 December 2007. It will appear in final form, together with the report on the work of the first part of the fortieth session, held in Vienna from 25 June to 12 July 2007, as *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17).

V.08-50096 (E) 190208 200208

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the resumed fortieth session of the Commission, held in Vienna from 10 to 14 December 2007.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The resumed fortieth session of the Commission was opened on 10 December 2007.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 to 60 States. The current members of the Commission, elected on 17 November 2003 and on 22 May 2007, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Algeria (2010), Armenia (2013), Australia (2010), Austria (2010), Bahrain (2013), Belarus (2010), Benin (2013), Bolivia (2013), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2010), Czech Republic (2010), Ecuador (2010), Egypt (2013), El Salvador (2013), Fiji (2010), France (2013), Gabon (2010), Germany (2013), Greece (2013), Guatemala (2010), Honduras (2013), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2013), Kenya (2010), Latvia (2013), Lebanon (2010), Madagascar (2010), Malaysia (2013), Malta (2013), Mexico (2013), Mongolia (2010), Morocco (2013), Namibia (2013), Nigeria (2010), Norway (2013), Pakistan (2010), Paraguay (2010), Poland (2010), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Serbia (2010), Singapore (2013), South Africa (2013),

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407), and 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417). By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

Spain (2010), Sri Lanka (2013), Switzerland (2010), Thailand (2010), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2010), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

5. With the exception of Armenia, Bahrain, Benin, China, Colombia, Ecuador, Fiji, Gabon, Honduras, Israel, Kenya, Madagascar, Malta, Mongolia, Morocco, Nigeria and Singapore, all the members of the Commission were represented at the resumed fortieth session.

6. The resumed fortieth session was attended by observers from the following States: Argentina, Belgium, Brazil, Burundi, Croatia, Democratic Republic of the Congo, Dominican Republic, Indonesia, Libyan Arab Jamahiriya, Panama, Peru, Philippines, Portugal, Romania, Slovakia, Slovenia, Tunisia, Turkey and Zambia.

7. The resumed fortieth session was also attended by observers from the following organizations:

(a) *United Nations system*: World Bank and International Monetary Fund;

(b) *Intergovernmental organizations*: Commission of the African Union, East African Community, European Community and International Institute for the Unification of Private Law;

(c) *Non-governmental organizations invited by the Commission*: American Bar Association, Association française des entreprises privées, Commercial Finance Association, European Centre for Peace and Development, European Law Students' Association, Forum for International Commercial Arbitration, International Bar Association, International Insolvency Institute, International Swaps and Derivatives Association, International Union of Marine Insurance and Union internationale des avocats.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission, and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

9. The following officers, elected during the first part of the fortieth session, continued in their offices:

Chairperson:	Dobrosav Mitrović (Serbia)
Vice-Chairpersons:	Biu Adamu Audu (Nigeria)
	Horacio Bazoberry (Bolivia)
	Kathryn Sabo (Canada)

10. In the absence of the Chairperson, the Commission, at its 855th meeting, on 10 December 2007, decided that Kathryn Sabo (Canada) would be the acting Chairperson at the resumed fortieth session.

11. At its 859th meeting, on 12 December, the Commission elected M. R. Umarji (India) Rapporteur of its resumed fortieth session.

D. Agenda

12. The agenda of the resumed fortieth session, as adopted by the Commission at its 855th meeting, on 10 December 2007, was as follows:

1. Opening of the resumed fortieth session.
2. Adoption of the agenda.
3. Adoption of a draft UNCITRAL legislative guide on secured transactions and possible future work.
4. Working methods of UNCITRAL.
5. Dates of future meetings.
6. Adoption of the report.

E. Adoption of the report

13. At its 863rd and 864th meetings, on 14 December 2007, the Commission adopted the present report by consensus.

III. Draft UNCITRAL Legislative Guide on Secured Transactions

A. General considerations

14. The Commission had before it a complete set of revised recommendations and revised commentaries on the draft UNCITRAL Legislative Guide on Secured Transactions (A/CN.9/637 and Add.1-8 and A/CN.9/631/Add.1-3) and the reports of Working Group VI (Security Interests) on its eleventh session (A/CN.9/617), held in Vienna from 4 to 8 December 2006, and its twelfth session (A/CN.9/620), held in New York from 12 to 16 February 2007. The Commission expressed its appreciation to the Secretariat for the preparation of an extremely large number of complex documents (about 300 pages) in a short period of time (between the first part of the fortieth session and the resumed fortieth session).

15. The Commission recalled that, during the first part of its fortieth session (A/62/17 (Part I), para. 158), it had adopted recommendation 4, subparagraphs (b) and (c), on the scope of the draft Guide as to intellectual property, securities and financial contracts (A/CN.9/631, chapter II), and recommendations 74-230 (A/CN.9/631, chapters VII-XIV); and had approved the substance of the commentaries to chapters VII-XIV (A/CN.9/631/Add.4-11) and on intellectual property (A/CN.9/631/Add.1) and the substance of the terminology (A/CN.9/631/Add.1, paras. 13-19). The Commission also recalled that, as decided during the first part of its fortieth session (A/62/17 (Part I), para. 159), the following materials would be reviewed by the Commission at its resumed session:

recommendations 1-73 (A/CN.9/631, as revised in document A/CN.9/637); the commentaries to chapters I-VI (A/CN.9/631/Add.1-3); recommendations on the extension of a retention-of-title right or a financial lease right to proceeds (non-unitary approach), if necessary; and the commentary on the alternatives to the recommendations on the third-party effectiveness of a retention-of-title right or a financial lease right to proceeds (unitary and non-unitary approaches), if necessary. Moreover, the Commission recalled that the question of whether the terminology and the recommendations of the draft Guide should be reproduced not only at the end of each chapter but also in a separate annex to the draft Guide had been referred to its resumed fortieth session (A/62/17 (Part I), para. 159).

B. Consideration of the draft Guide

1. Introduction, chapter I (Key objectives) and section C of chapter II (Scope of application and other general rules)

16. It was noted that the material in the introduction, in chapter I and in chapter II, section C, of the draft Guide (A/CN.9/631/Add.1) could be revised and reorganized into a new introduction as follows:

(a) Section A (Purpose of the Guide) should include the material contained in document A/CN.9/631/Add.1, paragraphs 1-12;

(b) Section B (Examples of financing practices covered in the Guide) should include the material contained in document A/CN.9/631/Add.1, paragraphs 57-77;

(c) Section C with a new heading (Key objectives and fundamental principles of an effective and efficient secured transactions regime) should include the material contained in document A/CN.9/631/Add.1, paragraphs 20-31, and additional material discussing some fundamental principles of the draft Guide that would link the general key objectives of the draft Guide to the specific recommendations;

(d) A new section D (Implementing a new secured transactions law) should be added to provide guidance to national legislators on the different ways in which the recommendations in the draft Guide could be implemented, taking into account existing legislation, legislative methods and drafting techniques and the need for dissemination of information to all those who would implement the law (judges, arbitrators and practitioners) in order to ensure a cohesive regime;

(e) Section E (Terminology) should include the material contained in document A/CN.9/637, paragraphs 1-6;

(f) Section F (Recommendations) should contain recommendation 1 from chapter I (Key objectives) of document A/CN.9/637, appropriately aligned with section C of the new introduction (see subparagraph (c) above).

