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Report of the United Nations Commission on International Trade Law

Fortieth session
(25 June-12 July and 10-14 December 2007)

General Assembly
Official Records
Sixty-second session
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Part one

Report of the United Nations Commission on International Trade Law on its fortieth session, held in Vienna from 25 June to 12 July 2007

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the first part of the fortieth session of the Commission, held in Vienna from 25 June to 12 July 2007 (see para. 3 below for the decision of the Commission to hold its fortieth session in two parts).

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 fortieth session of the Commission was opened on 25 June 2007. At its 837th meeting,[1] on 25 June, the Commission agreed that its fortieth session would be held in two parts. For the agenda and dates of the resumed session, see paragraphs 11 and 247 below.

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:[2] 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

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[1] This number was assigned to the first meeting of the fortieth session in order to align the numbering of Commission meetings with the numbering of summary records of the Commission meetings at its thirty-ninth session (see in particular A/CN.9/SR.835, a summary record of the penultimate meeting of the thirty-ninth session of the Commission). This resulted in a discrepancy with paragraph 12 of the report of the Commission on the work of its thirty-ninth session (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17)), which indicates the 834th meeting as the last meeting of that session.

[2] 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.

(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), 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 Benin, Chile, Ecuador, Fiji, Gabon, Guatemala, Israel, Madagascar, Malta, Mongolia, Namibia, Senegal, Sri Lanka and Zimbabwe, all the members of the Commission were represented at the first part of the session.

6. The first part of the session was attended by observers from the following States: Argentina, Azerbaijan, Belgium, Brazil, Cuba, Democratic Republic of the Congo, Dominican Republic, Finland, Hungary, Indonesia, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Panama, Peru, Philippines, Portugal, Qatar, Romania, Slovakia, Tunisia, Turkey, United Republic of Tanzania and Yemen.

7. The first part of the session was also attended by observers from the following international organizations:

(a) *United Nations system*: Economic and Social Commission for Western Asia and World Intellectual Property Organization;

(b) *Intergovernmental organizations*: European Community and International Institute for the Unification of Private Law;

(c) *Non-governmental organizations invited by the Commission*: American Bar Association, American Intellectual Property Law Association, Association française des entreprises privées, Association of Commercial Television in Europe, Association of European Trade Mark Owners, Commercial Finance Association, European Association of Insurance Companies, European Law Students' Association, Federation of European Factoring Associations, Independent Film and Television Alliance, International Bar Association, International Chamber of Commerce, International Swaps and Derivatives Association and International Trademark Association.

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 Commission elected the following officers:

Chairperson:	Dobrosav Mitrović (Serbia)
Vice-Chairpersons:	Biu Adamu Audu (Nigeria)
	Horacio Bazoberry (Bolivia)
	Kathryn Sabo (Canada)
Rapporteur:	T. K. Viswanathan (India)

D. Agenda

10. The agenda of the first part of the session, as adopted by the Commission at its 837th meeting, on 25 June 2007, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Adoption of a draft UNCITRAL legislative guide on secured transactions and possible future work.
5. Procurement: progress report of Working Group I.
6. Arbitration and conciliation: progress report of Working Group II.
7. Transport law: progress report of Working Group III.
8. Insolvency law: progress report of Working Group V.
9. Possible future work in the area of electronic commerce.
10. Possible future work in the area of commercial fraud.
11. Monitoring implementation of the 1958 New York Convention.
12. Endorsement of texts of other organizations: Unidroit Principles of International Commercial Contracts 2004.
13. Technical assistance to law reform.
14. Status and promotion of UNCITRAL legal texts.
15. Coordination and cooperation:
    (a) General;
    (b) Reports of other international organizations.
16. Willem C. Vis International Commercial Arbitration Moot competition.
17. Relevant General Assembly resolutions.
18. Other business.
19. Date and place of future meetings.

20. Adoption of the report of the Commission.

21. Congress 2007.

11. At its 852nd meeting, on 4 July, the Commission agreed that the agenda of the resumed fortieth session would include agenda item 4 and a separate agenda item entitled "Working methods of UNCITRAL". During the resumed session, the Commission would also adjust dates of future meetings, as appropriate. (For the dates of future meetings considered by the Commission at the first part of its fortieth session, see paras. 247-252 below.)

E. Establishment of the Committee of the Whole

12. The Commission established a Committee of the Whole and referred to it for consideration agenda item 4. The Commission elected Kathryn Sabo (Canada) Chairperson of the Committee. The Committee met from 25 June to 2 July 2007 and held 12 meetings. At its 849th meeting, on 3 July, the Commission considered the report of the Committee of the Whole and agreed to include it in the present report. (The report of the Committee of the Whole is reproduced in paragraphs 14-157 below.)

F. Adoption of the report

13. At its 853rd and 854th meetings, on 6 July 2007, the Commission adopted the present report by consensus.

III. Adoption of the draft UNCITRAL Legislative Guide on Secured Transactions and possible future work

A. Adoption of the draft UNCITRAL Legislative Guide on Secured Transactions

14. The Committee (see para. 12 above) had before it a complete set of revised recommendations and revised commentaries on the draft UNCITRAL Legislative Guide on Secured Transactions (A/CN.9/631 and Add.1-11) and the reports of the eleventh (Vienna, 4-8 December 2006) and twelfth (New York, 12-16 February 2007) sessions of Working Group VI (Security Interests) (A/CN.9/617 and A/CN.9/620, respectively). It also had before it a note by the Secretariat transmitting comments of the European Community and its member States on the draft Guide (A/CN.9/633). The Committee established a drafting group and referred to it the terminology of the draft Guide (A/CN.9/631/Add.1, para. 19). The Committee expressed its great appreciation to the Secretariat for its work in preparing the documents for the session.

15. The Committee noted that, in view of the need to conclude consultations and make subsequent amendments in the revised commentaries following the conclusion of the twelfth session of the Working Group, some documents had been submitted late and were not available in all language versions at the beginning of the session (specifically A/CN.9/631/Add.1-3, dealing with chapters I-VI). The Committee

therefore decided to begin its consideration of the draft Guide with chapter VII, which dealt with the priority of a security right as against the rights of competing claimants.

1. Chapter VII. Priority of a security right as against the rights of competing claimants

(a) Recommendations (A/CN.9/631, recommendations 74-107)

16. With regard to recommendation 84, the Committee noted that it was intended to address the question whether a transferee of an encumbered asset took the asset free of a security right that had been made effective against third parties by registration in a specialized registry or by notation on a title certificate. While some doubt was expressed as to whether that question should be addressed in recommendation 85 or not at all in the draft Guide, there was sufficient support for the retention of recommendation 84. However, the concern was expressed that it failed to address the transfer of rights other than security rights. In order to address that concern, it was suggested that, following the formulation of recommendation 85 or 93, reference should be made to the transfer of a "right in an encumbered asset" (not of "a security right") and to "a security right" in that asset (not "the security right"). That suggestion received sufficient support.

17. Noting that a security right registered before it was created was not effective against third parties and that, as a result, no issue of priority arose, the Committee decided to delete recommendation 86, subparagraph (b) (ii).

18. With respect to recommendation 87, subparagraph (a), the concern was expressed that the reference to "inventory or consumer goods" might be confusing, since the same tangible assets could be inventory for the seller and consumer goods for the buyer. In order to address that concern, it was suggested that the reference to consumer goods should be deleted. While the view was expressed that, in a sale from a consumer to a consumer of assets encumbered by a security right created by the seller, the buyer should take the assets free of the security right, there was sufficient support for the suggestion to delete the reference to "consumer goods". It was stated that a rule providing that a consumer buying an encumbered asset outside the ordinary course of business of the seller would take the asset free of an existing security right could interfere with existing financing transactions involving assets of high value.

19. In addition, with respect to recommendation 87, subparagraphs (a) and (b), it was observed that, as long as reference was made to sales and leases in the ordinary course of business, a reference to the type of asset involved was not necessary and, thus, reference to "tangible property other than negotiable instruments and negotiable documents" (as "tangible property" was defined to include negotiable instruments and negotiable documents (A/CN.9/631/Add.1, para. 19)) would be sufficient.

20. With respect to recommendation 99, the view was expressed that it was ambiguous in its application to securities. In addition, the view was expressed that the fact that the draft Guide addressed security rights in letters of credit and rights to payment of funds credited to a bank account but not in derivatives raised some concern with respect to the rules applying to financial contracts. The Committee decided to defer discussion of those issues until it had had the opportunity to

consider the application of the draft Guide as a whole to securities and financial contracts (see paras. 145-151 below).

21. With respect to recommendations 101 and 102, the concern was expressed that they did not sufficiently clarify that priority could be modified by agreement between competing claimants. In order to address that concern, it was suggested that wording along the lines of "unless otherwise agreed" should be added to those recommendations. That suggestion was objected to. It was stated that recommendation 77 was sufficient to clarify that priority could be modified by agreement between competing claimants. It was also observed that the addition of the suggested wording could cast doubt as to whether other priority rules were subject to a contrary agreement between competing claimants.

22. Some doubt was expressed as to whether recommendation 107 was necessary. It was stated that recommendation 106 was sufficient to give priority to rights acquired through due negotiation of a negotiable document under the law governing negotiable documents. However, the Committee agreed that recommendation 107 was necessary in that it went further and dealt with rights acquired without due negotiation of a negotiable document.

23. With respect to the formulation of recommendation 107, general support was expressed in favour of an alternative formulation. Under that formulation the right of a secured creditor, buyer or other transferee of a negotiable document that took possession of the negotiable document would have priority over a security right in the goods covered by the negotiable document, as long as the goods were covered by the document and the secured creditor, buyer or other transferee gave value in good faith and without knowledge that the transfer was in violation of the security right in the goods.

24. However, at the same time, several concerns were expressed with respect to that alternative formulation of recommendation 107. One concern was that it might inadvertently result in defeating a security right in a situation where a grantor, having created a security right in inventory in favour of secured creditor A, placed the inventory in a warehouse, had a warehouse receipt issued and obtained new financing by transferring possession of the warehouse receipt to secured creditor B. In order to address that concern, the suggestion was made that reference should be made to a secured creditor, buyer or other transferee of a negotiable document taking possession of the document in the grantor's, seller's or other transferor's ordinary course of business. Another concern was that the alternative formulation failed to address a conflict between the right of a secured creditor that took possession of the negotiable document and the right of a secured creditor in a negotiable document that was made effective against third parties other than by transfer of possession. In order to address that concern, the suggestion was made that the alternative text should be revised to address that priority conflict. A further concern was that the reference to both good faith and the absence of knowledge that the transfer was in violation of an existing security right was superfluous, as those two notions had the same meaning. In order to address that concern, the suggestion was made that the reference to good faith or the absence of such knowledge should be deleted. Yet another concern was that, unlike other recommendations, recommendation 107 was formulated in a negative way (a right was subordinate to another right instead of having priority over another right).

25. The Committee deferred adoption of recommendation 107, pending its consideration of a revised formulation (see paras. 130-133 below).

26. Subject to the changes mentioned above, the Committee adopted recommendations 74-106.

(b) Commentary (A/CN.9/631/Add.4)

27. The Committee approved the substance of the commentary to chapter VII subject to the following changes:

(a) Paragraph 1, second sentence, should make clear that, for the priority rules to apply, at least one of the competing claimants had to be a secured creditor;

(b) Paragraph 4, first sentence, should refer to security rights that were effective against third parties, and explain with examples the concept of "third-party effectiveness" and its relationship to the concept of "priority";

(c) Paragraph 5, second sentence, should clarify that no issue of priority could arise between security rights that were not effective against third parties;

(d) Before paragraph 6, the heading "Importance of the priority concept" should be added;

(e) Paragraph 8 should refer to the two ways by which a secured creditor could take priority with respect to the residual value of an asset, namely by stating in the registered notice the maximum amount secured by the first-priority ranking security right or by a subordination agreement;

(f) Paragraph 9 should be reconsidered as it appeared to repeat points made in paragraphs 6-8;

(g) Paragraph 10 should be completed;

(h) Paragraph 11 should be deleted;

(i) Paragraphs 15-18 appeared to address third-party effectiveness issues and should be limited to priority issues;

(j) Paragraph 17, the second part of the second sentence should be deleted;

(k) Paragraphs 21-22 and 24-25 should be limited to issues of priority and avoid addressing third-party effectiveness issues;

(l) Paragraph 23 should clarify that the concept of "control" did not flow from the concept of "possession" and should focus on the rule that control gave a superior priority right;

(m) Paragraphs 24 and 25 should be recast in a more objective way;

(n) Paragraphs 26-33 should refer back to the chapter on creation with respect to the creation of a security right in future advances and clarify that priority extended to future advances as of the time the security right became effective against third parties;

(o) Paragraph 31 should be recast to clarify that it addressed an issue that was distinct from the issue of priority in future advances and to refer to a statement of the maximum amount and subordination;

(p) In paragraph 75, in the phrase “the lease is entered into”, the word “lease” should be replaced with the word “licence”;

(q) In paragraph 110, the last sentence should be deleted, to reflect the fact that there was no obligation to disclose the existence of a control agreement, by contrast with the publicity regime inherent in the operation of a specialized registry;

(r) In paragraph 112, the word “present” should be inserted before the phrase “right of set-off”, and the words “unless it has disapplied such right” should be inserted after the words “non-secured transactions law”; and the last sentence should be deleted.

2. Chapter VIII. Rights and obligations of the parties

(a) Recommendations (A/CN.9/631, recommendations 108-113)

28. The Committee adopted recommendations 108-113.

(b) Commentary (A/CN.9/631/Add.5)

29. The Committee approved the substance of the commentary to chapter VIII.

3. Chapter IX. Rights and obligations of third-party obligors

(a) Recommendations (A/CN.9/631, recommendations 114-127)

30. The Committee adopted recommendations 114-127.

(b) Commentary (A/CN.9/631/Add.6)

31. The Committee approved the substance of the commentary to chapter IX, subject to the addition in paragraph 22 of a reference to another approach, under which depositary banks were treated in the same way as debtors of receivables and their consent was not required for a security right to be created in a right to payment of funds credited to a bank account.

4. Chapter X. Post-default rights

(a) Recommendations (A/CN.9/631, recommendations 128-172)

32. With respect to recommendation 128, some doubt was expressed as to whether reference should be made to commercially reasonable standards of conduct. It was stated that reference to good faith was sufficient. It was also observed that commercially reasonable standards were not universally understood in the same way. In response, it was noted that the draft Guide was designed to strike a balance between the need to allow the secured creditor some flexibility in the enforcement of its rights and the need to protect the rights of the grantor and its other creditors. It was also stated that that standard of conduct would require, for example, a secured creditor to obtain possession of the encumbered assets in a way that would be acceptable under local market conditions and to sell the assets in the relevant market with a view to obtaining the best possible price. In that connection, it was pointed out that the standard did not focus on the result (for example, that the creditor should obtain the best price) but on the enforcement procedure (for example, best price reasonably obtainable). It was agreed that the commentary should explain the term “commercially reasonable standards” giving examples.

33. With respect to recommendation 132, it was agreed that the phrase "does not affect" should be replaced with the phrase "may not adversely affect", since only an adverse effect would be objectionable.

34. With respect to recommendation 141, it was agreed that the last sentence should be removed from the recommendation and included in the commentary to the chapter.

35. With respect to the reference in recommendations 147, subparagraph (a), 149 and 150 to "receiving" or "sending" a notice, differing views were expressed. One view was that, in order to effectively protect the interests of the grantor and its other creditors, receipt of the notice should be required. Another view was that the matter should be left to other law, since it was well developed and should not be interfered with. However, the prevailing view was that it would be sufficient to require that the secured creditor should give notice to the grantor and its other creditors. It was stated that requiring receipt of the notice could create uncertainty, as there were different theories as to what constituted receipt (for instance, entry into a mailbox versus actual reading of the notice). In addition, it was observed that requiring that notice be received would increase the evidentiary burden of the secured creditor and thus have an adverse impact on the cost of credit. Moreover, it was said that leaving the matter to other law could result in failing to address sufficiently the potential impact of notice requirements on the cost of credit. It was also pointed out that the requirement that the secured creditor act in good faith and in a commercially reasonable manner, in conjunction with the general requirements regarding notice set out in recommendation 146, were sufficient to protect the interests of the grantor and its other creditors.

36. The Committee agreed that reference should be made in recommendations 147, subparagraph (a), 149 and 150 to the notice being "given to" the grantor and its other creditors. It was further agreed that the commentary (A/CN.9/631/Add.7, paras. 30-32) should address that matter in greater detail.