17. The Commission considered drafting suggestions on those new sections. With regard to the key objective of balancing the interests of affected persons, it was suggested that the commentary should make an express reference to the efforts of the Commission to harmonize secured transactions and insolvency laws. With regard to the fundamental principle of an integrated and functional approach, it was suggested that, to properly reflect both the unitary and the non-unitary approaches

to acquisition financing, the commentary should include a provision that, to the maximum extent possible, all transactions that create a right in all types of asset meant to secure the performance of an obligation (i.e. fulfil security functions) should be considered as security rights and regulated by the same rules or, at least, by the same principles. With regard to the fundamental principle of priority among multiple security rights, it was suggested that the commentary should discuss separately the significance of the availability of multiple security rights and the importance of a clear priority rule governing multiple security rights granted by the same grantor in the same assets. With regard to the fundamental principle of equality of treatment of all creditors that provided credit to enable grantors to acquire tangible assets, it was suggested to remove the earlier reference whereby retention-of-title sellers would be able to benefit from the complete range of rights given to secured creditors, which in some ways exceeded the rights available to retention-of-title sellers under existing law in most States. There was sufficient support for all those suggestions.

18. With regard to the terminology contained in document A/CN.9/637, the following changes were agreed upon:

(a) In subparagraph (n)(ii), the definition of the term "control" with respect to a right to payment of funds credited to a bank account, the text commencing with the word "evidenced" to the end of the subparagraph should be deleted, and a new definition – of the term "control agreement" – should be added along the following lines: "'Control agreement' means an agreement between the depositary bank, the grantor and the secured creditor, evidenced by a signed writing, according to which the depositary bank has agreed to follow instructions from the secured creditor with respect to the payment of funds credited to the bank account without further consent from the grantor;"

(b) The definition of an "issuer" of a negotiable document should be revised to read as follows: "'Issuer' of a negotiable document means the person that is obligated to deliver the tangible assets covered by the document under the law governing negotiable documents, whether or not that person has agreed to perform all obligations arising from the document;"

(c) To align it with the note to the definition in document A/CN.9/637, the note following the definition of "Right to receive the proceeds under an independent undertaking" should be revised as follows: "… Thus, what is received upon honour of (i.e. as a result of a complying presentation under) an independent undertaking constitutes the 'proceeds' of the right to receive the proceeds under an independent undertaking."

19. The Secretariat was also requested to consider deleting the subparagraph indications before the definitions, if that would not be inconsistent with the editorial rules of the United Nations.

20. Subject to the above-mentioned changes and any consequential editorial amendments, the Commission: (a) approved the reorganizing of the material in the introduction, chapter I and chapter II, section C, of the draft Guide into a new introduction, as set out in paragraph 16 above; (b) approved the substance of the commentary on the new introduction; (c) adopted recommendation 1; and (d) agreed that the terminology should be included not only in section E of the new

introduction but also, together with the recommendations (that would also be reproduced at the end of each chapter), in a separate annex to the draft Guide.

2. Chapter II (Scope of application and other general rules) and chapter III (Basic approaches to security)

(a) Recommendations (A/CN.9/637, recommendations 2-12)

21. With regard to recommendation 3, the Commission noted that the commentary would explain the reasons why recommendations in the draft Guide (with the exception of certain recommendations on enforcement) applied to all assignments of receivables, without transforming outright transfers into security rights.

22. With regard to recommendation 5, it was agreed that reference should also be made to the recommendations dealing with security rights in attachments to immovable property along the following lines: "The law should not apply to immovable property. However, recommendations 21, 25 (chapter on the creation of a security right), 34, 43, 48 (chapter on the effectiveness of a security right against third parties), 84, 85 (chapter on the priority of a security right), 161, 162 (chapter on the enforcement of a security right), 180 and 192 (chapter on acquisition financing) may affect rights in immovable property."

23. After discussion, the Commission adopted recommendations 2-12, reordered in accordance with the order of the revised commentary (see para. 24 (d) below).

(b) Commentary (A/CN.9/631/Add.1, paras. 32-56 and 78-141)

24. It was noted that the material in chapters II and III of the draft Guide contained in document A/CN.9/631/Add.1 could be revised and reorganized into a new chapter I (Scope of application and basic approaches to secured transactions) as follows:

(a) Section A (Scope of application) should include the material contained in document A/CN.9/631/Add.1, paragraphs 32-54, appropriately updated to reflect the decisions of the Commission during the first part of its fortieth session (A/62/17 (Part I), para. 158);

(b) Section B (Basic approaches to security) should include the material contained in document A/CN.9/631/Add.1, paragraphs 78-141, appropriately updated to reflect the decisions of the Commission during the first part of its fortieth session (A/62/17 (Part I), para. 158);

(c) Section C (Two key themes common to all chapters of the Guide) should include the material contained in document A/CN.9/631/Add.1, paragraphs 55 and 56, appropriately updated to reflect the decisions of the Commission during the first part of its fortieth session (A/62/17 (Part I), para. 158);

(d) Section D should include recommendations 2-12 from document A/CN.9/637, ordered in accordance with subparagraphs (a)-(c) above.

25. The Commission considered drafting suggestions with regard to those new sections. With regard to new chapter I, section B (Basic approaches to security), it was suggested that the draft Guide should further explain the rationale for all the different approaches taken with respect to security rights and their historical evolution. There was sufficient support for that suggestion. It was also suggested

that security rights in payment rights arising under or from a financial contract should be excluded from the draft Guide, whether the financial contract was governed by a netting agreement or not. The Commission recalled that it had already adopted recommendation 4, subparagraph (c), in document A/CN.9/631, excluding only payment rights arising under or from financial contracts governed by netting agreements, during the first part of its fortieth session (in document A/CN.9/637, the issues are addressed in recommendation 4, subparagraphs (c) and (d)) (A/62/17 (Part I), paras. 148-151 and 158).

26. Subject to the above-mentioned changes and any consequential editorial amendments, the Commission approved: (a) the reorganizing of the material in chapters II and III of the draft Guide into a new chapter I, as set out in paragraph 24 above; and (b) the substance of the commentary on the new chapter I.

3. Chapter IV (Creation of a security right (effectiveness as between the parties))

(a) Recommendations (A/CN.9/637, recommendations 13-28)

27. With regard to recommendation 14, the Commission confirmed that it was necessary that the secured creditor (and not just its representative) be identified in the security agreement, because: (a) the agreement would be the basis for the enforcement of the security right; and (b) no confidentiality concerns arose as, unlike a notice, the agreement would not be publicly available. It was also agreed that recommendation 14 would need to include language along the lines of recommendation 57, subparagraph (d), in order to provide a basis for the inclusion in the registered notice of the maximum amount for which the security right might be enforced. In that connection, it was agreed that the commentary should explain that the requirement for a maximum amount could be satisfied even if it was mentioned in a series of documents that referred to each other rather than in a single document.

28. With regard to recommendation 15, it was agreed that the text should be revised to provide that writing was sufficient by itself or in conjunction with a course of conduct.

29. Subject to the changes mentioned above, the Commission adopted recommendations 13-28.

(b) Commentary (A/CN.9/631/Add.1, paras. 142-247)

30. The Commission approved the substance of the commentary to chapter IV subject to the following changes and any consequential editorial amendments:

(a) Paragraph 167 should explain that, if the grantor relinquished possession of an encumbered asset and a written agreement did not already exist, a written agreement would be necessary for a security right to continue to exist after the grantor relinquished possession of the asset;

(b) Paragraphs 174-176 should be revised to provide a more balanced presentation of the two approaches with respect to a maximum amount to be set out in the security agreement and to separate that issue from the issue of security rights securing future obligations;

(c) Paragraph 182, fourth sentence, should be modified along the following lines: “Subject to rules …, … the agreement must identify that asset as the grantor’s right as a lessee under the lease;”

(d) Paragraph 184, second sentence, should be modified to clearly identify future assets as assets acquired by the grantor or coming into existence after the conclusion of the security agreement, while referring to the creation of a security right rather than to a disposition;

(e) Paragraph 190, last sentence, should refer to assets in general and not just to inventory;

(f) Paragraph 196 should be revised to indicate that a floating charge was indeed a security right (and accordingly the words “so called” and “merely” should be deleted) and should briefly discuss the difference between a floating charge and a fixed charge;

(g) Paragraphs 191-199 should refer to limitations with respect to security rights in all assets based on consumer-protection law or, alternatively, that discussion should be merged with the discussion on identification of assets;

(h) Paragraph 222 should elaborate on the limitation of a security right in tangible assets to the value of those assets before they were commingled in a mass or processed into a product;

(i) Paragraphs 229-232 should explain the reasons why anti-assignment clauses were invalidated with respect to the assignment of certain types of receivables but not with respect to the assignment of other types of receivables;

(j) Paragraph 247, second sentence, should be revised along the following lines: “As a result, … , provided that the security right in the document is created while the goods are covered by the document of title.”

4. Chapter V (Effectiveness of a security right against third parties)

(a) Recommendations (A/CN.9/637, recommendations 29-53)

31. With regard to recommendation 40, it was agreed that, to align it with the formulation of recommendation 45, the text should be revised along the following lines:

> “The law should provide that, if the proceeds are not described in the registered notice as provided by recommendation 39 and do not consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account, the security right in the proceeds continues to be effective against third parties for [a short period of time to be specified] days after the proceeds arise. If the security right in such proceeds is made effective against third parties by one of the methods referred to in recommendation 32 or 34 before the expiry of that time period, the security right in the proceeds continues to be effective against third parties thereafter.”

32. Subject to the above-mentioned change, the Commission adopted recommendations 29-53.

(b) Commentary (A/CN.9/631/Add.2)

33. The Commission approved the substance of the commentary to chapter V subject to the following changes and any consequential editorial amendments:

(a) Paragraph 17 should discuss "specialized control" as a concept existing in some jurisdictions only;

(b) Paragraph 20 should further explain that the approach addressed was the approach recommended in the draft Guide;

(c) Paragraph 42 should explain that the approach, under which judgement creditors were given a kind of a property right in an encumbered asset, should be compatible with insolvency law;

(d) Paragraphs 95-98 should clearly state that the issue was a change in the location of the asset or the grantor where that was the connecting factor for the application of the conflict-of-law rules;

(e) Paragraph 115 should refer to "some States" rather than to "other States" and should discuss the various approaches in a balanced way.

5. Chapter VI (The registry system)

(a) Recommendations (A/CN.9/637, recommendations 54-72)

34. With regard to recommendation 54, subparagraph (h), and recommendations 57-59, it was agreed that reference to the term "identifier" should be made in a consistent way.

35. In response to a question, it was noted that recommendation 57 required only the information necessary for third parties in order: (a) to avoid unnecessary information that could confuse third parties or lead to errors that might invalidate notices; (b) to standardize the information required; and (c) to send the message that, unlike immovable property title registries, movable property security right registries required minimal information.

36. The Commission considered the following new recommendations in document A/CN.9/637 (contained in the note after recommendation 57):

> "X. The law should provide that an error in the identifier or address of the secured creditor or its representative does not render a registered notice ineffective as long as it has not seriously misled a reasonable searcher.
>
> "Y. The law should provide that an error in the description of certain encumbered assets does not render a registered notice ineffective with respect to other assets sufficiently described.
>
> "Z. The law should provide that an error in the information provided in the notice with respect to the duration of registration and the maximum amount secured, if applicable, does not render a registered notice ineffective."

37. It was noted that the suggested new recommendations were intended to deal with errors with respect to information in the notice other than the grantor's identifier (which was dealt with in recommendation 58).

38. While some doubt was initially expressed as to whether those recommendations were necessary, the Commission decided after discussion that they should be retained, as they struck an appropriate balance between the interests of registrants and the interests of searchers by preserving the effectiveness of a registered notice in cases in which a reasonable searcher would not be seriously misled by an erroneous statement in the notice.

39. However, several suggestions were made as to the formulation of the suggested new recommendations. One suggestion was that recommendation X should be recast in a positive way to provide that a notice containing an incorrect statement of the identifier or the address of the secured creditor or its representative would not be ineffective unless it would seriously mislead a reasonable searcher. Another suggestion was that the same rule should apply to notices with erroneous descriptions of the encumbered assets, a matter addressed in recommendation Y. Another suggestion was that recommendation Y could refer to descriptions of encumbered assets that did not meet the requirements of recommendation 63. Another suggestion was that recommendation Z should include a provision whereby protection would be afforded to third parties that suffered damage after reasonably relying on notices with an erroneous statement of the maximum amount of the secured obligation or the duration of the registration. Yet another suggestion was that reference should be made not to "errors" (which included both a subjective and an objective criterion) but to "incorrect statements" (i.e. the factual result of a subjective error) by a registrant.

40. There was sufficient support for all those suggestions. It was agreed that recommendation X could address incorrect statements with respect to the description of the encumbered assets as well, while recommendation Y could be retained as it was, as it addressed a separate matter (i.e. whether an incorrect statement as to the description of certain assets invalidated the notice with respect to other assets covered in the notice although they were sufficiently described).

41. In addition, the suggestion was made that reference should be made to the fact of registration rather than to the registered notice, as the objective of those recommendations was to preserve registration as a mode of achieving third-party effectiveness. That suggestion was opposed on the grounds that registration should be effective, as, in any case, something was registered and the question was whether the particular registered notice was effective.

42. In response to a question, it was noted that the notion of "reasonable searcher" did not mean that, in order to be reasonable, a searcher would have to search for matters outside the registry to determine, for example, whether an error had been made in the notice. In response to another question, it was noted that, if the law prescribed a limited duration of registration (see recommendation 66), an erroneous statement would not affect the duration of the registration to the extent permitted by the law. It was also noted that whether or not the registry would reject an erroneous statement in that regard was a matter of the technical design of the registry that would not affect the duration of registration under the law. In addition, it was noted that, if the law allowed parties to determine the duration of registration (see recommendation 66), erroneous statements of the duration of registration would be corrected by the system, as, if the registrant paid for 5 years but stated 10 years on the notice, the notice would be cancelled after the expiry of 5 years, while, if the

registrant paid for 10 years but wrote 5 years on the notice, the registrant could amend the notice at any time (see recommendation 70).

43. With respect to the maximum amount addressed in the suggested new recommendation Z, it was noted that, if the notice referred to a higher amount than the amount mentioned in the security agreement, the registrant could only enforce its security right with priority up to the amount mentioned in the security agreement. It was also noted that, if the notice referred to a lower amount than the amount mentioned in the security agreement, the registrant could enforce its security right against the grantor up to the outstanding amount of the secured obligation, but would have priority over other competing claimants only up to the lower amount mentioned in the notice. That discussion confirmed that a reference should be made to the maximum amount in the security agreement in order for recommendation 57, subparagraph (d), and new recommendation Z to operate (see para. 27 above).