37. With respect to recommendation 150, it was agreed that the square brackets around the last sentence should be deleted, so that the recommendation would require the positive consent of the grantor to any proposal of the secured creditor to accept an encumbered asset in partial satisfaction of the grantor's obligation. It was widely felt that, unlike the situation where the secured obligation was fully paid and the grantor was fully discharged, in situations where the secured obligation was only partially discharged, positive consent of the grantor should be required so that the grantor would have actual knowledge of the extent of the unsatisfied portion of the obligation, for which the grantor would remain liable.

38. With respect to recommendation 154, it was observed that it did not fit under the heading "Distribution of proceeds of extrajudicial disposition of an encumbered asset" as it referred to distribution of profits realized by a judicial disposition. It was agreed that either the heading should be changed or recommendation 154 should be placed elsewhere in the text.

39. With respect to recommendation 169, some doubt was expressed as to whether the consent of the depositary bank should be required for out-of-court enforcement by a secured creditor that had no control with respect to a right to payment of funds credited to a bank account. In response, it was explained that the reason for that approach was that the bank-client relationship should not be interfered with. It was

also stated that, unlike debtors of trade receivables, depositary banks were involved in different kinds of practices subject to regulatory law that justified different treatment.

40. Subject to the above-mentioned changes and consequential amendments to the commentary to the chapter, the Committee adopted recommendations 128-172.

(b) Commentary (A/CN.9/631/Add.7)

41. The Committee approved the substance of the commentary to chapter X subject to the changes referred to above and to the following changes:

(a) In paragraphs 38-39, it should be explained that the right of the grantor to cure the default and reinstate the secured obligation was a matter for the agreement of the parties and the law of obligations;

(b) In paragraphs 57-58, it should be clarified that the right of the secured creditor to take over the management of the grantor's business and to sell it as a going concern could raise difficult issues, including the liability of the secured creditor for management acts and the protection of rights of other creditors;

(c) In paragraph 92, it should be clarified that, if the proceeds took the form of a type of asset, such as receivables, with respect to which special enforcement rules applied, enforcement should follow the rules applicable to that type of asset.

5. Chapter XI. Insolvency

(a) Definitions and recommendations (A/CN.9/631, recommendations 173-183)

42. The Committee noted that the definitions and the recommendations contained in part A of chapter XI of the draft Guide were taken from the UNCITRAL Legislative Guide on Insolvency Law,[3] while the recommendations in part B of that chapter expressed specific principles relating to security rights in a manner that was consistent with the Insolvency Guide. General support was expressed for that approach.

43. It was also noted that the presentation of the insolvency chapter differed from the presentation of other chapters of the draft Guide in order to accommodate selected recommendations and material from the commentary of the Insolvency Guide. In addition, it was noted that those recommendations and explanatory material were included to ensure that readers and users of the draft Guide were provided with sufficient background information to understand the intersection of secured transactions law and insolvency law, and to ensure consistency between the two guides.

44. In order to facilitate a clearer understanding of the relationship between the commentary and the two sets of recommendations, it was suggested that the recommendations in part A and part B should be presented with separate commentary. In response, it was noted that that presentation might inadvertently give the wrong impression that the matters addressed in the recommendations in part B had not been discussed in the Insolvency Guide, and might result in duplication and inconsistencies. It was also suggested that the insolvency chapter

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

should be placed at the end of the draft Guide on the basis that it addressed what should be included in the insolvency law, rather than in the secured transactions law. There was sufficient support for that suggestion.

45. With respect to the definition of the term "financial contract" taken from the Insolvency Guide, it was stated that it might need to be reviewed depending on the decision of the Committee on the treatment of financial contracts in the draft Guide. In response, it was noted that the definition was based on article 5, subparagraph (k), of the United Nations Convention on the Assignment of Receivables in International Trade (2001).[4] It was also noted that, if the Committee agreed on a different definition for the purpose of the draft Guide, the interrelationship between the two definitions would need to be explained, but the definition of the Insolvency Guide could not be changed (see paras. 137-142 below).

46. Other proposals for clarification included: adding recommendation 63 from the Insolvency Guide, which would serve as additional background to the recommendations on post-commencement finance; and, if necessary in order to clarify the commentary, including additional recommendations from the Insolvency Guide. There was sufficient support for those suggestions.

47. With respect to recommendation 174 (non-unitary approach), it was agreed that it should be revised to reflect the decision of the Committee to refer to "retention-of-title right" and "financial lease right" in the context of the non-unitary approach to acquisition financing (see paras. 69-75 below).

48. With respect to recommendation 181, it was agreed that it should be revised to clarify that a subordination agreement would only be binding in insolvency to the extent that it was effective under law other than insolvency law.

49. Subject to the above-mentioned changes, the Committee confirmed the appropriateness of the presentation of the definitions and recommendations and adopted recommendations 173-183.

(b) Commentary (A/CN.9/631/Add.8)

50. Noting that the commentary to chapter XI was consistent with the Insolvency Guide, the Committee approved the substance of the commentary subject to the following changes:

(a) The discussion in the commentary should refer more clearly to the relevant recommendations and discuss additional recommendations of the Insolvency Guide;

(b) The origin of material from the Insolvency Guide should be clearly explained for the reader;

(c) The discussion of applicable law should be further developed and placed at the end of the commentary.

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

6. Chapter XII. Acquisition financing rights

(a) Recommendations (A/CN.9/631, recommendations 184-201)

51. The concern was expressed that requiring a notice in the general security rights registry for a retention-of-title sale or financial lease to be effective against third parties might inappropriately interfere with useful practices and undermine the notion of "ownership". It was stated that recharacterization of ownership as a security device could create significant problems not only in retention-of-title sales and financial leases but also in repurchase transactions and other financial contracts. It was also observed that the notion of "grantor" was not appropriate in a retention-of-title sale or financial lease, and, in any case, registration of ownership should not be required. Furthermore, it was mentioned that lack of flexibility might undermine the acceptability of the draft Guide, as flexibility would be one important criterion in determining the value of the draft Guide. It was emphasized that there were significant concerns that needed to be addressed for consensus on that matter to be reached. In order to address those concerns, it was suggested that retention-of-title sales and financial leases should not be recharacterized as security devices or be made subject to registration of a notice in the general security rights registry.

52. That suggestion was objected to. It was stated that the draft Guide did not recharacterize retention-of-title sales or financial leases. It was simply drawing the consequences from the fact that ownership in a retention-of-title sale or financial lease was diminished to the extent of the value of the amount of the purchase price or rent outstanding. It was also stated that retention-of-title related to tangible property other than negotiable instruments and negotiable documents and was not relevant to securities and financial contracts, which still remained to be discussed. It was also said that what was registered was a notice about a transaction that functioned as a warning to third parties that the person in possession of the assets might not be the owner. Furthermore, it was pointed out that, as the work of many international organizations and international financial institutions indicated, a modern law on secured transactions could not achieve its objective of increasing access to secured credit, which was a matter of high priority in particular for developing countries and countries with economies in transition, if it were not comprehensive in coverage and did not provide for registration of all transactions that performed security functions. It was also emphasized that the draft Guide was not a binding treaty or model law and it was up to States to enact or reject its recommendations in whole or in part. The Committee, recalling that the Commission, at its thirty-ninth session, had adopted the substance of the recommendations, including on acquisition financing devices,[5] noted the policy decisions of the Commission with respect to the chapter on acquisition financing rights.

(i) Section A. Unitary approach to acquisition financing rights

53. With respect to recommendation 192 (unitary approach), the concern was expressed that the different treatment of inventory (for instance, the fact that no grace period was provided and notification of inventory financiers on record was

[5] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 63-70.

required) could undermine inventory financing. In order to address that concern, it was suggested that recommendation 189 should apply to inventory as well.

54. That suggestion was objected to. It was observed that paragraphs 114-118 of the commentary to chapter XII (A/CN.9/631/Add.9) sufficiently explained the need for a different treatment of acquisition security rights in inventory.

55. With respect to recommendation 199 (unitary approach), the suggestion was made that, for the same reasons for which the super-priority for security rights in inventory did not extend to receivables, it should not extend to other payment rights, such as negotiable instruments, rights to the payment of funds credited to a bank account and rights to payment under independent undertakings. That suggestion received sufficient support. The Committee decided that the text in square brackets in recommendation 199 should be retained without the square brackets.

56. Subject to the above-mentioned changes, the Committee adopted recommendations 184-201 in section A (unitary approach) of chapter XII of the draft Guide.

(ii) Section B. Non-unitary approach to acquisition financing rights

57. With respect to recommendation 191 (non-unitary approach), the concern was expressed that, to the extent that it referred to the notion of priority, which was not appropriate for ownership devices, it did not really constitute an alternative approach and was thus not useful.

58. In order to address that concern, the suggestion was made that recommendation 191 and other recommendations in section B (non-unitary approach) of chapter XII of the draft Guide should be revised to refer to terminology that would be compatible with ownership devices. There was sufficient support for that suggestion. The Committee agreed that the recommendations in section B should be reformulated with that objective in mind. It was also agreed that recommendation 191 (non-unitary approach) should be revised to provide that a lender could obtain an acquisition security right directly from the grantor or an acquisition financing right through an assignment of the secured obligation from the supplier (see paras. 77-79 and 89 below).

59. With respect to recommendation 192 (non-unitary approach), a number of concerns were expressed. One concern was that it might not be easy to determine whether recommendation 189 or recommendation 192 should apply, as inventory in the hands of the seller could be equipment in the hands of the buyer, and the draft Guide did not make it clear in whose hands the assets had to constitute inventory. Another concern was that third-party financiers would have no way of ascertaining whether inventory or tangible property other than inventory was involved in a particular transaction. Yet another concern was that the requirement for registration of a notice in the general security rights registry and notification of inventory financiers on record before delivery of the goods could delay and complicate transactions, in particular cross-border transactions, involving different registries and languages. Yet another concern was that the requirements of registration and notification resulted in favouring the general inventory financier over the supplier of goods on credit. In order to address those concerns, the suggestion was made that recommendations 189 and 192 should be merged so that one rule along the lines of

recommendation 189 would apply to the priority of security rights in both inventory and tangible property other than inventory.

60. That suggestion was objected to. It was stated that the term "inventory" was widely used in most legal systems and was defined and referred to in the draft Guide in several recommendations. It was also observed that whether tangible property constituted inventory depended on whether it was held as inventory by the grantor (for example, the buyer in an acquisition financing transaction). In addition, it was said that a modern registry system and the use of one registration and one notice covering one or more acquisition financing transactions between the same parties over a long period of time (for instance, five years; see recommendation 196) would not create costs or delays to trade. Moreover, it was pointed out that the difficulty of cross-border transactions was not a problem that arose only in the context of acquisition financing transactions. It was also said that recommendation 192 achieved a balance among the various interests in that a supplier's right would be given priority subject to normal due diligence (including on whether the goods constituted inventory), an inventory financier's right would be sufficiently protected through the requirements for registration and notification and the buyer would benefit from competitive credit terms. Finally, it was mentioned that the regime contemplated by the draft Guide would be an improvement over the current situation in many legal systems, in which retention of title was lost if the assets concerned were exported to or through a State that did not recognize retention of title. Under the draft Guide, instead of losing its security entirely, the retention-of-title supplier would in such circumstances retain a security right.

61. In response, it was stated that a more flexible approach should be taken, as the conditions for trade and financing would not be the same in all countries. It was also observed that such flexibility was inherent in a guide that, by definition, was designed to provide non-binding guidance to States. Therefore, the suggestion was made that two alternatives should be presented on that matter, one treating differently inventory and tangible property other than inventory (along the lines set out in recommendations 189 and 192) and another treating both in the same way (along the lines set out in recommendation 189).

62. Diverging views were expressed as to the economic consequences of such an approach. One view was that it would have a negative impact on inventory financing, which might in turn result in a general contraction of credit. Another view was that the usefulness of the draft Guide might be diminished if it offered alternatives on important issues such as the issue of priority. Yet another view was that that approach struck an appropriate balance among all interests concerned and should be adopted.

63. The Committee agreed that, in order to ensure the flexibility of the draft Guide to meet the needs of States with differing needs, an alternative approach to recommendations 189 and 192 should be offered in both sections A and B of chapter XII (the unitary and the non-unitary approaches). Under this alternative approach, a new recommendation along the lines of recommendation 189 would address the priority position applicable to an acquisition security right or an acquisition financing right in tangible property. It was also agreed that the commentary should draw the attention of legislators to the economic and other consequences of each option (see paras. 88-90 below).

64. With respect to recommendation 194, it was suggested that it might be usefully clarified, as it seemed to refer to a judgement obtained after a security right was created but before it was made effective against third parties (see para. 92 below).

65. With respect to recommendations 198 and 199, it was agreed that their formulation should be adjusted to fit the alternative approach to recommendations 189 and 192 without, however, changing their underlying policy. Accordingly, the priority provided in the new recommendation should extend to proceeds of tangible property other than inventory (for example, equipment), as well as to proceeds of inventory except proceeds in the form of receivables or other payment rights.

66. It was widely felt that an extension of the priority given to an acquisition financing right to such proceeds of inventory could have an adverse impact on receivables financing. It was also generally considered that such a result would mean an unnecessary departure from current law in most States, under which such priority was limited to the assets subject to the acquisition financing right and did not extend to their proceeds. It was also observed that, in the few jurisdictions in which such priority extended to proceeds of inventory, priority was lost if the assets were commingled with other assets of the same type and lost their separate identity (see para. 98 below).

67. Recalling its decision that the recommendations in section B (non-unitary approach) of chapter XII of the draft Guide should use terminology based on the notion of "ownership" (see para. 58 above), the Committee considered a proposal with respect to certain definitions and the recommendations dealing with the non-unitary approach to acquisition financing. It was stated that the proposed revisions were intended to: deploy terminology relating to ownership rather than security rights, which was the essence of the non-unitary approach; track the order and the structure of the recommendations of the unitary approach; implement the principle of the functional equivalence of security rights and uses of ownership for security purposes; and implement the principle of equal treatment of all acquisition financing providers. It was noted that, as a result of those two principles, not only sellers and financial lessors but also lenders could obtain an acquisition financing right that enjoyed super-priority (in other words, priority as of the time of the delivery of tangible property other than inventory, provided that a notice was registered in the general security rights registry within the applicable grace period). It was also noted that, if sellers or financial lessors failed to register a notice in the general security rights registry within the relevant grace period, they would obtain a normal security right to which the general priority rules would apply (that is to say, priority of a security right in tangible property other than inventory would be achieved as of the time of registration of a notice with respect to the security right, which would be after the expiry of the grace period).

68. While it was widely felt that the proposal formed a good basis for discussion, it was stated that no final decision could be made. In that connection, it was observed that the proposal constituted a reformulation of recommendations the substance of which (in other words, the underlying policies) had already been approved by the Commission at its thirty-ninth session[6] and by Working Group VI (Security Interests) at its twelfth session (A/CN.9/620, paras. 84-90). It was also said that, for the Commission to be able to adopt the draft Guide at the resumed

[6] Ibid.

fortieth session, it was essential to finalize considerations with respect to the matters covered during the first part of the session. The Committee, therefore, agreed to proceed with its consideration of the proposal with a view to adopting the relevant definitions and recommendations.

69. With respect to the definitions, it was suggested that the draft Guide should use the terms "retention-of-title right" and "financial lessor's right" rather than the term "acquisition financing right" (A/CN.9/631/Add.1, para. 19). It was widely felt that use of those terms would be more consistent with terminology relating to ownership devices.

70. With respect to the term "retention-of-title right", the following text was proposed:

> "'Retention-of-title right', a term used only in the context of a non-unitary approach, means a seller's right in tangible property, other than negotiable instruments or negotiable documents, pursuant to an agreement with the buyer by which ownership of the tangible property that is the object of the sale is not transferred from the seller to the buyer until the purchase price is paid, and includes any arrangement by which a creditor that has provided credit to enable a person to acquire possession or use of tangible property, other than negotiable instruments or negotiable documents, reserves the right to become the irrevocable owner of the tangible property in satisfaction of the repayment obligation."

71. It was noted that the first part of the proposed text was based on the definition of the term "retention-of-title right", while the second part ("and includes … repayment obligation") was based on part (iv) of the definition of the term "acquisition financing right" (A/CN.9/631/Add.1, para. 19). It was also noted that the second part was intended to address situations in which a seller transferred ownership to a buyer but retained the right to recover ownership if the purchase price was not paid in full within the time period agreed upon. However, it was stated that the second part could be read as also referring to a lender being able to retain ownership in goods, the acquisition of which the lender had financed. It was also observed that such an understanding of the term "retention-of-title right" would be inconsistent with the meaning given to that term in most jurisdictions. In addition, it was said that it was not necessary to complicate the notion of "retention-of-title right", as long as the recommendations made it clear that a lender could obtain a retention-of-title or financial lease right. It was widely felt that that result was necessary to ensure the economic equivalence of ownership and security devices and to treat equally all acquisition financing providers.