44. With regard to recommendation 61, it was agreed that the words "after the change in the grantor's identifier but" should be inserted before the words "before registration of the amendment" in subparagraphs (a) and (b).

45. With regard to recommendation 62, it was noted that the main policy consideration at issue was how to balance the rights of two innocent parties subsequent to a transfer of an encumbered asset (i.e. the original secured creditor of the grantor and a subsequent secured creditor of the transferee of the encumbered asset).

46. Diverging views were expressed. One view was that a secured creditor that held a security right in assets of a grantor but that was not aware of the transfer of an encumbered asset by the grantor should be protected in the sense that the third-party effectiveness of its security right should be preserved (even though the security right would extend to the proceeds received by the grantor). It was stated that such an approach would be in line with the general rule in recommendation 31 (Continued third-party effectiveness after a transfer of the encumbered asset) and would provide an appropriate result. It was also observed that, otherwise, a grantor could defeat the right of a secured creditor by transferring an encumbered asset, a result that could discourage the extension of secured credit. In addition, it was said that the secured creditor of the transferee would have to conduct due diligence and clarify the chain of title of the asset in any case, and could thus discover the existence of security rights granted by prior owners of the asset. In that connection, it was mentioned that the general security rights registry was not designed to replace due diligence or confirmation of the chain of title of assets.

47. Another view was that the secured creditor of the transferee of the asset, having searched the registry against the name of the transferee and having found no previously registered security right, should also be protected in the sense that the security right of the secured creditor of the grantor would not be effective as against the secured creditor of the transferee. It was stated that, otherwise, the secured creditor of the transferee could not rely on the registry to ensure its priority, a result that could undermine the reliability of the registry and lead to the transferee being unable to obtain secured credit.

48. Several suggestions were made in an effort to bridge the gap between the above-mentioned views, including the following: (a) imposing on the grantor or the

transferee an obligation to inform the secured creditor of the grantor; and (b) providing that the right of the secured creditor of the transferor remained effective against third parties until a short period of time after the secured creditor acquired knowledge or was notified of the transfer, and then only if the secured creditor had registered a notice against the name of the transferee. Those proposals failed to attract sufficient support. It was stated that the breach of the grantor's obligation to inform the secured creditor would simply create another contractual cause of action, which would be of no use to the secured creditor in the case of the grantor's insolvency. It was also observed that requiring knowledge on the part of the secured creditor would inadvertently lead to litigation with respect to matters such as whether the secured creditor had knowledge, what constituted knowledge and when knowledge was acquired. In addition, it was said that requiring that written notice be given to the secured creditor would not assist secured creditors of the transferee, as they would be unaware of that notice.

49. Recognizing that there was no fully satisfactory solution and that the various suggested solutions had both advantages and disadvantages, the Commission decided that recommendation 62 should be revised to state that the law should address the issue and that the commentary should discuss the various policy options and their advantages and disadvantages.

50. In the discussion of recommendation 62, diverging views were also expressed as to the relationship between recommendations 61 and 62. One view was that those recommendations were closely linked and that, therefore, the same decision should be made for both. It was stated that a change in the name of the grantor was in effect involved also in the case of the transfer of an encumbered asset. Another view was that the issues addressed in those recommendations were slightly different and, therefore, could be addressed differently. It was stated that, while a secured creditor could find out with relative ease a name change of its grantor, that was not the case with a security right granted by a person that acquired the asset from the grantor. After deliberation, it was decided that recommendation 61 should remain unchanged and that the commentary should explain the rationale for the difference in the approaches followed in recommendations 61 and 62.

51. With regard to recommendation 64, it was agreed that the text should be revised to ensure that a notice could be registered before or after the creation of a security right or before or after the conclusion of a security agreement.

52. With regard to recommendation 66, it was agreed that the word "time" in the third sentence should be replaced with the word "duration".

53. Subject to the changes mentioned above, the Commission adopted recommendations 54-72.

(b) Commentary (A/CN.9/631/Add.3)

54. The Commission approved the substance of the commentary to chapter VI subject to the following changes and any consequential editorial amendments:

(a) The introductory section to the commentary should include a more systematic explanation as to why the Guide contained a separate chapter addressing the registry system, the difference between property and personal rights and why a

registry system was an important mechanism to indicate the potential existence of rights in assets;

(b) Paragraph 8 should clarify that it was the very diversity of approaches that had led to the solution of a notice-based general rights registry;

(c) Paragraph 18 should avoid implying that the issue of public access arose only in the context of notice-based registry systems;

(d) Paragraph 22 should make it clear that even in electronic systems equality of access was a point of general concern;

(e) In paragraph 27, the last sentence should be moved to paragraph 28, and the latter paragraph should make it clear that the prohibition against searching against the creditor name was intended to prevent public searching but not searching for internal purposes;

(f) Paragraph 34, in which searching against certain classes of assets is discussed, should be expanded to address the criteria that would need to be satisfied to permit that type of search (for instance, using a unique identifier for the asset concerned, such as a serial number, and restricting searching to high-value assets for which there was a resale market);

(g) Paragraphs 57 and 58 should be revised to ensure a balanced discussion of the advantages and disadvantages of requiring a maximum amount of the secured obligation to be stated in the notice (discussing separately security rights in future obligations);

(h) In paragraph 66 all legal structures under which legal and natural persons could conduct business, including partnerships, should be discussed;

(i) Paragraphs 67-69 should be redrafted in the light of the decisions of the Commission regarding recommendations 61 and 62 (see paras. 44-50 above).

6. Chapter VII (Priority of a security right)

(a) Recommendations (A/CN.9/637, recommendations 73-106)

55. With regard to recommendation 73, it was agreed that the text should be revised to clarify that it did not apply to priority conflicts between secured creditors that took a security right in an asset from different grantors (see also para. 57 (a), below). It was also agreed that the commentary to recommendations 73 and 76 should clarify that a secured creditor that took a security right in an encumbered asset from a buyer of the asset took the asset subject to a security right (that was granted in the asset by the seller of the asset and was effective against third parties) on the basis of the general principle that a person cannot give to another person more rights that it has (*nemo dat quod non habet*).

56. Recalling that it had adopted the recommendations of chapter VII during the first part of its fortieth session (A/62/17 (Part I), para. 158), and subject to the above-mentioned change, the Commission adopted revised recommendations 73-106.

(b) Commentary (A/CN.9/637/Add.1)

57. Recalling that it had approved the substance of the commentary to chapter VII during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary subject to the following changes and any consequential editorial amendments:

(a) It should be clarified (in the definitions, in the recommendations and in the commentary) that rules on priority were designed to deal with competing rights of claimants that were granted a right from the same grantor;

(b) Third-party effectiveness issues should be clearly distinguished from priority issues and repetition should be avoided;

(c) With regard to recommendation 79, the commentary should include discussion of a different approach, under which a transferee of an encumbered asset would take the asset free of the security right if the security right secured a credit extended after the expiry of a certain period of time.

7. Chapter VIII (Rights and obligations of the parties to a security agreement)

(a) Recommendations (A/CN.9/637, recommendations 107-113)

58. With regard to recommendation 109 and, by extension, recommendation 69, it was agreed that, to align the text with recommendation 137, recommendations 109 and 69 should refer to the termination of all commitments to extend credit. Accordingly, it was agreed that recommendation 109 should be revised along the following lines:

> "The secured creditor must return an encumbered asset in its possession if, all commitments to extend credit having been terminated, the security right has been extinguished by full payment or otherwise."