72. Subject to consideration in the context of recommendation 184 (see paras. 77-79 below) of the issue of whether a lender could obtain a retention-of-title or financial lease right, the Committee agreed that the second part of the definition could be deleted. It was also agreed that words along the lines "or irrevocably transferred" might be added to the first part of the definition.

73. With respect to the definition of the term "financial lessor's right", the following text was proposed:

> "'Financial lessor's right', a term used only in the context of the non-unitary approach, means a lessor's right in tangible property, other than

negotiable instruments or negotiable documents, that is the object of a lease agreement under which, at the end of the term of the lease:

"(i) The lessee automatically becomes the owner of the tangible property that is the object of the lease;

"(ii) The lessee may acquire ownership by paying no more than a nominal price; or

"(iii) The tangible property has no more than a nominal residual value.

"The term includes a hire-purchase agreement."

74. The Committee noted that the proposed text was based on the definition of the term "financial lease" (A/CN.9/631/Add.1, para. 19), and agreed that, for the sake of consistency with the term "retention-of-title right", it should be revised to refer to "financial lease right".

75. The Committee adopted the above-mentioned definitions, subject to minor editorial changes made by the Drafting Group. It was agreed that the meaning of the definitions should be explained in the commentary.

76. The Committee adopted the "Purpose" subsection of the recommendations in section B (non-unitary approach) of chapter XII of the draft Guide.

77. The Committee considered the following proposal for a new recommendation 184:

"Alternative methods of acquisition financing

"184. The law should provide for a regime of acquisition security rights identical to that adopted in the unitary system. All creditors, both suppliers and lenders, may acquire an acquisition security right in conformity with that regime. In addition, the law should provide for a regime of acquisition financing based on retention-of-title sales and financial leases. The law should further provide that a lender may acquire the benefit of a retention-of-title right and a financial lessor's right through an assignment of the obligations owing to the seller or lessor."

78. It was agreed that the first three sentences were sufficient in reflecting the principle of functional equivalence of retention-of-title sales (and financial leases) with secured transactions and the principle of equal treatment of all acquisition financing providers. However, with respect to the last sentence, the concern was expressed that, if a lender could obtain a retention-of-title right or a financial lease right only by way of an assignment of the obligation owed to the seller or the financial lessor, the consent of the seller or the financial lessor would be required. It was explained that, as a result, the lender would have to give value in return, a result that could eliminate any benefits that buyers or lessees could obtain as a result of the competition of acquisition financing providers. In order to address that concern, it was suggested that reference should be made in recommendation 184 to the possibility of a lender acquiring a retention-of-title or financial lease right by paying the seller or financial lessor and being subrogated in the latter's rights towards the buyer or lessee. There was sufficient support for that suggestion.

79. Subject to the addition at the end of words along the lines "or subrogation", the Committee adopted the proposed new recommendation 184. It was also agreed

that a summary explanation of subrogation and the manner in which retention-of-title or financial lease rights could be acquired by lenders through subrogation would be included in the commentary.

80. The Committee considered the following proposal for a new recommendation 185:

> **"Equivalence of a retention-of-title and a financial lessor's right to an acquisition security right**
>
> "185. The rules governing acquisition financing should produce functionally equivalent economic results regardless of whether the creditor's right is a retention-of-title right, a financial lessor's right or an acquisition security right."

81. It was noted that the proposed text was based on the original text of recommendation 184 in document A/CN.9/631. The Committee adopted the proposed new recommendation 185.

82. The Committee considered the following proposal for a new recommendation 186:

> **"Evidentiary requirement for retention-of-title and financial lessor's rights**
>
> "186. The law should provide that a retention-of-title right and a financial lessor's right must be evidenced in writing before the buyer or lessee obtains possession of the tangible property that is the object of the right."

83. It was noted that, unlike the original text of recommendation 185 in document A/CN.9/631, on which the proposed new recommendation 186 was based and which referred to "creation", the proposed new recommendation referred to evidentiary requirements. It was explained that a retention-of-title sale established a kind of an expectancy of ownership on the part of the buyer, the value of which was equal to the amount of the paid portion of the purchase price, but did not "create" ownership as such. The Committee adopted the proposed new recommendation 186.

84. The Committee considered the following proposal for a new recommendation 187:

> **"Right of buyer or lessee to create a security right in residual value of sold or leased property**
>
> "187. The law should provide that a buyer or lessee may create a security right in tangible property that is the object of a retention-of-title right or a financial lessor's right. The security right is enforceable only to the extent of the value remaining in the tangible property after the obligation owing to the seller or financial lessor is satisfied."

85. It was noted that the first sentence of the proposed text was based on the original text of recommendation 185 bis in document A/CN.9/631. However, it was widely felt that the second sentence went beyond its intended meaning to limit the security right created by the buyer in the tangible assets to the paid portion of their purchase price. It was stated that the text was not intended to deal with enforcement but rather to set out a priority rule, according to which the retention-of-title seller or financial lessor would be paid ahead of a secured creditor that obtained a right in the

goods from the buyer or lessee. It was agreed that the second sentence should be revised to read along the following lines: "The security right is limited to the value remaining in the tangible asset in excess of the obligation owing to the seller or financial lessor." Subject to that change, the Committee adopted the proposed new recommendation 187.

86. The Committee considered the following proposal for a new recommendation 188:

"Effectiveness of a retention-of-title or financial lessor's right in consumer goods against third parties

"188. The law should provide that a retention-of-title and a financial lessor's right in consumer goods is effective against third parties upon conclusion of the sale or lease provided that the right is evidenced by a writing in accordance with recommendation 186."

87. It was noted that the proposed text was based on the original text of recommendation 190 in document A/CN.9/631. It was also noted that: the substance of the original text of recommendation 186 was covered in the proposed new recommendations 188-190 (see para. 86 above as regards new recommendation 188 and para. 88 below as regards new recommendations 189-190); the original text of recommendations 187 and 193 was not necessary as a retention-of-title or financial lease right in consumer goods would normally not be subject to registration in a title registry; the original text of recommendation 188 was not necessary, as the issue addressed therein would normally be framed as one of effectiveness against third parties rather than priority. The Committee adopted the proposed new recommendation 188.

88. The Committee considered the following proposal for new recommendations 189 and 190 (alternative A) and a new recommendation 189 (alternative B):

"Alternative A

"Effectiveness of a retention-of-title or financial lessor's right in tangible property other than inventory or consumer goods against third parties

"189. The law should provide that a retention-of-title or financial lessor's right in tangible property other than inventory or consumer goods is effective against third parties only if:

"(a) The seller or lessor retains possession of the tangible property that is the object of the sale or lease; or

"(b) A notice relating to the right is registered not later than [specify a short time period, such as 20 or 30 days] days after delivery of possession of the tangible property to the buyer or lessee.

"Effectiveness of a retention-of-title or financial lessor's right in inventory against third parties

"190. The law should provide that a retention-of-title or financial lessor's right in inventory is effective against third parties only if:

"(a) The seller or lessor retains possession of the inventory; or

"(b) Before delivery of the inventory to the buyer or lessee:

"(i) A notice relating to the right is registered in the general security rights registry; and

"(ii) A secured creditor with an earlier registered non-acquisition security right created by the buyer or lessee in tangible property of the same kind as the inventory is notified in writing that the seller or lessor intends to claim a retention-of-title or financial lessor's right. The notification should describe the inventory sufficiently to enable the secured creditor to determine the nature of the inventory subject to the retention-of-title or financial lessor's right.

"Alternative B

"Effectiveness of a retention-of-title or financial lessor's right in tangible property other than consumer goods against third parties

"189. The law should provide that a retention-of-title or financial lessor's right in tangible property other than consumer goods is effective against third parties only if:

"(a) The seller or lessor retains possession of the tangible property; or

"(b) A notice relating to the right is registered not later than [specify a short time period, such as 20 or 30 days] days after delivery of the tangible property to the buyer or lessee."

89. The Committee noted that alternative A was based on the original text of recommendations 189 and 192 in document A/CN.9/631, while alternative B implemented the agreement of the Committee that no distinction should be drawn between inventory and tangible property other than inventory (see para. 63 above). It was also noted that the original text of recommendation 190 in document A/CN.9/631 was not necessary, since the matter was addressed in the proposed new recommendation 188, under which a retention-of-title sale of consumer goods was effective against third parties upon the conclusion of the sales contract. It was also noted that the original text of recommendation 191 in document A/CN.9/631 was not necessary, as its substance was addressed in the proposed new recommendation 184 (see paras. 77-79 above).

90. It was stated that reference should be made in both alternative A and alternative B to registration of a notice in the general security rights registry for both retention-of-title and financial lease rights so as to ensure that the registry would cover all the various rights in a comprehensive way, a result that would promote efficiency and transparency. The Committee adopted the proposed new recommendations 189 and 190 (alternative A) and the proposed new recommendation 189 (alternative B).

91. The Committee considered the following proposal for a new recommendation 191:

"Effectiveness of a retention-of-title or financial lessor's right in an attachment to immovable property as against earlier competing rights registered in the immovable property

"191. The law should provide that a retention-of-title or financial lessor's right in tangible property that is to become an attachment to immovable property is effective against existing rights in the immovable property that are registered in the immovable property registry (other than an existing right that secures a loan financing the construction of the immovable property) only if it is registered in the immovable property registry no later than [specify a short time period, such as 20-30 days] days after the tangible property becomes an attachment."

92. It was noted that the substance of the original text of recommendation 193 in document A/CN.9/631 was covered in the proposed new recommendation 188, under which the retention-of-title seller or financial lessor did not need to register in any title registry. It was also noted that the original text of recommendation 194 in document A/CN.9/631 was no longer necessary, as the retention-of-title seller or financial lessor as an owner would always prevail over a judgement creditor of the buyer or lessor. In addition, it was noted that the proposed new recommendation 191 was an appropriate reformulation of the original text of recommendation 195. The Committee adopted the proposed new recommendation 191.

93. The Committee considered the following proposal for a new recommendation 192:

"One notification or notice sufficient

"192. The law should provide that a single notification to secured creditors with earlier registered non-acquisition security rights pursuant to recommendation 190 may cover retention-of-title and financial lessor's rights under one or more than one retention-of-title sales or financial leases between the same parties without the need to specifically identify each transaction. However, the notification is effective only for rights in tangible property that is delivered into the possession of the buyer or lessee within a period of [specify time, such as five years] years after the notification is given."

94. It was noted that the proposed text was based on the original text of recommendation 196 in document A/CN.9/631. It was agreed that, as notification of inventory financiers on record was required only in the context of alternative A in recommendation 190 (non-unitary approach), the new proposed recommendation 192 should follow the new proposed recommendation 190 in alternative A (see para. 88 above). It was also agreed that reference should be made to "notice" rather than to "notification" since, in some languages, the two terms had the same meaning, and the draft Guide used the term "notification" only with the qualifying words "of the assignment". Subject to those changes, the Committee adopted the proposed new recommendation 192.

95. The Committee considered the following proposal for a new recommendation 193:

"One registration or notice sufficient

"193. The law should provide that registration of a single notice is sufficient to ensure the third-party effectiveness of retention-of-title and financial lessor's rights under multiple transactions entered into between the same parties, whether concluded before or after the registration, to the extent

they cover tangible property that falls within the description contained in the notice."

96. It was noted that the proposed text was based on the original text of recommendation 197 in document A/CN.9/631. Subject to referring only to registration in the heading, the Committee adopted the proposed new recommendation 193.

97. The Committee considered the following proposal for new recommendations 194-197:

"Extension of a retention-of-title or financial lessor's right in proceeds of tangible property other than inventory or consumer goods

"194. The law should provide that a retention-of-title or financial lessor's right in tangible property other than inventory or consumer goods extends to the proceeds of such property (including proceeds of proceeds).

"Third-party effectiveness of a retention-of-title or financial lessor's right in proceeds of tangible property other than inventory or consumer goods

"195. The law should provide that a retention-of-title or a financial lessor's right in proceeds is effective against third parties only if the proceeds are described in a generic way in the registered notice by which the seller's or lessor's rights were made effective against third parties or the proceeds consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

"196. If recommendation 195 does not apply, the right in the proceeds is effective against third parties for [to be specified] days after the proceeds arise and continuously thereafter, provided a notice of the right in the proceeds is registered in the general security rights registry before the expiry of that period.

"Extension of a retention-of-title or financial lessor's right in proceeds of inventory

"197. The law should provide that a retention-of-title or financial lessor's right in inventory extends to its proceeds, other than proceeds in the form of receivables, negotiable instruments, funds credited in a bank account and the obligation to pay under an independent undertaking (including proceeds of proceeds), provided that the seller or lessor notifies earlier-registered secured creditors with security rights in tangible property of the same kind as the proceeds before the proceeds arise."

98. It was noted that the proposed new recommendations 194 and 197 were based on the original text of recommendations 198 and 199 in document A/CN.9/631, while the proposed new recommendations 195 and 196 were based on the original text of recommendations 40 and 41 in document A/CN.9/631.

99. It was stated that the proposed new recommendations 194 and 197 should be aligned with the approach taken in most jurisdictions in which retention-of-title and financial lease rights were known as devices separate from secured transactions; they did not extend to proceeds; and no distinction was drawn between proceeds of inventory and tangible property other than inventory. In response, it was observed

that a solution that would avoid inconsistency with the regime applicable to ownership devices would be to provide that a retention-of-title or financial lease right would not extend to proceeds and that the retention-of-title seller or financial lessor would have instead a normal security right in proceeds, to which the general third-party effectiveness and priority rules would apply (pursuant to recommendations 40, 41 and 80). In addition, it was said that, in order to ensure the same results in the unitary and the non-unitary approach, that security right should have super-priority in proceeds in the form of equipment but not in proceeds of inventory in the form of the payment rights described in the proposed new recommendation 197.

100. Subject to those changes, the Committee expressed initial approval for the substance of the proposed new recommendations 194 and 197 but agreed to recommend to the Commission that a revised text of the recommendations should be reviewed at the resumed fortieth session of the Commission.

101. The Committee considered the following proposal for new recommendation 198:

> **"Effect of failure to obtain third-party effectiveness of a retention-of-title or financial lessor's right**
>
> "198. The law should provide that if a seller or lessor fails to comply with the requirements for obtaining third-party effectiveness of a retention-of-title or financial lessor's right, the seller or lessor has a security right in the tangible property subject to the sale or lease, and the general regime for security rights applies."

102. The suggestion was made that the proposed new text should be revised to make it clear that, if a retention-of-title seller or a financial lessor failed to register a notice in the general security rights registry within the applicable grace period, such a seller or lessor would retain a security right as against third parties (provided that they registered a notice), but ownership would pass to the buyer. In connection with that suggestion, the concern was expressed that, at least between the seller and the buyer (or the lessor and the lessee), ownership could not pass before full payment of the price. In order to address that concern, the suggestion was made that the proposed text should be revised to provide that ownership would pass to the buyer or lessee "as against third parties" and the seller or lessor would have a security right, provided that it registered a notice in the general security rights registry after the expiry of the grace period. That suggestion received sufficient support. Subject to that change, the Committee adopted the proposed new recommendation 198. It was also agreed that the new recommendation (as for all new or revised recommendations) should be explained in the commentary.

103. The Committee considered the following proposal for new recommendations 199-201:

> **"Post-default enforcement of retention-of-title and financial lessor's rights**
>
> "199. The law should provide a regime for the post-default enforcement of retention-of-title and financial lessor's rights that deals with:
>
> "(a) The manner in which the seller or lessor may obtain possession of the tangible property subject to the sale or lease;

"(b) Whether the seller or lessor is required to dispose of the tangible property and, if so, how;

"(c) Whether the seller or lessor may retain any surplus; and

"(d) Whether the seller or lessor has a claim for any deficiency against the buyer or lessee.

"200. The law should provide that the regime that applies to the post-default enforcement of a security right applies to the post-default enforcement of a retention-of-title or financial lessor's right except to the extent necessary to preserve the coherence of the regime applicable to sale and lease.

"Law applicable to retention-of-title and financial lessor's rights

"201. The law should provide that the provisions of this law on private international law apply to retention-of-title and financial lessor's rights."

104. It was noted that the proposed text was based on the original text of recommendations 200 and 201 in document A/CN.9/631. Subject to referring to a "financial lease right" rather than to a "financial lessor's right" (see para. 74 above), the Committee adopted the proposed new recommendations 199-201.