59. Recalling that it had adopted the recommendations of chapter VIII during the first part of its fortieth session (A/62/17 (Part I), para. 158), and subject to the above-mentioned change, the Commission adopted revised recommendations 107-113.

(b) Commentary (A/CN.9/637/Add.2)

60. Recalling that it had approved the substance of the commentary to chapter VIII during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary subject to the following change and any consequential editorial amendments: with regard to recommendation 108, the commentary should explain that it applied only to security rights in tangible assets subject to possession, with respect to which the secured creditor in possession should be obliged to preserve both the asset and its value.

8. Chapter IX (Rights and obligations of third-party obligors)

(a) Recommendations (A/CN.9/637, recommendations 114-127)

61. With regard to recommendation 124, subparagraph (b), it was agreed that, to make it clear that reference was made to a security right created by a transferor of an independent undertaking, the text should be revised along the following lines:

"The rights of a transferee of an independent undertaking are not affected by a security right in the right to receive the proceeds under the independent undertaking created by the transferor or any prior transferor."

62. Recalling that it had adopted the recommendations of chapter IX during the first part of its fortieth session (A/62/17 (Part I), para. 158), and subject to the above-mentioned change, the Commission adopted revised recommendations 114-127.

(b) Commentary (A/CN.9/637/Add.3)

63. Recalling that it had approved the substance of the commentary to chapter IX during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary and requested the Secretariat to make any consequential changes to reflect the above-mentioned change in the recommendations.

9. Chapter X (Enforcement of a security right)

(a) Recommendations (A/CN.9/637, recommendations 128-173)

64. Recalling that it had already adopted the recommendations of chapter X during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission noted that some changes might be necessary in order to address issues that had arisen during the finalization of the commentaries after the close of the first part of the fortieth session.

65. With regard to recommendation 137, it was agreed that the grantor should be entitled to exercise its right to pay the secured obligation not "until the disposition of the encumbered asset by the secured creditor" but until the earlier of either such disposition or the conclusion of an agreement of the secured creditor to dispose of the encumbered asset. It was also agreed that the same change should be made in recommendation 142.

66. With regard to recommendation 144, subparagraph (c), which addressed the secured creditor's remedy of obtaining possession of an encumbered asset extrajudicially, the Commission agreed that reference should be made not only to the grantor but also to the person in possession of the asset, as the main purpose of the provision was to permit extrajudicial enforcement but without a breach of the peace or public order.

67. The suggestion was also made that a new subparagraph should be added to recommendation 144 to provide that the requirements of subparagraphs (a), (b) and (c) did not need to be met if the grantor affirmatively consented at the time the secured creditor sought to obtain possession of the encumbered asset extrajudicially. The Commission noted that, under recommendation 130, after default, the grantor and any other person owing performance of the secured obligation were entitled to waive their rights under the provisions on enforcement. It also noted that, if the suggested new subparagraph were added in recommendation 144, it could place in doubt the application of the rule contained in recommendation 130 in the case of other recommendations in which there was no explicit reference to waiver of rights and remedies. For those reasons, the Commission decided that a new subparagraph

was not necessary, but that the matter could usefully be discussed in the commentary.

68. With regard to recommendation 148, subparagraph (c), it was agreed that, to ensure consistency with article 16, paragraph 1, of the United Nations Convention on the Assignment of Receivables in International Trade (2001),[2] the text should be revised to ensure that it was sufficient if the notice to the grantor was in the language of the security agreement. With regard to the notice to other parties, it was widely felt that it should be in a language that was reasonably expected to be understood by its recipients.

69. With regard to recommendation 149, it was agreed that the bracketed text should be replaced with a new asset-specific recommendation along the following lines:

> "The law should provide that, in the case of collection or other enforcement of a receivable, negotiable instrument or enforcement of a claim, the enforcing secured creditor must apply the net proceeds of its enforcement (after deducting costs of enforcement) to the secured obligation. The enforcing secured creditor must pay any surplus remaining to the competing claimants that, prior to any distribution of the surplus, notified the enforcing secured creditor of the competing claimant's claim, to the extent of that claim. The balance remaining, if any, must be remitted to the grantor."

70. With regard to recommendation 152, it was agreed that the bracketed text should be deleted, because: (a) it was superfluous in the light of recommendations 8 and 130, which provided for party autonomy; and (b) if that text were retained, a similar proviso would need to be added to all recommendations to which party autonomy would apply.

71. With regard to recommendation 156, it was agreed that the commentary should explain that, once the grantor asked the secured creditor to make a proposal, the secured creditor had to notify all the parties listed in recommendation 154, including the grantor, who could object, as the grantor's proposal did not need to be so specific as to make it impossible for the grantor to object to the specific terms of the secured creditor's proposal.

72. The Commission agreed that, to deal with the enforcement of a security right in an attachment to a movable asset, a new recommendation should be added along the following lines:

> "The law should provide that a secured creditor with a security right in an attachment to a movable asset is entitled to enforce its security right in the attachment. A creditor with higher priority is entitled to take control of the enforcement process, as provided in recommendation 142. A creditor with lower priority may pay off the obligation secured by the security right of the enforcing secured creditor in the attachment. The enforcing secured creditor is liable for any damage to the movable asset caused by the act of removal other than any diminution in its value attributable solely to the absence of the attachment."

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[2] General Assembly resolution 56/81, annex.

73. With regard to recommendation 164, subparagraph (a), it was agreed that the text should refer not only to recommendation 128 (which provided the general standard of conduct in the context of enforcement) but also to recommendation 129 (which provided that that standard could not be waived unilaterally or varied by agreement).

74. With regard to recommendation 165, it was agreed that the recommendation should be revised to make it consistent with the definition of "assignment" in the terminology section and should refer to a receivable assigned "otherwise than by an outright transfer" rather than "by way of security".

75. Recalling that it had adopted the recommendations of chapter X during the first part of its fortieth session (A/62/17 (Part I), para. 158), and subject to the changes mentioned above, the Commission adopted revised recommendations 128-173.

(b) Commentary (A/CN.9/637/Add.4)

76. Recalling that it had approved the substance of the commentary to chapter X during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary and requested the Secretariat to make any consequential changes in order to reflect the above-mentioned changes in the recommendations and the decisions taken by the Commission with respect to the commentary in the context of its discussion of the recommendations.

10. Chapter XI (Acquisition financing)

(a) Recommendations (A/CN.9/637, recommendations 174-199)

77. Recalling that it had already adopted the recommendations of the chapter on acquisition financing rights (which was chapter XII in A/CN.9/631) during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission noted that two alternatives were presented in recommendations 176 and 189 to implement the decision taken by the Commission during the first part of its fortieth session (A/62/17 (Part I), para. 63). It was also noted that, unlike alternative A, which drew a distinction between tangible assets other than inventory and inventory and provided different rules for those types of asset, alternative B did not draw such a distinction and provided the same rule for all tangible assets (namely that registration of a notice within a certain period of time after delivery of the tangible assets was sufficient).

78. In addition, the Commission noted a suggestion by the Secretariat that the same approach might be followed with respect to acquisition security rights in proceeds,[3] with the difference that the right in the proceeds would be a normal security right and not an acquisition security right. Moreover, the Commission noted that recommendations 183 and 198 had been moved from the chapter on the impact of insolvency on a security right to the chapter on acquisition financing to avoid giving the impression that the characterization of acquisition financing transactions as security or ownership devices was a matter of insolvency law, a result that would

[3] See in A/CN.9/637, the notes in recommendations 182 and 196.

run counter to the UNCITRAL Legislative Guide on Insolvency Law[4] (see, for example, footnote 6 to recommendation 35 of that Guide, which is reproduced as footnote 41 of the draft UNCITRAL Legislative Guide on Secured Transactions contained in document A/CN.9/637). It was also noted that a new recommendation should be added to provide that, if a seller failed to register within the prescribed time period a retention-of-title right in a tangible asset that became an attachment to immovable property, it should have a normal security right.[5] Furthermore, it was noted that the commentary would explain that it flowed from the concept of ownership that the right of a retention-of-title seller would have priority over an acquisition security right granted by the buyer.[6]

79. With regard to recommendation 187, it was agreed that, to align it with recommendation 22, the text should be revised along the following lines:

> "The law should provide that a buyer or lessee may create a security right in a tangible asset that is the object of a retention-of-title right or a financial lease right. The maximum amount realizable from the security right is the asset's value in excess of the amount owing to the seller or financial lessor."

80. The Commission adopted revised recommendations 174-199 subject to the above-mentioned changes.

(b) Commentary (A/CN.9/637/Add.5)

81. Recalling that it had approved the substance of the commentary to the chapter on acquisition financing rights during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary and requested the Secretariat to make any consequential changes to reflect the above-mentioned changes in the recommendations.

11. Chapter XII (Conflict of laws)

(a) Recommendations (A/CN.9/637, recommendations 200-224)

82. With regard to recommendation 202, it was agreed that the commentary should explain that a possible effect of the recommendation might be that lenders could not confidently lend against existing tangible assets without investigating both the history of the location of the assets and whether they constituted assets subject to specialized registration under the law of any State in which they were previously located or whether they might be the subject of a specialized registration in any other State. It was mentioned that the same point applied to title certificates. It was also mentioned that recommendation 202 gave no guidance in cases of assets being registered in specialized registries in more than one State.

83. With regard to recommendation 204, it was agreed that the text should be revised along the following lines:

> "The law should provide that a security right in a tangible asset (other than a negotiable instrument or a negotiable document) in transit or to be

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[4] United Nations publication, Sales No. E.05.V.10.

[5] See in A/CN.9/637/Add.5, the note in para. 182.

[6] See in A/CN.9/637/Add.5, the note in para. 178.

exported from the State in which it is located at the time of the creation of the security right may be created and made effective against third parties under the law of the State of the location of the asset at the time of creation as provided in recommendation 200 or, provided that the asset reaches the State of its ultimate destination within [a short period of time to be specified] days after the time of creation of the security right, under the law of the State of its ultimate destination."

84. With regard to recommendation 205, the concern was expressed by some member States that it might not provide an appropriate applicable law rule for a number of important practices, such as receivables arising under or from financial contracts that were not governed by netting agreements (and were not excluded from the scope of the draft Guide), receivables arising from insurance contracts and receivables assigned in the context of securitization transactions. It was stated that recommendation 205 could create problems for those practices, as: (a) the place of the grantor's central administration was not always easy to determine; (b) the grantor could change the place of its central administration; and (c) the debtor of the receivable could not be protected through application of the law of the grantor's location. It was observed that certainty could be achieved through a rule that would provide that the applicable law would be the law governing the receivable, as the parties to that contract would always be familiar with the law governing the receivable (or the contract from which the receivable arose) and that law would meet their expectations. In order to address that concern, several suggestions were made. One suggestion was that recommendation 205 should be revised to provide more flexibility, indicating that there were other possible approaches (by the addition, for example, of the word "ordinarily" after the words "the law should"). Another suggestion was that the commentary should further explain the merits of an approach based on the law governing the receivable.

85. The concern was also expressed that the interrelationship among recommendations 45, 205 and 217 was not clear. It was stated that, in particular in cases where an assignor made an assignment, changed the place of its central administration and then made another assignment, the draft Guide did not provide a clear solution as to what the law applicable to those assignments would be. It was noted that, under recommendation 217: (a) the creation of the security right (the proprietary effects as between the parties) would be subject to the law of the grantor's central administration at the time of the creation of the security right (so both assignments would be effective as between the parties); and (b) the third-party effectiveness and priority of the security right would be subject to the law of the grantor's central administration at the time the issue arose (which would mean that the law of the new location of the grantor-assignor would govern third-party effectiveness and priority). However, it was also noted that, under recommendation 45, a secured creditor (assignee) that met the requirements for third-party effectiveness in the first location of the grantor (assignor in the case of a receivable) would have a short period of time to make its security right effective against parties under the law of the new location of the grantor in order to maintain its third-party effectiveness and priority (so the first grantor-assignor would be protected). While some doubt was expressed as to whether that analysis provided a fully satisfactory solution to the problem of the change of the grantor's location, it was widely felt that the commentary should include that useful analysis to clarify the interaction among recommendations 45, 205 and 217.

86. Broad support was expressed for further elaboration in the commentary on the approach based on the law governing the receivable (separately from the approach based on the "location" of the receivables (*lex situs*)). It was suggested that a starting point in that direction might be a text along the following lines: "Some States have a conflict-of-laws rule for intangibles that differs from the rule in recommendation 205. Those States contemplate capital market or other transactions and seek perhaps to establish greater certainty by looking not to the law of the grantor's location but rather to the law governing the intangible. The rule that looks to the law governing the intangible has the advantages of avoiding the risk of a subsequent change of location of the grantor and a single, stable conflict-of-laws rule for transactions involving successive assignments of intangibles among assignors located in different countries. It is not as advantageous for financing practices involving the assignment of intangibles in bulk, as those practices may be governed by laws of multiple countries. Moreover, it shifts the risk of a change of location of the grantor to the risk of a change in the law governing the intangible." While it was agreed that that text was a good starting point, some concern was expressed for the last two sentences. To address that concern, it was suggested that the last two sentences should be deleted or, at least, replaced with more neutral language. In response, it was noted that, in the conflict-of-laws chapter, the same approach should be followed as in all the chapters of the draft Guide, and thus the commentary of the conflict-of-laws chapter should discuss the various approaches setting out their advantages and disadvantages in a way that would ultimately explain the rationale of the recommendation adopted by the Commission.

87. However, the suggestion to revise recommendation 205 was objected to. It was stated that recommendation 205 had already been adopted by the Commission during the first part of its fortieth session (A/62/17 (Part I), para. 158). It was observed that recommendation 205 was in line with the United Nations Assignment Convention, adopted relatively recently, in 2001, on the basis of a draft convention prepared by UNCITRAL. It was also said that all the arguments mentioned in the discussion of recommendation 205 had been considered at length in the process that had led to the preparation of the United Nations Assignment Convention and had been reconsidered during the preparation of the draft Guide. In addition, it was mentioned that, while the law governing the receivable could apply well to practices that involved one existing receivable, it could not provide certainty in the typical case in receivables financing of present and future receivables assigned in bulk, because, at the time of the assignment, parties could not determine the law applicable to matters such as third-party effectiveness and priority with respect to future receivables. Moreover, it was said that the law governing the receivable could not provide certainty in the case of insolvency of the grantor (assignor), which was the main risk in receivables financing, unless the assignor, the assignee and the debtor were located in the same country. By contrast, it was stated, the law of the grantor's location: (a) could be easily determined in most cases (even if, in some exceptional cases, there could be some doubt as to the location of the central administration of the grantor-assignor); and (b) more importantly, was likely to be the place in which the main insolvency proceeding with respect to the grantor would be opened, thus ensuring that the law governing priority and the law governing the ranking of claims in insolvency proceedings would be the law of one and the same jurisdiction.