105. Subject to the above-mentioned changes and consequential amendments to the commentary to the chapter, the Committee adopted recommendations 184-201 of section B (non-unitary approach) of chapter XII of the draft Guide.

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

106. Subject to any changes consequential upon the revisions to recommendations 184-201 (unitary and non-unitary approaches), the Committee approved the substance of the commentary to chapter XII.

7. Chapter XIII. Private international law

(a) Recommendations (A/CN.9/631, recommendations 202-222)

107. The view was expressed that the title of the chapter should be adjusted to fit its contents (in other words, the law applicable to security rights). It was widely felt that the term "private international law" was broader than the terms "conflict of laws" or "applicable law", since it included issues of jurisdiction, recognition and enforcement of foreign judgements. It was agreed that the title to the chapter should be changed to "conflicts of laws" or "applicable law" or any other title that may be suggested by United Nations terminology experts.

108. In response to a question with respect to the footnote to the chapter, it was noted that the footnote emphasized the contribution of the Permanent Bureau of the Hague Conference on Private International Law to the chapter. Expressing its appreciation for that contribution, the Committee agreed that reference should be made to the Permanent Bureau rather than to the Conference.

109. With respect to recommendation 202, it was agreed that the law of the State under which a specialized registration system was maintained should govern security rights in tangible property subject to a specialized registration system.

110. The suggestion was also made that, with respect to security rights in goods covered by a negotiable instrument, reference should be made to the law of the State in which the negotiable document was located. The Committee agreed to defer consideration of that suggestion to a later time in the session after it had had an opportunity to discuss the revised version of recommendation 107 (priority of a security right in a negotiable document or goods covered by a negotiable document) (see paras. 130-134 below). The suggestion was also made that the Committee should consider the law applicable to the transfer of a security right. In that connection, the view was expressed that the approach taken in the United Nations Assignment Convention should be followed. The Committee decided to postpone consideration of that suggestion until it had had an opportunity to consider all the recommendations in chapter XIII (see para. 127 below).

111. With respect to recommendation 204, a number of concerns were expressed. One concern was that, while the rule might be appropriate for assignments of future trade receivables or of trade receivables assigned in bulk, it would be inappropriate for receivables arising from financial contracts. Another concern was that the rule might be inappropriate even for trade receivables. In that connection, reference was made to the European Commission proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (the proposed Rome I regulation), in the context of which the law of the assignor's location and the law governing the assigned receivable were discussed as the options for the law applicable to third-party effects of assignments. Yet another concern was that the rule in recommendation 204 would result in the application of two different laws in a situation where a person made an assignment in State X and then moved to State Y and made a second assignment of the same receivables. It was added that the same problem would arise in a situation where A in State X assigned to B in State Y and B assigned to C in State Z. Yet another concern was that it would be difficult for debtors of receivables to determine which law applied to their discharge or to ensure that they would not have to deal with an inconvenient or unacceptable creditor. In view of the above-mentioned concerns, support was expressed in favour of the law governing the receivable.

112. In response, it was stated that the issue of financial contracts still remained to be discussed (see paras. 137-142 below). As to trade receivables, it was observed that the draft Guide adopted the approach of the United Nations Assignment Convention. In that connection, the Committee recalled that the Commission at its thirty-ninth session, in 2006, "noted with appreciation that the European Commission shared the concerns expressed in the note by the Secretariat (see A/CN.9/598/Add.2, para. 34) and admitted that the adoption in a European Union binding instrument of an approach to the law applicable to third-party effects of assignments that would be different from the approach taken in the United Nations Assignment Convention would undermine the certainty reached at the international level and might have a negative impact on the availability and the cost of credit. In addition, the Commission noted with appreciation that the European Commission had expressed its willingness to cooperate closely with the UNCITRAL secretariat to ensure, as far as possible, coherence between the two instruments and the

facilitation of ratification of the United Nations Assignment Convention by European Union member States".[7]

113. In addition, it was observed that, under recommendation 216, the governing law would be that of the State in which the grantor was located at the time a priority conflict arose, rather than two governing laws. It was also said that, under recommendation 46, an assignee in State X could preserve its third-party effectiveness and priority if it met the third-party effectiveness requirements in State Y within a certain period of time. It was further emphasized that, under the draft Guide, no issue of priority arose (to which recommendation 204 could apply) in a situation where two competing claimants took a right from different persons (as in an assignment from A to B and from B to C). Moreover, it was pointed out that, under recommendation 213, subparagraph (a), the debtor of a receivable could obtain a discharge if it paid in accordance with the law governing the receivable, without being concerned whether the person that received the payment was entitled to retain proceeds as against competing claimants. It was also mentioned that whether a receivable was assignable was, under recommendation 213, subparagraph (b), also a matter for the law governing the receivable. Finally, it was noted that, after six years of intergovernmental negotiations in UNCITRAL that had led to the preparation of the United Nations Assignment Convention and another six years of equally detailed negotiations that had led to the preparation of the draft Guide, it was clear that the law governing the receivable would inadvertently result in the application of several laws, in the typical case of a receivables financing transaction that involved the assignment of receivables in bulk, and in uncertainty as to the applicable law, in the equally typical case of a receivables financing transaction involving the assignment of future receivables.

114. The Committee agreed that recommendation 204 provided the appropriate law and recalled the decision taken by the Commission at its thirty-ninth session to approve the substance of the recommendations of the draft Guide, including recommendation 204.[8] It was also agreed that the commentary to the chapter should fully discuss the policy reasons justifying the approach taken in recommendation 204. In addition, it was agreed that the concerns expressed with regard to the law applicable to financial contracts would be discussed at a later stage in the session.

115. In the discussion, it was noted that recommendation 204 was one of the recommendations that might not be appropriate for security rights in intellectual property and would need to be reviewed in the context of any possible future work by the Commission on security rights in intellectual property (see paras. 155-157 below and A/CN.9/632, paras. 81-86).

116. With respect to recommendation 205, it was agreed that reference should be made, in this recommendation and in other relevant recommendations, to the law under which a specialized registration system was organized, but only if registration in such a system had priority consequences (and not tax or other consequences unrelated to priority).

117. As to recommendation 206, it was agreed that, in view of the strongly held views in support of both alternatives A and B, both alternatives should be retained.

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[7] Ibid., para. 243.

[8] Ibid., para. 74.

It was also agreed that the commentary should fully reflect the policy reasons underlying each alternative.

118. With respect to recommendation 214, the concern was expressed that reference to the law of the State where enforcement took place would create uncertainty, because: the place of enforcement could not be predicted at the time of conclusion of a transaction; in cases where the encumbered assets included both tangible and intangible assets, such an approach could result in the application of more than one law; and enforcement could involve several acts in several places, including places other than the place of the location of the encumbered assets.

119. In order to address that concern, it was suggested that reference should be made – for the enforcement of security rights in both tangible and intangible assets – to the law governing priority. In support of that suggestion, it was observed that, under such an approach, the law applicable to the enforcement of a security right in a tangible asset would be the law of the location of the asset (except in the case of tangible assets subject to a specialized registration system; see the second sentence of recommendation 202). It was also said that the law applicable to the enforcement of a security right in an intangible asset would be the law of the location of the grantor (except in the case of certain payment rights; see recommendations 206-210). In response to a question, it was explained that that approach could apply even in States that did not use the term "priority", since the term "priority", interpreted broadly, would cover any situation in which there was a conflict between competing rights.

120. That suggestion was objected to. It was stated that the compromise reached in recommendation 214 after long and difficult negotiations was a better result. It was also observed that application of the rule in recommendation 214, subparagraph (a), would result in the application of the law of the State where enforcement takes place to both procedural and substantive matters, while the reference to the law of the location of the grantor was appropriate with respect to the enforcement of security rights in intangible property (except with respect to certain payment rights; see recommendations 206-210).

121. In response, it was observed that, in the case of extrajudicial enforcement, no procedural matters arose and thus the certainty apparently offered by the rule in recommendation 214, subparagraph (a), could be said to be illusory. It was also stated that recommendation 214, subparagraph (a), appeared to be based on the potentially wrong assumption that enforcement would always take place in the State in which the assets were located. In addition, it was said that priority was so closely linked to enforcement that the same law should apply to both priority and enforcement.

122. Accordingly, it was proposed that both alternatives could be preserved. However, that suggestion did not attract sufficient support. It was widely felt that the importance of certainty with respect to the law applicable to the enforcement of a security right outweighed the benefits of the flexibility to be provided by alternative recommendations. It was agreed that the recommendation should contain only the current text of recommendation 214 and that other approaches should be discussed in the commentary.

123. With respect to recommendation 215, the suggestion was made that it should refer to the location of the branch of the grantor, which was most closely connected

to the security agreement. Noting that recommendation 215 reflected appropriately the correct approach of the United Nations Assignment Convention (article 5, subparagraph (h)), the Committee recalled the decision of the Commission at its thirty-ninth session to adopt the substance of recommendation 215.[9]

124. With respect to recommendation 216, subparagraph (a), it was widely felt that it should refer to the creation of a security right as a matter of fact rather than of law. In order to reflect that understanding, it was suggested that reference should be made to "putative" or "purported" creation. There was sufficient support for that suggestion.

125. With respect to recommendation 218, subparagraph (c), it was agreed that it should be revised along the following lines: "The rules in subparagraphs (a) and (b) of this recommendation do not permit the application of the provisions of the law of the forum on third-party effectiveness or the priority of a security right as against the rights of competing claimants." That formulation, it was said, would ensure that the forum could not use principles of public policy to apply its own substantive law rules on third-party effectiveness or priority. On the other hand, it was observed, the forum could set aside the creation rules of the applicable law and apply instead its own substantive law rules on the creation of a security right. As a result, the forum could refuse to recognize that a security right had been effectively created, if that was not permitted under the substantive law of the forum (for instance, a security right in wages).

126. With respect to recommendation 219, subparagraph (b), it was agreed that it should be deleted, as recommendation 220 addressed the same point.

127. Recalling its decision to consider the law applicable to the transfer of a security right once it had completed its discussion of the recommendations in chapter XIII (see para. 110 above), the Committee agreed that the commentary could discuss the effect of a transfer of a receivable on a right securing payment of the receivable and the law applicable thereto, describing approaches taken in various legal systems, without, however, making any recommendation, as that matter related to the law applicable to contractual obligations.

128. Subject to the above-mentioned changes and consequential amendments to the commentary to the chapter, the Committee adopted recommendations 202-222.

(b) Commentary (A/CN.9/631/Add.10)

129. The Committee approved the substance of the commentary to chapter XIII subject to the changes referred to above and the following changes:

(a) In paragraph 2, as making the determination of the internationality of a case a condition precedent to the application of conflict-of-laws rules could undermine their application, the third and fourth sentences should be deleted;

(b) References to courts and, to the extent possible, to the forum in chapter XIII should be replaced by references to "authorities" and to the State in which a case "was examined" respectively;

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[9] Ibid.

(c) In paragraph 14, the text should be reviewed to avoid any implication that all legal systems took an identical stance on the application of the law of the location of the asset to the creation of a security right as between the parties;

(d) In paragraphs 35-40, any limitations that the Committee might introduce to the scope of recommendation 204 with respect to financial contracts (see paras. 137-142 below) should be discussed;

(e) In paragraph 56, it should be clarified that recommendation 214 was not designed to apply to procedural enforcement matters and that, in some States, such matters could arise only in the context of judicial enforcement.

8. Priority of a security right in a negotiable document or goods covered by a negotiable document/law applicable to the priority of a security right in a negotiable document or goods covered by a negotiable document

130. Recalling its decision to defer discussion of recommendation 107 to a later time in the session (see para. 25 above), the Committee considered the following proposal for a revised version of recommendation 107:

> "107. The law should provide that a security right in tangible property made effective against third parties by possession of a negotiable document has priority over a competing security right made effective against third parties by another method. This rule does not apply if (i) the tangible property is not inventory and (ii) the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of (x) the time that the tangible property became represented by the negotiable document, and (y) the time when an agreement was made between the grantor and a secured creditor in possession of the negotiable document providing for the tangible property to be represented by a negotiable document so long as the tangible property became so represented within [30] days from the date of the agreement."

131. It was noted that, under the proposed reformulation, recommendation 107 would provide that a security right that was made effective against third parties through the transfer of possession of a negotiable document to the secured creditor would have priority over a security right that was made effective against third parties in any other way. It was widely felt that that text would better reflect the policy of preserving the negotiability of negotiable documents and reflecting relevant commercial practices.

132. It was also generally considered that, in order to properly address the relevant commercial practices, the rule should be made subject to an exception, with respect to which the general priority recommendations would apply (in other words, priority should be determined as of the time of registration). It was stated that the exception referred to a security right in tangible property other than inventory (for instance, equipment). It was observed that, unlike inventory, equipment was not normally expected to be represented by a negotiable document and be made subject to a security right in the negotiable document. Therefore, a security right in equipment should be protected in the sense that the general priority rules should apply. It was also observed that the exception involved a security right that was made effective against third parties before title to the tangible property became represented by the negotiable document or before conclusion of the agreement between the grantor and

the secured creditor providing that title in the tangible property were represented by a negotiable document. It was stated that that exception was justified by the fact that a person taking possession of a negotiable document should first check the registry and determine whether the assets covered by the document were subject to a security right.

133. The Committee adopted the proposed new recommendation 107.

134. The Committee recalled its decision to revert to the question of the law applicable to a priority conflict between a possessory security right in a negotiable document and a non-possessory security right in the tangible property covered by the document (see para. 110 above). The Committee agreed that such a priority conflict should be referred to the law of the State in which the negotiable document was located. It was widely felt that such an approach would be in line with applicable principles of negotiable document law.

9. Chapter XIV. Transition

(a) Recommendations (A/CN.9/631, recommendations 223-230)

135. The Committee adopted recommendations 223-230.

(b) Commentary (A/CN.9/631/Add.11)

136. The Committee approved the substance of the commentary to chapter XIV.

10. Financial contracts

137. The Committee engaged in a preliminary discussion with respect to the application of the draft Guide to contingent payment rights arising under or from financial contracts. At the outset, it was stated that the draft Guide applied to contingent payment rights arising under or from financial contracts as it applied to intangible assets in general. It was also observed that, if all types of securities were excluded from the scope of the draft Guide, the draft Guide would still apply to certain types of payment rights arising under or from financial contracts (for instance, foreign exchange contracts). In addition, it was said that those types of payment rights should either be excluded from the draft Guide or be made subject to certain asset-specific rules. Moreover, it was pointed out that such rules should deal with several issues, such as those mentioned below.

138. One such issue was the definition of the term “financial contract”. In that connection, it was pointed out that the definition contained in the United Nations Assignment Convention (article 5, subparagraph (k)) was a good starting point but would need to be updated so as to take into account recent developments in practice. Another issue was the law applicable to security rights in payment rights arising under or from financial contracts. It was observed that the law of the grantor’s location, provided in recommendation 204, would not be appropriate with respect to such payment rights. Yet another issue was the way in which a security right in a payment right arising from or under a financial contract could be made effective against third parties and whether third-party effectiveness achieved by control would result in that security right having a superior priority ranking. Yet another issue was that anti-assignment agreements contained in financial contracts should be respected, a result that would require an adjustment to the definition of the term

"receivable" and recommendation 25. Yet another issue was the recharacterization of the transfer of a financial contract as a secured transaction.

139. It was also noted that the above-mentioned considerations would apply even more if only some types of securities were excluded from the draft Guide (see paras. 145-147 below). In any case, it was stated, further work would be required in order to prepare asset-specific rules to fully reflect financial contract practice.

140. In response, it was observed that any exclusion from or inclusion in the draft Guide of payment rights arising under or from financial contracts should be based on the definition of the term "financial contract" contained in the United Nations Assignment Convention, as the definition was sufficiently flexible to accommodate new practices. It was also pointed out that the Convention excluded only payment rights arising under or from financial contracts governed by netting agreements (article 4, subparagraph 2 (b), and article 5, subparagraphs (k) and (l), of the Convention). In addition, it was pointed out that the suggestion that different rules should apply to security rights in payment rights from or under financial contracts was based on the potentially wrong assumption that existing law was sufficiently developed and worked well.

141. At the same time, it was emphasized that work on security rights in payment rights arising under or from financial contracts should be deferred to the future, since the relevant issues required significant additional work and, in any case, the draft Guide should not be made even more complex or delayed. It was widely felt that such a result could adversely affect the acceptability or the usefulness of the draft Guide. As to any future work in this area, it was mentioned that it could take the form of another asset-specific part of the draft Guide. As to the question of the provisional treatment of financial contracts in the draft Guide, the various approaches taken in recommendation 4 were mentioned.

142. The Committee decided to postpone a final decision on the treatment of financial contracts in the draft Guide until it had had an opportunity to consider the treatment of securities and coordination with the work of the International Institute for the Unification of Private Law (Unidroit) on the draft Unidroit Convention on Substantive Rules regarding Intermediated Securities (see paras. 145-151 below).

11. Chapter II. Scope of application and other general rules

(a) Security rights in intellectual property (A/CN.9/631, recommendation 4, subparagraph (b), and related commentary)

143. The Committee noted that recommendation 4, subparagraph (b), deferred to intellectual property law if any inconsistency arose between the draft Guide and intellectual property law. While support was expressed for the substance of the recommendation, the concern was expressed that the bracketed text, adding the condition that intellectual property law should address matters relating to security rights in intellectual property, could complicate the application of intellectual property law. In order to address that concern, the suggestion was made that the bracketed text should be deleted. There was sufficient support for that suggestion. Subject to that change, the Committee adopted recommendation 4, subparagraph (b).

144. With respect to the commentary on intellectual property issues, it was widely felt that the revisions to the commentary agreed upon by Working Group VI (Security Interests) at its twelfth session (A/CN.9/620, paras. 111-120) should be included in the commentary. Subject to those changes, the Committee approved the substance of the commentary on intellectual property issues.

(b) Securities (A/CN.9/631, recommendation 4, subparagraph (c))

145. With respect to recommendation 4, subparagraph (c), the Committee considered the question of whether the draft Guide should exclude all types of securities or intermediated securities only. The concern was expressed that an exclusion of intermediated securities only could result in overlap and conflict with the draft Unidroit Convention on Substantive Rules regarding Intermediated Securities and other regional and national texts. It was stated that a distinction between intermediated and non-intermediated securities was not easy to draw. It was also observed that, in some cases, the term "intermediated securities" might cover directly held securities in the so-called transparent holding systems, in which central securities depositories held securities for investors. In addition, it was said that securities raised different issues and should be subject to specific rules, the preparation of which would require careful study and discussion.

146. In that connection, it was suggested that possible future work of UNCITRAL in the area of securities should focus on directly held and non-traded securities, which were often the main asset that many small and medium-sized companies could offer as security for credit. On the other hand, it was also suggested that possible future work should: avoid drawing unnecessary distinctions between tradable and non-tradable securities and thus creating too many regimes; preserve title transfers; ensure that control was available as a method of third-party effectiveness and provided a security right with superior priority; and provide appropriate applicable law provisions. In addition, it was suggested that the rules on intermediated and non-intermediated securities should be integrated, as the distinction was not obvious. It was also suggested that title transfers and security rights in receivables arising from securities should be subject to the same regime.

147. It was agreed that all types of securities should be excluded from the draft Guide. Subject to that change, the Committee adopted recommendation 4, subparagraph (c). The Committee recommended to the Commission that future work should be undertaken with a view to preparing an annex to the draft Guide on certain types of securities, taking into account work by other organizations, in particular Unidroit.

(c) Financial contracts

148. Pursuant to its earlier decision to postpone a final decision on the treatment of payment rights arising under or from financial contracts in the draft Guide until it had had an opportunity to consider the treatment of securities and coordination with the work of Unidroit on the draft Unidroit Convention on Substantive Rules regarding Intermediated Securities (see para. 142 above), the Committee continued its discussion of whether security rights in payment rights arising under or from financial contracts and other similar contracts should also be excluded from the draft Guide. It was agreed that payment rights arising under or from financial contracts and foreign exchange contracts should be excluded. It was widely felt that

security rights in such payment rights raised different issues and required in some respects different treatment. In addition, it was generally considered that in particular the recommendations dealing with anti-assignment agreements, set-off rights of the debtor of the receivable and applicable law were not appropriate with respect to such payment rights.

149. As to the meaning of the term "financial contract" and thus as to the scope of the exclusion, differing views were expressed. One view was that a broad definition of the term "financial contract" should be adopted to ensure that all contracts encompassed by present and future practice in financial markets would be excluded from the scope of the draft Guide. It was stated that payment rights arising under or from financial contracts should be excluded whether they were subject to a netting agreement or not. It was also observed that a receivable payable upon termination of all outstanding transactions should also be excluded. In addition, it was pointed out that in particular the law applicable to a security right in such a receivable should be reviewed.

150. However, the prevailing view was that the definition of the term "financial contract" and the approach taken in the United Nations Assignment Convention (article 4, subparagraph (2) (b), and article 5, subparagraphs (k) and (l)) should be adopted. It was stated that such an approach was appropriate and would also ensure consistency with the Convention. It was also observed that, in line with the approach taken in article 4, subparagraph (2) (b), of the Convention, payment rights arising under or from financial contracts should be excluded only to the extent that they were subject to netting agreements (as a result, for example, a security right in a single receivable would not be excluded), and receivables payable upon termination of all outstanding obligations should not be excluded. In that connection, it was pointed out that the Commission, in its possible future work in that area, could examine the question of whether a special rule was required with respect to the third-party effectiveness and priority of a security right in such a receivable, as the United Nations Assignment Convention did not address that matter. However, it was added that the law applicable to a security right in such a receivable could not be reconsidered, as the United Nations Assignment Convention addressed it appropriately. While some doubt was expressed in that regard on the ground that there was a need for a new approach in view of new developments, it was widely felt that UNCITRAL could not and should not recommend an applicable law rule that would be inconsistent with the United Nations Assignment Convention.

151. The Committee agreed that security rights in payment rights arising under or from financial contracts and foreign exchange contracts should be excluded from the scope of the draft Guide based on the relevant exclusions of article 4, subparagraphs 2 (b) and (c), and the definitions of "financial contract" and "netting agreement" contained in article 5, subparagraphs (k) and (l), of the United Nations Assignment Convention. It was also agreed to recommend to the Commission that efforts should be made to consider at the resumed fortieth session of the Commission any proposals submitted in that regard. In addition, it was agreed to recommend to the Commission that it should consider at a future session possible future work on financial contracts.

12. Coordination with the draft Unidroit Model Law on Leasing

152. The Committee noted with appreciation efforts undertaken by delegates and the secretariats of Unidroit and UNCITRAL to ensure effective coordination between the draft Unidroit Model Law on Leasing and the draft Guide. It was also noted that those efforts had resulted in a proposal that the draft Model Law: defer to the draft Guide for financial leases that created a security right or an acquisition financing right; refer to the draft Guide for the definitions of those terms; and leave applicable law issues to the draft Guide. It was also noted that, under the proposed approach, the draft Guide should cover only those financial leases that created a security right or an acquisition financing right.

153. Noting that reference should be made to the terms "retention-of-title right" and "financial lease right", rather than to the term "acquisition financing right" (see para. 69 above), and that the term "financial lease right" was defined to ensure that only financial leases that created a security right would be covered by the draft Guide (see paras. 73-75 above), the Committee approved the proposed approach.

13. Recommendations by the Committee of the Whole to the Commission with respect to future work on the draft UNCITRAL Legislative Guide on Secured Transactions

154. Expressing once again its appreciation to the Secretariat for the preparation of an extremely large number of complex documents in a very short period of time, the Committee noted that it had adopted recommendations 4 (b) and (c) (on the scope of the draft Guide as to intellectual property, securities and financial contracts) and 74-230 (chapters VII-XIV) and approved the substance of the commentaries on chapters VII-XIV and on intellectual property, subject to the changes agreed upon by the Committee. The Committee also noted that, subject to the changes agreed upon by the Committee, it had approved the substance of the terminology of the draft Guide on the understanding that the terminology would be reviewed at the resumed fortieth session of the Commission. The Committee recommended that the Commission approve the decisions of the Committee. The Committee also recommended to the Commission that, at its resumed fortieth session, the Commission should consider recommendations 1-73 and the commentaries of chapters I-VI. In addition, the Committee recommended to the Commission that it would not need to review at its resumed fortieth session the recommendations and commentaries considered at the first part of the session, with the exception of the following materials, if necessary: recommendations on the extension of a retention-of-title right or a financial lease right to proceeds (non-unitary approach); 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). A suggestion to include in the matters to be further reviewed the recommendation dealing with the law applicable to security rights in intangible property did not attract sufficient support. The Committee also recommended to the Commission that the question of whether the definitions and recommendations of the draft Guide should be reproduced, in addition to the relevant chapter of the commentaries, in a separate annex to the draft Guide, should be deferred to the resumed fortieth session.

B. Possible future work on security rights in intellectual property

155. The Committee considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632). The Committee expressed its appreciation to the Secretariat for preparing the note and for organizing in cooperation with the World Intellectual Property Organization (WIPO) a colloquium on security rights in intellectual property,[10] as requested by the Commission at its thirty-ninth session.[11] It was noted that the colloquium, attended by representatives of Governments and of international and national governmental and non-governmental organizations with expertise in intellectual property law, had indicated the importance of intellectual property as security for credit and the need for adjustments to the draft Guide that would ensure the appropriate coordination between secured transactions and intellectual property law. It was further noted that the commentary of the draft Guide (A/CN.9/631/Add.1, para. 47) drew the attention of States to the need to consider adjusting their laws to avoid any inconsistencies between secured transactions and intellectual property law without, however, providing any specific guidance in that regard.

156. Broad support was expressed in favour of future work by the Commission on security rights in intellectual property. It was stated that a significant part of corporate wealth was embodied in intellectual property assets. It was also observed that the coordination between secured transactions law and intellectual property law under the regimes existing in many countries was not sufficiently developed to accommodate financing practices in the context of which credit was extended with intellectual property being used as security. In addition, it was said that the draft Guide did not provide sufficient guidance to States as to the adjustments that would need to be made to address the needs of financing practices relating to intellectual property. Moreover, it was emphasized that work should be undertaken as expeditiously as possible to ensure that the draft Guide gave a complete and comprehensive guidance in that regard. It was also suggested that, subject to the decision by the Commission, States might be alerted, by reference in the draft Guide, to upcoming work by the Commission on the preparation of an annex to the Guide specific to intellectual property that would modify the general considerations of the draft Guide in the same way that existing asset-specific parts of the draft Guide did so. It was finally pointed out that intellectual property law experts from Governments and from international governmental and non-governmental organizations should be invited to participate in future work in that area. There was general support for those statements and suggestions.

157. The Committee decided to recommend to the Commission that Working Group VI (Security Interests) should be entrusted with the preparation of an annex to the draft Guide specific to security rights in intellectual property. It was widely felt that the preparation of such an annex would usefully supplement the work of the Commission on the draft Guide by providing specific guidance to States

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[10] The UNCITRAL Second International Colloquium on Secured Transactions: Security Interests in Intellectual Property Rights, held in Vienna on 18 and 19 January 2007; for further information about the Colloquium, see the UNCITRAL website (http://www.uncitral.org/uncitral/en/commission/colloquia/2secint.html).

[11] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 86.

as to the appropriate coordination between secured transactions and intellectual property law. The Committee was of the view that inviting international organizations with expertise in the area of intellectual property, such as WIPO, and international governmental and non-governmental organizations with expertise in secured transactions and intellectual property law to participate actively in the preparation of such an annex would help ensure the successful completion of this work within a reasonable period of time.

C. Decisions by the Commission with respect to agenda item 4

158. Upon recommendation of the Committee of the Whole (see para. 154 above), the Commission approved the decisions of the Committee and, subject to the changes agreed upon by the Committee, adopted recommendations 4 (b) and (c) (on the scope of the draft Guide as to intellectual property, securities and financial contracts) and 74-230 (chapters VII-XIV) and approved the substance of the commentaries on chapters VII-XIV and on intellectual property. In addition, the Commission, subject to the changes agreed upon by the Committee, approved the substance of the terminology of the draft Guide on the understanding that the terminology would be reviewed at its resumed fortieth session.

159. Upon recommendation of the Committee of the Whole (see para. 154 above), the Commission, in addition, decided that, at its resumed fortieth session, it would consider recommendations 1-73 and the commentaries of chapters I-VI. The Commission agreed that it would not need to review at that time the recommendations and commentaries considered at the first part of the session, with the exception of the following materials, if necessary: recommendations on the extension of a retention-of-title right or a financial lease right to proceeds (non-unitary approach); 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). The Commission agreed to defer to its resumed fortieth session the question of whether the definitions and recommendations of the draft Guide should be reproduced, in addition to the relevant chapter of the commentaries, in a separate annex to the draft Guide.

160. With respect to securities, on the recommendation of the Committee of the Whole (see para. 147 above), the Commission decided that future work should be undertaken with a view to preparing an annex to the draft Guide on certain types of securities, taking into account work by other organizations, in particular Unidroit.

161. With respect to financial contracts, on the recommendation of the Committee of the Whole (see para. 151 above), the Commission decided that efforts should be made to consider at its resumed fortieth session any proposals submitted in that regard. In addition, it decided to consider at a future session possible future work on financial contracts.

162. With respect to future work on security rights in intellectual property, on the recommendation of the Committee of the Whole (see para. 157 above), the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property. (For the next session of the Working Group, see para. 251 (f) below.)

IV. Procurement: progress report of Working Group I

163. At its thirty-sixth and thirty-seventh sessions, in 2003 and 2004, respectively, the Commission considered the possible updating of the UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Guide to Enactment[12] on the basis of the notes by the Secretariat (A/CN.9/539 and Add.1 and A/CN.9/553).[13, 14] At its thirty-seventh session, the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform in public procurement as well as possible additional issues. The Commission decided to entrust the preparation of proposals for the revision of the Model Law to its Working Group I (Procurement) and gave the Working Group a flexible mandate to identify the issues to be addressed in its considerations. The Commission noted that, in updating the Model Law, care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.[15]

164. The Working Group commenced its work pursuant to that mandate at its sixth session (Vienna, 30 August-3 September 2004). At that session, it decided to proceed with the in-depth consideration of the topics suggested in the notes by the Secretariat (A/CN.9/WG.I/WP.31 and A/CN.9/WG.I/WP.32)[16] in sequence at its future sessions (A/CN.9/568, para. 10).

165. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, respectively, the Commission took note of the reports of the sixth (Vienna, 30 August-3 September 2004), seventh (New York, 4-8 April 2005), eighth (Vienna, 70-11 November 2005) and ninth (New York, 24-28 April 2006) sessions of the Working Group (A/CN.9/568, A/CN.9/575, A/CN.9/590 and A/CN.9/595, respectively).[17, 18]

166. At its current session, the Commission took note of the reports of the tenth (Vienna, 25-29 September 2006) and eleventh (New York, 21-25 May 2007) sessions of the Working Group (A/CN.9/615 and A/CN.9/623, respectively).

167. The Commission was informed that the Working Group, at its tenth and eleventh sessions, had continued its work on the elaboration of proposals for the revision of the Model Law and in this regard had considered the following topics: (i) the use of electronic means of communication in the procurement process; (ii) aspects of the publication of procurement-related information, including revisions to article 5 of the Model Law and the publication of forthcoming procurement opportunities; (iii) the procurement technique known as the electronic

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[12] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I; see also *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment* (United Nations publication, Sales No. E.05.V.10).

[13] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 225-230.

[14] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 79-82.

[15] Ibid., paras. 81 and 82.

[16] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 171.

[17] Ibid., paras. 170-172.

[18] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 190-192.

reverse auction; (iv) abnormally low tenders; and (v) the method of contracting known as the framework agreement. It used the notes by the Secretariat (A/CN.9/WG.I/WP.43 and Add.1, A/CN.9/WG.I/WP.44 and Add.1, A/CN.9/WG.I/WP.47, A/CN.9/WG.I/WP.48, A/CN.9/WG.I/WP.50 and A/CN.9/WG.I/WP.51) as a basis for its deliberations (A/CN.9/615, paras. 10 and 11, and A/CN.9/623, paras. 12 and 13).

168. The Commission was further informed that the Working Group, at its eleventh session, had held a preliminary exchange of views on document A/CN.9/WG.I/WP.52 and the drafting materials regarding framework agreements contained therein, and had decided to consider the document in depth at its next session. The Commission noted that the Working Group had deferred consideration of documents A/CN.9/WG.I/WP.45 and Add.1 and A/CN.9/WG.I/WP.52/Add.1 to a future session (A/CN.9/623, para. 12).

169. The Commission recalled that, at its thirty-ninth session, it had recommended that the Working Group, in updating the Model Law and the Guide, should take into account the question of conflicts of interest and should consider whether any specific provisions addressing that question in the Model Law would be warranted.[19] The Commission took note of the decision of the Working Group at its tenth session to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, para. 11), and that the Working Group, at its eleventh session, had noted that any time frame to be agreed for the completion of the revisions to the Model Law and the Guide should take into account the time necessary to consider and address this question (A/CN.9/623, para. 13).