88. After discussion, the Commission decided that recommendation 205 should not be reopened, although the commentary could further elaborate on the approach based on the law governing the receivable (as an approach distinct from the *lex situs* approach). It was widely felt that, as was done in all commentaries, the commentary on that issue should discuss the approaches taken in the various legal systems, setting out their advantages and disadvantages in a way that would explain the reasons why, on balance, the Commission recommended the rule contained in recommendation 205. It was agreed that the commentary should explain the interaction among recommendations 45, 205 and 217, in particular with a view to explaining how the problem of a change of the grantor's location would be addressed under the draft Guide.

89. With regard to recommendation 214, subparagraph (a), it was agreed that the reference to the law applicable to the relationship between the issuer of a negotiable document and the holder of a security right in the document should be deleted, in order to avoid any inconsistency with the approaches currently taken in the transport laws of different States and a draft convention on the carriage of goods [wholly or partly] [by sea] being prepared by UNCITRAL.

90. With regard to recommendation 220, it was noted that it had been moved from chapter XIV (on the impact of insolvency on a security right) and had been revised in order to avoid inconsistencies with the UNCITRAL Legislative Guide on Insolvency Law. The latter text, it was noted, addressed the law applicable to the validity and effectiveness of rights and claims in insolvency, and not the law applicable to the general priority or the enforcement of a security right. It was also noted that the commentary would: (a) explain that the first sentence of the recommendation introduced a conflict-of-laws rule that was both generally acceptable and in line with the UNCITRAL Legislative Guide on Insolvency Law (in that its second sentence preserved the application of the *lex fori concursus*); and (b) would cross-refer to the commentary to chapter XIV addressing the impact of insolvency on a security right.

91. Recalling that it had adopted the recommendations of the chapter on private international law (which was chapter XIII in document A/CN.9/631) during the first part of its fortieth session (A/62/17 (Part I), para. 158), and subject to the changes mentioned above, the Commission adopted revised recommendations 200-224.

(b) Commentary (A/CN.9/637/Add.6)

92. Recalling that it had approved the substance of the commentary to the chapter on private international law during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary and requested the Secretariat to make any consequential changes to reflect the above-mentioned changes in the recommendations and the decisions taken by the Commission with respect to the commentary in the context of its discussion of the recommendations.

12. Chapter XIII (Transition)

(a) Recommendations (A/CN.9/637, recommendations 225-231)

93. With regard to recommendation 226, it was agreed that the recommendation should not be changed but that the commentary should explain that a secured

creditor that had initiated enforcement proceedings under the law in force before the effective date of the new law should have the option of continuing those proceedings under the old law or abandoning those proceedings and initiating proceedings under the new law.

94. With regard to recommendation 231, it was agreed that the reference to "status" should be changed to "priority status" in order to clarify that recommendation 231 simply explained the meaning of the term "priority status" used in recommendation 230.

95. Recalling that it had adopted the recommendations of the chapter on transition (which was chapter XIV in document A/CN.9/631) during the first part of its fortieth session (A/62/17 (Part I), para. 158), and subject to the changes mentioned above, the Commission adopted revised recommendations 225-231.

(b) Commentary (A/CN.9/637/Add.7)

96. Recalling that it had approved the substance of the commentary to the chapter on transition during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary and requested the Secretariat to make any consequential changes to reflect the decisions taken by the Commission with respect to the commentary in the context of its discussion of the recommendations.

13. Chapter XIV (The impact of insolvency on a security right)

(a) Recommendations (A/CN.9/637, recommendations 232-239)

97. Recalling that it had adopted the definitions and recommendations of the chapter on insolvency (which was chapter XI in document A/CN.9/631) during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission adopted the revised recommendations 232-239.

(b) Commentary (A/CN.9/637/Add.8)

98. Recalling that it had adopted the commentary to the chapter on insolvency during the first part of its fortieth session (A/62/17 (Part I), para. 158), the Commission approved the substance of the revised commentary to chapter XIV on the impact of insolvency on a security right. It also agreed that the commentary should explain that the term "financial contract" was defined in both the draft UNCITRAL Legislative Guide on Secured Transactions and the UNCITRAL Legislative Guide on Insolvency Law in accordance with article 5, subparagraph (k), of the United Nations Assignment Convention and that the note to the definition of the term in the draft Guide[7] merely explained the definition.

C. Adoption of the UNCITRAL Legislative Guide on Secured Transactions

99. At the close of its deliberations on the draft Guide, the Commission agreed that the Secretariat should be given a mandate to make the changes approved by the

[7] See A/CN.9/637, para. 6, note to the definition of "financial contract".

Commission, as well as any consequential editorial amendments, avoiding making changes where it was not clear whether a change was editorial or substantive. The Commission also agreed that the Secretariat should review the entire draft Guide with a view to removing any redundant material.

100. At its 864th meeting, on 14 December 2007, the Commission adopted the following resolution:

The United Nations Commission on International Trade Law,

Recognizing the importance to all countries of efficient secured transactions regimes promoting access to secured credit,

Recognizing also that access to secured credit is likely to assist all countries, in particular developing countries and countries with economies in transition, in their economic development and in fighting poverty,

Noting that increased access to secured credit on the basis of modern and harmonized secured transactions regimes will demonstrably promote the movement of goods and services across national borders,

Noting also that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Noting further the importance of balancing the interests of all stakeholders, including grantors of security rights, secured and unsecured creditors, retention-of-title sellers and financial lessors, privileged creditors and the insolvency representative in the grantor's insolvency,

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

Expressing its appreciation to international intergovernmental and non-governmental organizations active in the field of secured transactions law reform for their participation in and support for the development of the draft UNCITRAL Legislative Guide on Secured Transactions,

Expressing also its appreciation to Kathryn Sabo, Chairperson of Working Group VI (Security Interests) and the acting Chairperson at the resumed fortieth session of the Commission, as well as to the Secretariat, for their special contribution to the development of the draft UNCITRAL Legislative Guide on Secured Transactions,

Noting with satisfaction that the draft UNCITRAL Legislative Guide on Secured Transactions is consistent with the UNCITRAL Legislative Guide on Insolvency Law with regard to the treatment of security rights in insolvency proceedings,

1. *Adopts* the UNCITRAL Legislative Guide on Secured Transactions, consisting of the text contained in documents A/CN.9/631/Add.1-3 and A/CN.9/637 and Add.1-8, with the amendments adopted by the Commission at its fortieth session, and authorizes the Secretariat to edit and finalize the text of the Guide pursuant to the deliberations of the Commission at that session;

2. *Requests* the Secretary-General to disseminate broadly the text of the UNCITRAL Legislative Guide on Secured Transactions, transmitting it to Governments and other interested bodies, such as national and international financial institutions and chambers of commerce;

3. *Recommends* that all States utilize the UNCITRAL Legislative Guide on Secured Transactions to assess the economic efficiency of their secured transactions regimes and give favourable consideration to the Guide when revising or adopting legislation relevant to secured transactions, and invites States that have used the Guide to advise the Commission accordingly.