170. The Commission commended the Working Group for the progress made in its work, and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices and techniques in the Model Law. It recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work. (For the next two sessions of the Working Group, see para. 251 (a) below.)

V. Arbitration and conciliation: progress report of Working Group II

171. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed that Working Group II (Arbitration and Conciliation) should undertake a revision of the UNCITRAL Arbitration Rules.[20]

172. At that session, the Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were widely recognized as a very successful text, having been adopted by many arbitration centres and used in many different instances, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of

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[19] Ibid., para. 192.

[20] Ibid., para. 187; for the text of the UNCITRAL Arbitration Rules, see *Official Records of the General Assembly*, *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

the Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to define carefully the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[21]

173. At its current session, the Commission commended the Working Group for the progress made regarding the revision of the UNCITRAL Arbitration Rules, as reflected in the reports of the forty-fifth (Vienna, 11-15 September 2006) and forty-sixth (New York, 5-9 February 2007) sessions of the Working Group (A/CN.9/614 and A/CN.9/619, respectively). The Commission also had before it a note by the Secretariat transmitting the report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976 (A/CN.9/634).

174. The Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.

175. The Commission noted that broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.

176. The Commission noted with satisfaction that the Working Group was progressing rapidly with the preparation of the revised UNCITRAL Arbitration Rules. The Working Group was expected to complete its work so that the final review and adoption of the revised Rules would take place at the latest at the forty-second session of the Commission, in 2009. It was agreed that, should the Working Group complete its proposals early enough for them to be considered by the Commission at its forty-first session, in 2008, that option would also be acceptable.

177. With respect to future work in the field of settlement of commercial disputes, the Commission recalled that, at its thirty-ninth session, it had agreed that the issue of arbitrability was a topic that the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should maintain the topic on its agenda but, at least in an initial phase, should consider the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.[22]

178. The Commission was informed that 2008 would mark the fiftieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

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[21] *Official Records of the General Assembly*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.

[22] Ibid., para. 187.

done at New York on 10 June 1958[23] (the "New York Convention") and that conferences to celebrate that anniversary were being planned in different regions, which would provide opportunities to exchange information on how the New York Convention had been implemented around the world. The Secretariat was requested to monitor the conferences and make full use of events associated with that anniversary to encourage further treaty actions in respect of the New York Convention and promote a greater understanding of that instrument. The Commission was informed that a one-day conference organized jointly by the United Nations and the International Bar Association was scheduled to be held in New York on 1 February 2008. (For the next two sessions of the Working Group, see para. 251 (b) below.)

VI. Transport law: progress report of Working Group III

179. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) to prepare, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods by sea, such as the scope of application, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper and transport documents.[24] At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft convention on transport law should cover door-to-door transport operations.[25] At its thirty-sixth to thirty-ninth sessions, in 2003-2006, respectively, the Commission noted the complexities involved in the preparation of the draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] and authorized the Working Group, on an exceptional basis, to hold its sessions on the basis of two-week sessions.[26, 27, 28, 29]

180. At its current session, the Commission took note with appreciation of the progress made by the Working Group at its eighteenth (Vienna, 6-17 November 2006) and nineteenth (New York, 16-27 April 2007) sessions (for the reports of the sessions, see A/CN.9/616 and A/CN.9/621, respectively).

181. The Commission was informed that the Working Group, at its eighteenth session, had continued and largely completed its second reading of the draft Convention, and had made significant progress with respect to a number of difficult issues, including those regarding transport documents and electronic transport records, shipper's liability for delay, time for suit, limitation of the carrier's liability, the relationship of the draft Convention with other conventions, general average, jurisdiction and arbitration. Also considered by the Working Group was the issue of rights of suit pursuant to the draft Convention and it was decided that, while an attempt to offer uniform solutions for rights of suit was a laudatory goal, the chapter

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[23] United Nations, *Treaty Series*, vol. 330, No. 4739.

[24] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

[25] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 224.

[26] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 208.

[27] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 133.

[28] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 238.

[29] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 270.

should be deleted from the draft Convention in the light of its complexity and of the Working Group's goal for completion of the text. The Commission was also informed that the Secretariat had facilitated consultations between experts from Working Group III (Transport Law) and experts from Working Group II (Arbitration and Conciliation) and that a common understanding had been reached that accommodated the needs and general approach of both working groups regarding the provisions on arbitration in the draft Convention.

182. The Commission was further informed that the Working Group, at its nineteenth session, had commenced its third reading of the draft Convention and that significant progress had been made in that regard. The third reading of a number of chapters of the draft Convention had been completed, including of related definitions, regarding the scope of application, electronic transport records, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, additional provisions relating to particular stages of carriage, the validity of contractual terms, liability for delay in the delivery of goods, the relationship of the draft Convention with other conventions and the obligations of the shipper. The Commission was further informed that the third reading had also largely been completed of the chapter regarding transport documents and electronic transport records.

183. The Commission commended the Working Group for the progress made in its work, particularly in the light of its goal of presenting the draft Convention to the Commission for its consideration in 2008. Nevertheless, some serious concerns were raised regarding the treatment of certain substantive issues in the draft Convention, such as freedom of contract in volume contracts, and it was suggested that those issues should receive further examination prior to finalization of the draft Convention. One delegation indicated that the treatment of the issue of freedom of contract in volume contracts would determine its position with regard to the adoption of a final convention.

184. With respect to the time frame for completion of the draft Convention, the Commission was informed that the Working Group planned to complete its third and final reading at the end of 2007, with a view to presenting the draft Convention for finalization by the Commission in 2008. In order to accommodate that goal and to allow for the possibility that the Working Group might need additional time beyond the end of its twentieth session to complete the final reading, the Commission agreed to schedule the twenty-first session of the Working Group for 14 to 25 January 2008, so as to provide sufficient time to complete the final reading of the draft Convention and circulate it for comments to Governments prior to the forty-first session of the Commission, in 2008. Further, the Commission agreed to move the twenty-first session of the Working Group from New York to Vienna, given that, if the final reading were completed at that session, it would require the participation of a formal drafting group, including translators and editors, which was possible only in Vienna. The Commission further noted that the Working Group could decide at the conclusion of its twentieth session whether it required a one-week or a two-week session in January 2008, but that, generally, noting the complexities and magnitude of the work involved in the preparation of the draft Convention, the Commission authorized the Working Group to hold its sessions on the basis of two-week sessions. (For the next two sessions of the Working Group, see para. 251 (c) below.)

VII. Insolvency law

A. Progress report of Working Group V

185. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that: (a) the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems that the Working Group would identify under that topic; and (b) post-commencement finance should initially be considered as a component of work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic.[30]

186. The Commission noted with appreciation the progress of the Working Group regarding consideration of the treatment of corporate groups in insolvency as reflected in the reports of its thirty-first (Vienna, 11-15 December 2006) and thirty-second (New York, 14-18 May 2007) sessions (A/CN.9/618 and A/CN.9/622, respectively) and commended the Secretariat for the working papers and reports prepared for those sessions.

187. The Commission reaffirmed that the mandate of the Working Group was to consider the treatment of corporate groups in insolvency, with post-commencement finance to be included as a component of that work (see para. 185 above).

188. The Commission took note of the agreement of the Working Group, at its thirty-first session, that the Insolvency Guide[31] and the UNCITRAL Model Law on Cross-Border Insolvency[32] provided a sound basis for the unification of insolvency law and that the current work on corporate groups was intended to complement those texts, not to replace them (A/CN.9/618, para. 69). The Commission also took note of the suggestion made at that session of the Working Group that a possible method of work would be to consider the provisions contained in those existing texts that might be relevant in the context of corporate groups and identify those issues that required additional discussion and the preparation of additional recommendations. The Commission further took note that other issues, although relevant to corporate groups, could be treated in the same manner as in the Insolvency Guide and the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/618, para. 70).

189. Concerns were expressed in the Commission with respect to some components of that work, in particular substantive consolidation and its effect on the separate identity of individual members of a corporate group. In addition, the possibility of submitting a solvent member of a corporate group to collective procedures was seriously questioned. The Commission noted those concerns and requested the

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[30] Ibid., para. 209 (a) and (b).

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

[32] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), annex I.

Working Group to bear them in mind in its deliberations. (For the next two sessions of the Working Group, see para. 251 (e) below.)

B. Facilitation of cooperation and coordination in cross-border insolvency proceedings

190. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed that initial work to compile practical experience with negotiating and using cross-border insolvency protocols should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007.[33]

191. The Commission had before it a note by the Secretariat on facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings (A/CN.9/629). The Commission emphasized the practical importance of facilitating cross-border cooperation in insolvency cases. It expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency protocols based on the draft outline of contents in document A/CN.9/629. It reaffirmed that that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.

VIII. Possible future work in the area of electronic commerce

192. The Commission recalled that Working Group IV (Electronic Commerce), after it had completed its work on the draft Convention on the Use of Electronic Communications in International Contracts, in 2004, requested the Secretariat to continue monitoring various issues related to electronic commerce, including issues related to cross-border recognition of electronic signatures, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible (A/CN.9/571, para. 12).

193. The Commission further recalled that, at its thirty-eighth session, in 2005, it took note of the work undertaken by other organizations in various areas related to electronic commerce, summarized in a note by the Secretariat (A/CN.9/579). At that session, the Commission requested the Secretariat to prepare a more detailed study, which should include proposals as to the form and nature of a comprehensive reference document discussing the various elements required to establish a favourable legal framework for electronic commerce, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world.[34]

194. It was also recalled that at its thirty-ninth session, in 2006, the Commission had considered a note by the Secretariat prepared pursuant to that request (A/CN.9/604). The note identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition

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[33] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 209 (c).
[34] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 214.

of electronic signatures; (b) liability and standards of conduct for information service providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues that could be included, although in a more summary fashion, in such a document: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cybercrime. At that session, there had been support for the view that the task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if the Commission were to formulate a comprehensive reference document dealing with the topics identified by the Secretariat. It had been also said at that session that such a document might also assist the Commission in identifying areas in which it might itself undertake future harmonization work. However, concerns had also been expressed that the range of issues identified was too wide and that the scope of the comprehensive reference document might need to be reduced. At that session, the Commission had requested the Secretariat to prepare a sample portion of the comprehensive reference document dealing specifically with issues related to authentication and cross-border recognition of electronic signatures, for review at the Commission's fortieth session, in 2007.[35]

195. At its current session, the Commission considered the sample chapter that had been prepared by the Secretariat pursuant to that request (A/CN.9/630 and Add.1-5). The Commission reviewed the structure, level of detail, nature of discussion and type of advice provided in the sample chapter. The Commission commended the Secretariat for the preparation of the sample chapter, which the Commission regarded as very informative and useful. It was suggested that it would be desirable for the Secretariat to prepare other chapters following the same model, to deal with other issues that the Commission might wish to select from among those proposed earlier, in particular the transfer of rights in tangible goods and other rights through electronic communications. However, the Commission was not in favour of requesting the Secretariat to undertake similar work in other areas with a view to preparing a comprehensive reference document. The Commission agreed to request the Secretariat to continue to follow closely legal developments in the relevant areas, with a view to making appropriate suggestions in due course. In view of the valuable work that had already been done, the Commission requested the Secretariat to publish the sample chapter as a stand-alone publication.

IX. Possible future work in the area of commercial fraud

A. Background

196. It was recalled that the Commission at its thirty-fifth to thirty-ninth sessions, from 2002 to 2006, had considered possible future work on commercial fraud.[36, 37, 38, 39, 40] It was in particular recalled that at its thirty-seventh session, in 2004, with a

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[35] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 203-206.
[36] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290.
[37] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 231-241.
[38] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112.

view towards education, training and prevention, the Commission had agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud to the extent that such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes. While it was not proposed that the Commission itself or its intergovernmental working groups should be directly involved in that activity, it was agreed that the Secretariat should consider preparing, in close consultation with experts, such materials listing common features present in typical fraudulent schemes and that the Secretariat would keep the Commission informed of progress in that regard.[41]

197. It was further recalled that the attention of the Commission had been drawn at its thirty-eighth session, in 2005, to Economic and Social Council resolution 2004/26 of 21 July 2004, pursuant to which the United Nations Office on Drugs and Crime (UNODC) had convened an intergovernmental expert group meeting in March 2005 to prepare a study on fraud and the criminal misuse and falsification of identity, and to develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL.[42] The results of that meeting were reported to the Commission on Crime Prevention and Criminal Justice (the "Crime Commission") at its fourteenth session (Vienna, 23-27 May 2005) (E/CN.15/2005/11), where it was agreed that a study of the problem should be undertaken on the basis of the responses received to a questionnaire on fraud and the criminal misuse and falsification of identity. The UNCITRAL secretariat had participated in the expert group meeting, the progress of which was reported to the Crime Commission at its fifteenth session (Vienna, 24-28 April 2006) (E/CN.15/2006/11 and Corr.1). As the UNCITRAL secretariat had worked with UNODC in the drafting and dissemination of the questionnaire in preparation for the study, the Commission expressed its support for the assistance of the UNCITRAL secretariat in the UNODC project.[43]

198. It was also recalled that, at its thirty-ninth session, in 2006, the Commission heard a progress report on work by the Secretariat on materials listing common features present in typical fraudulent schemes. At that session, the Commission took note of the suggested format for the materials as set out in document A/CN.9/600, paragraph 14, and that the materials could contain additional information, such as explanations regarding how to effectively perform due diligence (A/CN.9/600, para. 16). The Commission agreed with statements made at that session to the effect that commercial fraud deterred legitimate trade and undermined confidence in established contract practices and instruments and that the UNCITRAL transactional and private law perspective and expertise were necessary for a full understanding of the problem of commercial fraud and were most useful in the formulation of measures to fight it. The Commission concluded that its secretariat should continue its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes, with a view to presenting

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[39] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220.
[40] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 211-217.
[41] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 112.
[42] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 217.
[43] Ibid., paras. 218-219.

interim or final materials for the consideration of the Commission at a future session; it should continue to cooperate with UNODC in its study on fraud, the criminal misuse and falsification of identity and related crimes; and it should keep the Commission informed of the progress of that work.[44]

B. Work on indicators of commercial fraud

199. At its current session, the Commission was informed that the Secretariat had, as requested, continued its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes in order to prepare materials of an educational nature for the purpose of preventing the success of fraudulent schemes. The results of that work were reflected in a note by the Secretariat entitled "Indicators of commercial fraud" (A/CN.9/624 and Add.1 and 2). It was explained that, as noted in the introduction to the materials before the Commission (A/CN.9/624, annex, chapter I), the intended audience was very broad and included individuals, professionals, businesspersons, regulators, law enforcement officers, litigants and, potentially, arbitration tribunals and courts in cases involving commercial fraud. It was further explained that the materials were intended to be instructive reference materials to provide guidance to the intended audience, regardless of their particular level of sophistication with respect to investments or commercial transactions. The presentation of each of the indicators was similar: first, the potential indicator of fraud was identified; this was followed by a more detailed description of the indicators; and, lastly, instances and examples of the particular indicator were given, as found in a commercial fraud in a variety of contexts. Advice was then provided regarding what could be done to avoid or to counteract the effects of the behaviour identified in each indicator, as appropriate. Finally, since it was not possible to identify discrete indicators with absolutely clear demarcations between them, it was explained that many of the indicators could or should overlap, and cross references to other related indicators were included, where relevant. However, the Commission was also informed that, as noted in the introduction to the materials, each of the indicators taken alone or in combination was not intended to indicate definitively the presence of commercial fraud; rather, the presence of a single warning sign was intended to send a signal that commercial fraud was a possibility, while the presence of several of the indicators was intended to heighten that concern. The Commission was informed that the text of the indicators of commercial fraud that was before it was an interim text, and that it was proposed to the Commission that the indicators of commercial fraud should be circulated by the Secretariat to Governments, international organizations and interested bodies for comment, and for consideration by the Commission at its next session.

200. The Commission commended the Secretariat, the experts and the other interested organizations that had collaborated on the preparation of the indicators of commercial fraud for their work on the difficult task of identifying the issues and in drafting materials that could be of great educational and preventive benefit. The Commission agreed with the proposal to circulate the materials on indicators of commercial fraud prior to the next session of the Commission for comment, and

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[44] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 214-217.

welcomed the opportunity to consider the document and related comments at its next session. At the same time, concern was expressed regarding future work in the area of commercial fraud, given that other international organizations, including UNODC, were working on the problem of commercial fraud and its impact. It was suggested that commercial fraud was primarily a concern of criminal law and that any future work in the area by UNCITRAL should bear in mind the mandate of UNCITRAL and whether it was possible for it to make a contribution in the area. Other views were expressed along the lines that broad cooperation and dialogue between criminal law authorities and commercial law interests with respect to commercial fraud had not been achieved until UNCITRAL had commenced its work on the indicators and its cooperation with UNODC and that that cooperation was critical to maintaining a constructive dialogue on commercial fraud and sharing information in an effective manner. It was suggested that UNCITRAL, in providing information and education on commercial fraud, had made a useful contribution to strengthening efforts to reduce the impact of fraud globally.

C. Collaboration with the United Nations Office on Drugs and Crime with respect to commercial and economic fraud

201. The Commission had before it for information the report of the Secretary-General on the results of the second meeting of the Intergovernmental Expert Group to Prepare a Study on Fraud and the Criminal Misuse and Falsification of Identity (E/CN.15/2007/8 and Add.1-3), held in Vienna from 16 to 19 January 2007.

202. The Commission was informed that the study confirmed the difficulty of measuring fraud, and that most Governments underestimated the seriousness of that rapidly expanding global problem, which was associated with the increasing use of information technology. In addition, it was noted in the study that Governments were concerned about commercial entities sometimes being reluctant to report incidents of fraud and that the high proceeds and low risks involved had made fraud attractive to both organized criminal organizations and terrorist organizations. The Commission was informed that the Crime Commission had considered the study at its sixteenth session.[45] At that session, the Crime Commission proposed for adoption by the Economic and Social Council a draft resolution by which the Council would: (a) request the Secretary-General to disseminate its report containing the conclusions of the study as widely as possible; (b) encourage Member States to take a number of actions, including availing themselves of the recommendations of the report when developing effective strategies for responding to the problems addressed in the report and consulting and collaborating with appropriate commercial and other private-sector entities to the extent feasible, with a view to more fully understanding the problems of economic fraud and identity-related crime and cooperating more effectively in the prevention, investigation and prosecution of such crime; (c) encourage the promotion of mutual understanding and cooperation between public- and private-sector entities through initiatives aimed at bringing together various stakeholders and facilitating the exchange of views and information among them; and (d) request UNODC to facilitate such

[45] See the report on the sixteenth session of the Commission on Crime Prevention and Criminal Justice (E/2007/30, chap. III), to be issued subsequently as *Official Records of the Economic and Social Council, 2007, Supplement No. 10* (E/2007/30/Rev.1).

cooperation in consultation with the UNCITRAL secretariat, pursuant to Economic and Social Council resolution 2004/26 of 21 July 2004.[46]

203. The Commission noted with interest and appreciation the report of the Secretary-General and the draft resolution proposed by the Crime Commission for adoption by the Economic and Social Council. The Commission requested the Secretariat to continue to cooperate with and to assist UNODC in its work with respect to commercial and economic fraud and to report to the Commission regarding any developments or efforts made in that respect.

X. Monitoring implementation of the New York Convention

204. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention.[47] It was also recalled that the Secretariat had presented an interim report to the Commission at its thirty-eighth session, in 2005 (A/CN.9/585), which set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project.[48]

205. It was further recalled that the Commission, at its thirty-eighth session, had welcomed the progress reflected in the interim report, noting that the general outline of replies received had served to facilitate discussions as to the next steps to be taken and highlighted areas of uncertainty where more information could be sought from States parties or further studies could be undertaken. It was suggested that one possible future step could be the development of a legislative guide to limit the risk that State practice would diverge from the spirit of the New York Convention.[49]

206. It was noted that, at its thirty-ninth session, in 2006, the Commission had taken note of an oral presentation by the Secretariat on additional questions it proposed to put to States (as noted in document A/CN.9/585, para. 73) in order to obtain more comprehensive information regarding various aspects of implementation of the New York Convention, including legislation, case law and practice. The Commission had agreed at that session that the project should aim at the development of a legislative guide, with a view to promoting a uniform interpretation of the New York Convention. At the same session, the Commission had reaffirmed the decisions made at its thirty-eighth session, in 2005, that a level of flexibility should be left to the Secretariat in determining the time frame for completion of the project and the level of detail that should be reflected in the report that the Secretariat would present for consideration by the Commission in due course.[50]

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[46] E/2007/30, chap. I, sect. B, draft resolution II.

[47] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[48] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 189.

[49] Ibid., paras. 190 and 191.

[50] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 220.

207. At its current session, the Commission was informed that a written report was intended to be presented at its forty-first session, in 2008, which would coincide with the fiftieth anniversary of the New York Convention. The Commission commended the Secretariat for the work accomplished so far in respect of that project. The Commission was further informed that the Arbitration Committee of the International Bar Association had proposed to actively assist the Secretariat in gathering information required to complete the report. The Commission further noted that the Commission on Arbitration of the International Chamber of Commerce had created a task force to examine the national rules of procedure for recognition and enforcement of foreign arbitral awards on a country-by-country basis, with the aim of issuing in 2008 a report on national rules of procedure. The Commission encouraged the Secretariat to seek possible cooperation with the International Chamber of Commerce in order to avoid duplication of work in that respect.

208. It was proposed that, in the context of monitoring implementation of the New York Convention, the recommendation adopted by the Commission at its thirty-ninth session, in 2006,[51] regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention be circulated to States in order to seek comments as to the impact of that recommendation in their jurisdictions. That proposal received support.

XI. Endorsement of texts of other organizations: Unidroit Principles of International Commercial Contracts 2004

209. The Commission recalled its decision made at its thirty-ninth session, in 2006, that the 2004 edition of the Unidroit Principles of International Commercial Contracts[52] be circulated to States with a view to possible endorsement by the Commission at its current session.[53] The Commission noted that, pursuant to that decision, the Secretariat had circulated the text of the Principles to all States.

210. The Commission noted that the Principles, first published in 1994, provided a comprehensive set of rules for international commercial contracts. It further noted that the new edition, completed in 2004, contained five new chapters and revisions to take into account electronic contracting. The Commission recognized that the Unidroit Principles 2004 complemented a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods (1980).[54] It was observed that unofficial translations of the Principles had been published in over 12 languages, including all official languages of the United Nations except Arabic. The observer for Unidroit indicated that a version in Arabic was expected to be published in the near future.

211. General support was expressed for recognizing the value of the Unidroit Principles 2004. It was noted that the Principles were widely recognized and had

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[51] Ibid., annex II.

[52] Available on the Unidroit website (http://www.unidroit.org/english/principles/contracts/main.htm).

[53] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 234.

[54] United Nations, *Treaty Series*, vol. 1489, No. 25567.

been applied in a variety of circumstances. A question was raised as to the relationship between the United Nations Sales Convention and the Principles. It was observed that the United Nations Sales Convention contained comprehensive specialized rules governing contracts for the international sale of goods and applied in accordance with its scope-of-application provisions to the exclusion of the Principles. Equally, questions concerning matters governed by the United Nations Sales Convention that were not expressly settled in it were to be settled, as provided in article 7 of the Convention, in conformity with the general principles on which the Convention was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Thus, the optional use of the Principles was subordinate to the rules governing the applicability of the United Nations Sales Convention.

212. It was noted that the preamble of the Principles referred to their application "when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like". It was clarified that, depending on the circumstances, the Principles might be regarded as one possible expression of the *lex mercatoria* but that that issue ultimately depended on applicable law, existing contractual arrangements and the interpretation taken by users of the Principles.

213. Bearing in mind the above considerations, the Commission, at its 851st meeting, on 4 July 2007, adopted the following decision regarding the Unidroit Principles 2004:

> "*The United Nations Commission on International Trade Law*,
>
> "*Expressing* its appreciation to the International Institute for the Unification of Private Law (Unidroit) for transmitting to it the text of the 2004 edition of the Unidroit Principles of International Commercial Contracts,
>
> "*Taking note* that the Unidroit Principles 2004 complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods (1980),
>
> "*Noting* that the preamble of the Unidroit Principles 2004 states that the Unidroit Principles 2004 set forth general rules for international contracts and that:
>
> "They shall be applied when the parties have agreed that their contract be governed by them,
>
> "They may be applied when parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like,
>
> "They may be applied when the parties have not chosen any law to govern their contract,
>
> "They may be used to interpret or supplement international uniform law instruments,
>
> "They may be used to interpret or supplement domestic law,
>
> "They may serve as a model for national and international legislators,

"*Congratulating* Unidroit on having made a further contribution to the facilitation of international trade by preparing general rules for international commercial contracts,

"*Commends* the use of the Unidroit Principles 2004, as appropriate, for their intended purposes."

XII. Technical assistance to law reform

A. Technical cooperation and assistance activities

214. The Commission had before it a note by the Secretariat (A/CN.9/627) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its thirty-ninth session, in 2006 (A/CN.9/599). The Commission emphasized the importance of such technical cooperation and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/627, paragraphs 6-28.

215. The Commission noted that the continuing ability to participate in technical cooperation and assistance activities in response to specific requests of States was dependent upon the availability of funds to meet associated UNCITRAL costs. The Commission in particular noted that, despite efforts by the Secretariat to solicit new donations, funds remaining in the UNCITRAL Trust Fund for Symposia would be sufficient only for technical cooperation and assistance activities already planned for 2007. Beyond the end of 2007, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other associated costs would have to be declined unless new donations to the Trust Fund were received or other alternative sources of funds could be found.

216. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for technical assistance and cooperation activities. The Commission expressed its appreciation to Mexico and Singapore for contributing to the Trust Fund since the Commission's thirty-ninth session and to organizations that had contributed to the programme by providing funds or by hosting seminars. The Commission also expressed its appreciation to France and the Republic of Korea, which had funded junior professional officers to work in the Secretariat.

217. The Commission also appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission, noting that no contributions to the trust fund for travel assistance had been received since the thirty-sixth session of the Commission.

B. Technical assistance resources

218. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). As at 18 April 2007, 63 issues of compiled case-law abstracts from the CLOUT system had been prepared for publication, dealing with 686 cases relating mainly to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration.[55]

219. It was widely agreed that the CLOUT system continued to be an important aspect of the overall technical assistance activities undertaken by UNCITRAL and that its broad dissemination in all six official languages of the United Nations promoted the uniform interpretation and application of UNCITRAL texts. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system.

220. The Commission noted that the digest of case law on the United Nations Sales Convention, published in December 2004,[56] had been reviewed and edited and that the revised draft would be presented to the CLOUT national correspondents meeting on 5 July 2007.

221. The Commission also noted developments with respect to the UNCITRAL website (www.uncitral.org), emphasizing its importance as a component of the overall UNCITRAL programme of information and technical assistance activities. The Commission expressed its appreciation for the availability of the website in the six official languages of the United Nations and encouraged the Secretariat to maintain and further upgrade the website in accordance with existing guidelines. It was noted that, since the holding of the thirty-ninth session of the Commission, the website had received on average more than 2,500 visitors per day.

222. The Commission took note of developments with respect to the UNCITRAL Law Library and UNCITRAL publications.

XIII. Status and promotion of UNCITRAL legal texts

223. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/626) and updated information available on the UNCITRAL website. The Commission noted with appreciation the new actions and enactments of States and jurisdictions since its thirty-ninth session regarding the following instruments:

(a) [Unamended] Convention on the Limitation Period in the International Sale of Goods, 1974 (New York):[57] new action by Montenegro; 27 States parties;

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[55] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[56] Available on the UNCITRAL website (http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html).

[57] United Nations, *Treaty Series*, vol. 1511, No. 26119; see also *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods*, *New York,*

(b) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg):[58] new action by Albania; 32 States parties;

(c) United Nations Convention on Contracts for the International Sale of Goods (1980):[59] new actions by El Salvador, Montenegro and the former Yugoslav Republic of Macedonia; 70 States parties;

(d) United Nations Convention on the Use of Electronic Communications in International Contracts (2005):[60] signatures by China, Madagascar, Paraguay, the Russian Federation, Sierra Leone, Singapore and Sri Lanka;

(e) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958):[61] new actions by the Bahamas, Gabon, the Marshall Islands, Montenegro and the United Arab Emirates; 142 States parties;

(f) UNCITRAL Model Law on International Commercial Arbitration (1985):[62] legislation enacted by Cambodia (2006), Estonia (2006), Uganda (2000) and Venezuela (Bolivarian Republic of) (1998) based on the Model Law;

(g) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994):[63] legislation enacted by Afghanistan (2006) based on the Model Law;

(h) UNCITRAL Model Law on Electronic Commerce (1996):[64] legislation enacted by the United Arab Emirates (2006) and Viet Nam (2005) based on the Model Law;

(i) UNCITRAL Model Law on Cross-Border Insolvency (1997):[65] legislation enacted by Colombia (2006) and New Zealand (2006) based on the Model Law;

(j) UNCITRAL Model Law on Electronic Signatures (2001):[66] legislation enacted by the United Arab Emirates (2006) and Viet Nam (2005) based on the Model Law.

224. The Commission heard that, in the context of the treaty event[67] to be held from 25 to 27 September and on 1 and 2 October 2007, the following three treaties related to the work of UNCITRAL would be highlighted: the New York Convention,

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20 May-14 June 1974 (United Nations publication, Sales No. E.74.V.8), part I.

[58] United Nations, *Treaty Series*, vol. 1695, No. 29215.

[59] Ibid., vol. 1489, No. 25567.

[60] United Nations publication, Sales No. E.07.V.2.

[61] United Nations, *Treaty Series*, vol. 330, No. 4739.

[62] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), annex I.

[63] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

[64] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I; see also *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with Additional Article 5 bis as Adopted in 1998* (United Nations publication, Sales No. E.99.V.4).

[65] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), annex I.

[66] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II.

[67] The treaty event is a yearly exercise aimed at promoting the international rule of law through broader participation in multilateral treaties deposited with the Secretary-General. It usually takes place at United Nations Headquarters during the general debate of the General Assembly.

the United Nations Sales Convention and the United Nations Convention on the Use of Electronic Communications in International Contracts.

225. States were invited to consider participating in the 2007 treaty event by undertaking appropriate treaty actions relating to those treaties. In particular, it was recalled that the United Nations Convention on the Use of Electronic Communications in International Contracts would close for signature on 16 January 2008 and that therefore the 2007 treaty event might provide one of the last high-level opportunities for signature of that text.

XIV. Coordination and cooperation

A. General

226. The Commission had before it a note by the Secretariat (A/CN.9/628 and Add.1) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon substantive legislative work. The Commission commended the Secretariat for the preparation of that document, recognizing its value to coordination of the activities of international organizations in the field of international trade law, and welcomed the revision of the survey on an annual basis.

227. It was recalled that the Commission at its thirty-seventh session, in 2004, had agreed that it should adopt a more proactive attitude, through its Secretariat, to fulfilling its coordination role.[68] Recalling the endorsement by the General Assembly, most recently in its resolution 61/32 of 4 December 2006, paragraph 5, of UNCITRAL efforts and initiatives towards coordination of activities of international organizations in the field of international trade law, the Commission noted with appreciation that the Secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, the Organization of American States, Unidroit, the World Bank and the World Trade Organization. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

B. Reports of other international organizations

228. The Commission heard a statement on behalf of Unidroit, reporting on progress with a number of projects outlined in document A/CN.9/628 and Add.1, including the following:

(a) The Working Group on the Principles of International Commercial Contracts held its second session in June 2007 and made substantial progress on the

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[68] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 113-115.

unwinding of failed contracts, plurality of obligors and of obligees, termination of long-term contracts for just cause and initial progress on illegality. An intersessional meeting of a drafting committee would be held;

(b) The fourth session of the Unidroit Committee of Governmental Experts was held in May 2007 to further consider the draft Convention on Substantive Rules regarding Intermediated Securities. That meeting considered a number of additional systems regulating the trading, custody, clearing and settlement of securities, including in Asia (China and Malaysia), Europe (Spain and several Nordic countries) and Latin America (Brazil and Colombia). A diplomatic conference was scheduled for 2 to 13 June 2008;

(c) The drafting of a legislative guide on principles and rules on trading in securities in emerging markets was currently suspended to concentrate on the draft Convention on Substantive Rules regarding Intermediated Securities;

(d) The Convention on International Interests in Mobile Equipment (2001)[69] and the Protocol to that Convention on Matters specific to Aircraft Equipment (2001)[70] each currently had 16 States parties. The Diplomatic Conference to Adopt a Rail Protocol to the Convention on International Interests in Mobile Equipment, held in Luxembourg from 12 to 23 February 2007, adopted the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Stock (2007).[71] The Luxembourg Protocol had been signed by four States on 23 February 2007, the date of adoption. The third session of the Unidroit Committee of Governmental Experts, expected to be held in late 2007, would continue to discuss the preliminary draft protocol on matters specific to space assets;

(e) The relationship between the Convention on International Interests in Mobile Equipment and the Protocols thereto and the draft Unidroit Model Law on Leasing continued to be examined, most recently by the Unidroit Committee of Governmental Experts in Johannesburg, South Africa. A further session was scheduled for December 2007 or early 2008, and it was anticipated that the Unidroit General Assembly would consider the draft Model Law in early 2008.