IV. Working methods of UNCITRAL

101. The Commission recalled that, during the first part of its fortieth session, it had had before it observations and proposals made by France on the working methods of the Commission (A/CN.9/635) and had engaged in a preliminary exchange of views on those observations and proposals. The Commission also recalled that, at that session, it had been agreed that the issue of working methods would be placed as a specific item on the agenda of the Commission at its resumed fortieth session (A/62/17 (Part I), para. 11). The Commission further recalled that, in order to facilitate informal consultations among all interested States, the Secretariat had been requested to prepare a compilation of procedural rules and practices established by UNCITRAL or by the General Assembly in its resolutions regarding the work of the Commission. It was further recalled that the Secretariat had been requested to make the necessary arrangements, as resources permitted, for representatives of all interested States to meet on the day prior to the opening of the resumed fortieth session of the Commission and, if possible, during the resumed session (A/62/17 (Part I), paras. 234-241).

102. At its resumed session, the Commission had before it, in addition to the observations and proposals made by France on the working methods of the Commission (A/CN.9/635), observations made by the United States of America on the same topic (A/CN.9/639) and, as requested, a note by the Secretariat on the rules of procedure and methods of work of the Commission (A/CN.9/638 and Add.1-6). The Commission noted that, in accordance with its request made during the first part of its fortieth session (see para. 101 above), the Secretariat had made arrangements for representatives of all interested States to meet prior to the opening of the resumed fortieth session in order to hold informal consultations on the rules of procedure and methods of work of the Commission. It was reported that the informal consultations were held among all interested States on 7 December 2007.

103. It was recalled that the Commission, during the first part of its fortieth session, had decided to engage in a comprehensive review of its rules of procedure and methods of work (A/62/17 (Part I), para. 236), and that the General Assembly, in its resolution 62/64 of 6 December 2007, had welcomed that decision. Delegations

welcomed the opportunity to review the rules of procedure and methods of work of the Commission and expressed appreciation for the documents submitted to facilitate such a review.

104. Several speakers expressed the view that the elaboration of new rules of procedure for UNCITRAL would not be necessary and that the Commission should continue applying the relevant rules of procedure of the General Assembly with the necessary flexibility, as dictated by the specific nature of the work of the Commission. They pointed out in this regard that the existing flexible approach to the application and interpretation of the relevant rules had proved its effectiveness and contributed to the productivity and success of the Commission. Nevertheless, support was expressed for introducing more clarity in respect of the few issues where uncertainty might exist as to which rules of procedure and methods of work were applicable or where such rules might be applied diversely by the subsidiary organs of the Commission. The competence of the Commission to determine its rules of procedures and methods of work was acknowledged. However, the Commission was urged to exercise utmost caution before entering areas, such as a possible definition of consensus, where its decisions might impact other bodies of the General Assembly.

105. Some speakers expressed the view that it would be premature to decide that the Commission did not need any specific rules of procedure or to make any conclusion as to the form in which future work on the topic might be undertaken, for example through guidelines for chairmen and other officers of working groups or a manual compiling best practices. It was concluded that only at the end of the review of its rules of procedure and working methods would the Commission be able to decide on its future course of action on the topic.

106. The point was made that, in the course of that review, the Commission should continue reflecting on practical ways to facilitate the participation of representatives of developing countries and non-governmental organizations from those countries in the work of UNCITRAL, including in any preparatory work, in order to ensure that the legislation and practices of these countries were adequately taken into account.

107. The Commission agreed that: (a) any future review should be based on the previous deliberations on the subject in the Commission, the observations made by France (A/CN.9/635) and the United States (A/CN.9/639) and the note by the Secretariat (A/CN.9/638 and Add.1-6), which was considered to provide a particularly important historical overview of the establishment and evolution of UNCITRAL rules of procedure and methods of work; (b) the Secretariat should be entrusted with the preparation of a working document describing current practices of the Commission with the application of rules of procedure and methods of work, in particular as regards decision-making and the participation of non-State entities in the work of UNCITRAL, distilling the relevant information from its previous note (A/CN.9/638 and Add.1-6); the working document would serve as a basis for future formal and informal deliberations of the Commission on the matter, it being understood that, where appropriate, the Secretariat should indicate its observations on rules of procedure and methods of work for consideration by the Commission; (c) the Secretariat should circulate the working document to all States for comment and should compile any comments it might receive; (d) informal consultations among all interested States might be held, if possible, before the forty-first session

of the Commission; and (e) the working document might be discussed as early as at the forty-first session of the Commission, time permitting.

V. Dates of future meetings

108. The Commission recalled that, during the first part of its fortieth session (A/62/17 (Part I), para. 248), it had approved the holding of its forty-first session in New York from 16 June to 11 July 2008, subject to confirmation or possible shortening of the session, to be decided during its resumed fortieth session, in particular in the light of the progress of work in Working Group II (Arbitration and Conciliation) and Working Group III (Transport Law). The Commission also recalled that, at that session, it had approved the schedule of meetings for its working groups, subject to possible review at its resumed fortieth session (A/62/17 (Part I), para. 251).

109. At its resumed fortieth session, the Commission decided to shorten the duration of its forty-first session by one week, the new dates of the session thus being from 16 June to 3 July 2008 (United Nations Headquarters in New York would be closed on Friday, 4 July 2008), and to reserve the first nine days of the session, from 16 to 26 June, for the finalization and adoption of a draft convention on the carriage of goods [wholly or partly] [by sea]. The Commission confirmed the schedule of meetings for its working groups approved during the first part of its fortieth session (A/62/17 (Part I), para. 251).

110. It was noted that decisions of the Commission regarding the duration of its sessions were to be made bearing in mind the amount of time needed for the completion of work on its agenda and the fact that lengthy sessions imposed a burden on some States.

VI. Other business

111. The attention of the Commission was brought to General Assembly resolution 62/64 on the report of the United Nations Commission on International Trade Law on the work of its fortieth session, Assembly resolution 62/65 of 6 December 2007 on the fiftieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, and Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels.

112. The Commission took note of the resolutions and deferred their consideration to its forty-first session. The Commission noted that, by paragraph 3 of General Assembly resolution 62/70, the Assembly invited the Commission to comment, in its report to the Assembly, on the current role of the Commission in promoting the rule of law.

113. The Commission decided to include the item “Role of UNCITRAL in promoting the rule of law” in the agenda of its forty-first session and invited all States members of UNCITRAL and observers to exchange their views on the item at that session.

Annex

List of documents before the Commission at its resumed fortieth session

Symbol	*Title or description*
A/62/17 (Part I)	Report of the United Nations Commission on International Trade Law on the work of its fortieth session (Vienna, 25 June-12 July 2007)
A/CN.9/617	Report of Working Group VI (Security Interests) on the work of its eleventh session (Vienna, 4-8 December 2006)
A/CN.9/620	Report of Working Group VI (Security Interests) on the work of its twelfth session (New York, 12-16 February 2007)
A/CN.9/631/Add.1-3	Note by the Secretariat on the recommendations of the UNCITRAL draft Legislative Guide on Secured Transactions
A/CN.9/635	Note by the Secretariat transmitting observations by France on the working methods of UNCITRAL
A/CN.9/636	Provisional agenda, annotations thereto and scheduling of meetings of the resumed fortieth session
A/CN.9/637	Note by the Secretariat on the terminology and recommendations of the UNCITRAL draft Legislative Guide on Secured Transactions
A/CN.9/637/Add.1-8	Note by the Secretariat on the draft legislative guide on secured transactions
A/CN.9/638 and Add.1-6	Note by the Secretariat on UNCITRAL rules of procedure and methods of work
A/CN.9/639	Note by the Secretariat transmitting observations by the United States on UNCITRAL rules of procedure and methods of work