XV. Willem C. Vis International Commercial Arbitration Moot competition

229. It was noted that the Institute of International Commercial Law at Pace University School of Law in White Plains, New York, had organized the Fourteenth Willem C. Vis International Commercial Arbitration Moot in Vienna, from 30 March to 5 April 2007. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Fourteenth Moot had been based on the United Nations Sales

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[69] Available on the Unidroit website (http://www.unidroit.org/english/conventions/mobile-equipment/main.htm).

[70] Available on the Unidroit website (http://www.unidroit.org/english/conventions/mobile-equipment/main.htm).

[71] Available on the Unidroit website (http://www.unidroit.org/english/conventions/mobile-equipment/main.htm).

Convention,[72] the Arbitration Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania,[73] the Arbitration Model Law[74] and the New York Convention.[75] A total of 177 teams from law schools in 51 countries had participated in the Fourteenth Moot. The best team in oral arguments was that of the University of Freiburg, Germany. The Fifteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 14 to 20 March 2008.

XVI. Relevant General Assembly resolutions

230. The Commission took note with appreciation of General Assembly resolutions 61/32, on the report of the Commission on the work of its thirty-ninth session, and 61/33 of 4 December 2006, on the revised articles of the Model Law on International Commercial Arbitration, and of the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention.[76]

231. The Commission also took note of General Assembly resolution 61/39 of 4 December 2006, on the rule of law at the national and international levels, and heard an oral report from the Secretariat on the status of implementation of the resolution. In particular, as regards the preparation of an inventory requested by the General Assembly in the resolution, the Commission noted that the UNCITRAL secretariat, based on replies to a circulated questionnaire, had submitted a detailed inventory of all activities of UNCITRAL and its secretariat related to the promotion of the rule of law at the national and international levels, and, as was requested, identified problems commonly encountered in those activities and possible solutions.

232. The Commission was apprised of the pertinent statement made by the Chairman of the thirty-ninth session of the Commission at the sixty-first session of the General Assembly upon introduction of the annual report of the Commission to the Sixth Committee of the Assembly. The Commission was informed that the Chairman, in his statement made on behalf of UNCITRAL, had welcomed consideration in a comprehensive and coherent manner by the Assembly of ways and means to promote the rule of law at the national and international levels. He noted current sporadic and fragmented approaches within the United Nations in that regard. With the primary focus on criminal justice, transitional justice and judicial reform, these approaches, he stated, often overlooked the economic dimension of the rule of law, including the need for commercial law reforms as an essential foundation for long-term stability, development, empowerment and good governance. He further stated that, as United Nations experience in various areas of its operation had shown, approaches to building and promoting the rule of law had to be comprehensive and coherent in order to achieve sustained results.

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[72] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[73] Available on the website of the Chamber of Commerce and Industry of Romania (http://arbitration.ccir.ro/engleza/rulesarb.htm).

[74] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[75] United Nations, *Treaty Series*, vol. 330, No. 4739.

[76] Ibid.

233. The Commission reiterated its conviction that its work to establish modern private law standards on international trade in a manner that was acceptable to States with different legal, social and economic systems and to promote such standards significantly contributed to the development of harmonious international relations, respect for the rule of law, peace and stability, and was indispensable for supporting economic development and for designing a sustainable economy. It therefore highlighted the need for more effective integration of resources and expertise of UNCITRAL, as the only United Nations expert body in the field of international commercial law, in the programmes within and outside the United Nations aimed at promoting the rule of law at the national and international levels. The hope was expressed that the areas of work, resources and expertise of UNCITRAL, together with the problems encountered in the implementation of its mandate and the actions and resources needed to overcome those problems, would be duly taken into account in the implementation of General Assembly resolution 61/39.

XVII. Other business

A. Observations and proposals by France on the methods of work of the Commission

234. The Commission had before it observations and proposals by France on the working methods of the Commission (A/CN.9/635). It was stated by the proponents that the fortieth anniversary of the Commission was a particularly timely moment to review its working methods, which were said to be uncertain and to deviate from rules of procedure generally followed by subsidiary organs of the General Assembly. Of particular concern to the proponents of such a review was the perception that the working methods of the Commission and its working groups might not sufficiently encourage effective participation in the creation of UNCITRAL standards or the subsequent enactment of those standards by a broad range of States. Examples were given of instruments adopted by UNCITRAL that had so far not been widely ratified or enacted by States. The proposed changes in the working methods of the Commission were described as a means through which member States might increase their sense of ownership and responsibility in respect of UNCITRAL through stronger control over the standard-making activity of the Commission. Among the various proposals outlined in the observations by France, emphasis was placed on the decision-making process in the Commission and its working groups. From the point of view of the delegation of France, it was appropriate to better define the notion “consensus”, on which the decision-making process was based. The role of non-State entities in the elaboration of uniform law standards was also questioned and it was proposed that a clearer distinction should be made between the phase of negotiation, during which non-governmental organizations might make useful contributions, and the phase of decision-making, in which only member States should take part.

235. In response to those observations and proposals, it was stated that any input aimed at maintaining the tradition of excellence of UNCITRAL and ensuring its effectiveness should be welcomed. It was pointed out that, as a technical body, UNCITRAL had decided in its earliest sessions that it would develop working

methods that were appropriate for the performance of its functions. Over its 40 years of existence, it had developed several conventions, model laws, legislative guides and other standards with input from elected members from all regions of the world. As a result, UNCITRAL texts had been welcomed and adopted all over the world. It was recalled that the nature of UNCITRAL work (namely, the field of private law) required expert input from professional associations outside governments who had insight into the areas of law being considered for work by the Commission. In view of the need for the participation of such observers from private international associations, the Commission was urged to prevent any circumstances that could affect their willingness to participate in UNCITRAL meetings. It was noted that recognizing the key role of participants from non-State entities and encouraging their continued input was not incompatible with clarifying to invited non-governmental organizations their role as contributors and not decision-makers. It was also stated that the fact that UNCITRAL decisions had so far been made without the need for a vote should be regarded as a positive feature that reflected efforts to seek commonly acceptable solutions as opposed to quick results through voting. By seeking to find solutions that were acceptable to a broad spectrum of countries, UNCITRAL had avoided entrenched disagreements and had been an effective standard-setting organization.

236. In the general discussion that ensued, it was widely felt that, while the current working methods had demonstrated their efficiency, a comprehensive review of the working methods of the Commission might be timely, particularly in view of the recent increase in membership of the Commission and the number of topics being dealt with by the Commission and its six full-membership working groups to which non-member States also were invited. It was agreed that the guiding principles for such a comprehensive review should be those of inclusiveness, transparency and flexibility. Tolerance and professionalism were also mentioned. Particular mention was made of the need to preserve flexibility and discretion in the adjustment of its working methods by the Secretariat. Views were also expressed to the effect that existing rules of procedure of the Commission were insufficiently known, characterized by a high degree of flexibility and informality, and difficult to access and to assess.

237. It was suggested that continuation of the discussion might be greatly facilitated if the Secretariat could present a compilation of procedural rules and practices established by UNCITRAL itself or by the General Assembly in its resolutions regarding the work of the Commission. The Commission requested the Secretariat to prepare such a document for consideration by the Commission, if possible as early as its resumed fortieth session.

238. As to the substance of the proposals, various views were expressed. With respect to the decision-making process, while general preference was expressed in favour of adopting decisions by consensus, it was stated that further clarification might be required, in particular regarding the possibility of better reflecting the views of minorities and the criteria to be applied by chairpersons in assessing the level of consensus or in recognizing the exceptional circumstances where voting might be unavoidable. In that context, it was suggested that one could envisage the preparation of a comprehensive set of rules of procedure or a set of principles or guidelines to be applied by the Commission and its subsidiary bodies.

239. With respect to participation by non-governmental organizations, it was generally agreed that active participation from relevant commercial circles represented by invited non-governmental organizations was essential to the quality of the work of UNCITRAL. It was suggested that attention should be given to establishing rules to guarantee transparency in the selection of such organizations and to clarify the advisory nature of their role. Reference was made to the arrangements for consultation with non-governmental organizations established by the Economic and Social Council.[77] While it was stated that such arrangements might be a useful source, it was pointed out that they were not necessarily binding on the Commission as a subsidiary organ of the General Assembly. It was also pointed out that the role of observer States and intergovernmental organizations in the decision-making process would need to be clarified.

240. With respect to the use of languages, general sympathy was expressed for broader use, in addition to English, of French and other official languages of the United Nations, including in documents circulated informally, subject to the availability of resources. As to multilingualism in official documentation, it was recalled that that was an essential characteristic of the work of UNCITRAL as a United Nations body.

241. As to the manner in which the discussion on the working methods should continue, it was agreed that the issue would be placed as a specific item on the agenda of the Commission at its resumed fortieth session (see para. 11 above). Noting that it was highly desirable for the Commission at its resumed fortieth session to finalize, in meetings of a Committee of the Whole, the adoption of the draft Legislative Guide on Secured Transactions, it was considered that the Commission would be able to devote time to the question of working methods at its resumed fortieth session only as far as permitted by the work on the draft Guide. In order to facilitate informal consultations among all interested States, the Secretariat was requested to prepare a report on existing rules and practices (see para. 237 above) and 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.

B. Internship programme

242. An oral report was presented on the internship programme at the UNCITRAL secretariat. While general appreciation was expressed for the programme, which is designed to give young lawyers the opportunity to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law, it was observed that only a small proportion of interns were nationals of developing countries. A suggestion was made that consideration should be given to establishing the financial means of supporting wider participation by young lawyers from developing countries. That suggestion was supported.

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[77] Economic and Social Council resolution 1996/31.

C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

243. The Commission was informed that the proposed programme budget for the biennium 2008-2009 listed among the "Expected accomplishments of the Secretariat" its contribution to facilitating the work of UNCITRAL. The performance measure of that expected accomplishment was the satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[78] The Commission agreed to provide feedback to the Secretariat.

D. Bibliography

244. The Commission had before it a bibliography of recent writings related to its work (A/CN.9/625).

XVIII. Congress 2007

245. The Commission recalled that, at its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, respectively, it had approved a plan, in the context of its fortieth session, to hold a congress similar to the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century, held in New York from 18 to 22 May 1992.[79] The Commission had envisaged that the congress would review the results of the past work programme of UNCITRAL and of related work of other organizations active in the field of international trade law, assess current work programmes and consider and evaluate topics for future work programmes.[80, 81]

246. At its current session, the Commission noted with appreciation the preparations by the Secretariat for the Congress "Modern Law for Global Commerce", which was to be held in Vienna after the close of the formal deliberations of the Commission, from 9 to 12 July 2007. The Commission requested the Secretariat to publish the proceedings of the Congress in the official languages of the United Nations to the extent permitted by available resources.

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[78] Proposed programme budget for the biennium 2008-2009, Part III, International justice and law, Section 8, Legal affairs (Programme 6 of the biennial programme plan and priorities for the period 2008-2009), Subprogramme 5, Progressive harmonization, modernization and unification of the law of international trade (A/62/6 (Sect. 8), table 8.19 (d)).

[79] For the proceedings of the Congress, see *Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992* (A/CN.9/SER.D/1).

[80] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 231.

[81] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 256-258.

XIX. Date and place of future meetings

A. Dates of the resumed fortieth session

247. The Commission agreed to hold its resumed fortieth session in Vienna from 10 to 14 December 2007 (for the agenda of the resumed fortieth session, see para. 11 above).

B. Forty-first session of the Commission

248. The Commission 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). (United Nations Headquarters in New York would be closed on Friday, 4 July 2008.)

C. Sessions of working groups up to the forty-first session of the Commission

249. At its thirty-sixth session, in 2003, the Commission agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in an increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time resulted in an increase in the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[82]

250. In view of the magnitude and complexities of the project before Working Group III (Transport Law), the Commission decided to authorize two-week sessions of the Working Group to be held in the second half of 2007 and the first half of 2008, utilizing the entitlement of Working Group IV (Electronic Commerce), which would not meet before the forty-first session of the Commission (see paras. 184 above and 251 (c) and (d) below).

251. Subject to possible review at its resumed fortieth session (see para. 11 above), the Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its twelfth session in Vienna from 3 to 7 September 2007 and its thirteenth session in New York from 7 to 11 April 2008;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-seventh session in Vienna from 10 to 14 September 2007 and its forty-eighth session in New York from 4 to 8 February 2008;

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[82] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

(c) Working Group III (Transport Law) would hold its twentieth session in Vienna from 15 to 25 October 2007 (the United Nations offices in Vienna are closed on 26 October), and its twenty-first session in Vienna from 14 to 25 January 2008, with possible reduction of the duration of the session to one week (see para. 184 above);

(d) No session of Working Group IV (Electronic Commerce) was envisaged;

(e) Working Group V (Insolvency Law) would hold its thirty-third session in Vienna from 5 to 9 November 2007 and its thirty-fourth session in New York from 3 to 7 March 2008;

(f) Working Group VI (Security Interests) would hold its thirteenth session in New York from 19 to 23 May 2008.

D. Sessions of working groups in 2008 after the forty-first session of the Commission

252. The Commission noted that tentative arrangements had been made for working group meetings in 2008 after its forty-first session (the arrangements were subject to the approval of the Commission at its forty-first session):

(a) Working Group I (Procurement) would hold its fourteenth session in Vienna from 8 to 12 September 2008;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-ninth session in Vienna from 15 to 19 September 2008;

(c) Working Group III (Transport Law) would hold its twenty-second session in Vienna from 20 to 24 October 2008;

(d) Working Group IV (Electronic Commerce) would hold its forty-fifth session in Vienna from 27 to 31 October 2008;

(e) Working Group V (Insolvency Law) would hold its thirty-fifth session in Vienna from 17 to 21 November 2008;

(f) Working Group VI (Security Interests) would hold its fourteenth session in Vienna from 24 to 28 November 2008.

Annex

List of documents before the Commission at its fortieth session

Symbol	*Title or description*
A/CN.9/613	Provisional agenda, annotations thereto and scheduling of meetings of the fortieth session
A/CN.9/614	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-fifth session (Vienna, 11-15 September 2006)
A/CN.9/615	Report of Working Group I (Procurement) on the work of its tenth session (Vienna, 25-29 September 2006)
A/CN.9/616	Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006)
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.9/618	Report of Working Group V (Insolvency Law) on the work of its thirty-first session (Vienna, 11-15 December 2006)
A/CN.9/619	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-sixth session (New York, 5-9 February 2007)
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.9/621	Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)
A/CN.9/622	Report of Working Group V (Insolvency Law) on the work of its thirty-second session (New York, 14-18 May 2007)
A/CN.9/623	Report of Working Group I (Procurement) on the work of its eleventh session (New York, 21-25 May 2007)
A/CN.9/624 and Add.1 and 2	Note by the Secretariat on indicators of commercial fraud
A/CN.9/625	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/626	Note by the Secretariat on the status of conventions and model laws
A/CN.9/627	Note by the Secretariat on technical cooperation and assistance
A/CN.9/628 and Add.1	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law
A/CN.9/629	Note by the Secretariat on facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings
A/CN.9/630 and Add.1-5	Note by the Secretariat on possible future work on electronic commerce: comprehensive reference document on elements required to establish a favourable legal framework for electronic commerce: sample chapter on international use of electronic authentication and signature methods
A/CN.9/631 and Add.1-11	Note by the Secretariat on security interests: recommendations and commentary of the UNCITRAL draft legislative guide on secured transactions
A/CN.9/632	Note by the Secretariat on possible future work on security rights in intellectual property

Symbol	*Title or description*
A/CN.9/633	Note by the Secretariat transmitting comments of the European Community and its member States on the UNCITRAL draft legislative guide on secured transactions
A/CN.9/634	Note by the Secretariat transmitting the report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976
A/CN.9/635	Note by the Secretariat transmitting observations by France on the working methods of UNCITRAL

Part two

Report of the United Nations Commission on International Trade Law on its resumed fortieth session, held in Vienna from 10 to 14 December 2007

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:[83] 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),

[83] 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),[84] 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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[84] 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,[85] 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

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

run counter to the UNCITRAL Legislative Guide on Insolvency Law[86] (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.[87] 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.[88]

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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[86] United Nations publication, Sales No. E.05.V.10.
[87] See in A/CN.9/637/Add.5, the note in para. 182.
[88] 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[89] 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

[89] 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