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Report of Working Group VI (Security Interests) on the work of its fifth session (New York, 22-25 March 2004)

Contents

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I. Introduction

1. At its present session, the Working Group continued its work on the development of "an efficient legal regime for security rights in goods involved in a commercial activity".[1] The Commission's decision to undertake work in the area of secured credit law was taken in response to the need for an efficient legal regime that would remove legal obstacles to secured credit and could thus have a beneficial impact on the availability and the cost of credit.[2]

2. At its thirty-third session (2000), the Commission discussed a report prepared by the secretariat on issues to be addressed in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that secured credit law was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of its close link with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. Furthermore, it was stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable.[3]

3. At its thirty-fourth session (2001), the Commission considered another report prepared by the secretariat (A/CN.9/496) and agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.[4] As to the form of work, the Commission considered that a model law would be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include legislative recommendations.[5]

4. At its first session (New York, 20-24 May 2002), the Working Group considered chapters I to V and X (A/CN.9/WG.VI/WP.2 and Add.1-5 and 10) of the first preliminary draft guide on secured transactions, prepared by the secretariat. At that session, the Working Group requested the secretariat to prepare revised versions of those chapters (see A/CN.9/512, para. 12). At that session, the Working Group

also considered suggestions for the presentation of modern registration systems in order to provide the Working Group with information necessary to address concerns expressed with respect to registration of security rights in movable property (see A/CN.9/512, para. 65). At the same session, the Working Group agreed on the need for coordination with Working Group V (Insolvency Law) on matters of common interest and endorsed the conclusions of Working Group V with respect to those matters (see A/CN.9/512, para. 88).

5. At its thirty-fifth session (2002), the Commission considered the report of the first session of the Working Group (A/CN.9/512). It was widely felt that the legislative guide represented a valuable opportunity for the Commission to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among nations. In that connection, the Commission noted with satisfaction that the project had attracted the attention of international, governmental and non-governmental organizations and that some of those took an active part in the deliberations of the Working Group. At that session, the Commission also felt that the timing of the Commission's initiative was most opportune both in view of the relevant legislative initiatives under way at the national and international levels and in view of the Commission's own initiative in the field of insolvency law. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security rights in goods, including inventory. The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.[6]

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

7. At its third session (New York, 3-7 March 2003), the Working Group considered chapters VIII, XI and XII of the first preliminary draft guide on secured transactions (A/CN.9/WG.VI/WP.2/Add.8, A/CN.9/WG.VI/WP.2/Add.11 and A/CN.9/WG.VI/WP.2/Add.12) and chapters II and III (paras. 1-33) of the second version of the draft guide (A/CN.9/WG.VI/WP.6/Add.2 and A/CN.9/WG.VI/WP.6/Add.3) and requested the secretariat to prepare revised versions (A/CN.9/532, para. 13).

8. At its thirty-sixth session in 2003, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its second and third sessions (A/CN.9/531 and A/CN.9/532), as well as the report of the first joint session of Working Group V and VI (A/CN.9/535). The Commission noted with appreciation the progress made by the Working Group in its work.[7]

9. At its fourth session (Vienna, 8-12 September 2003), the Working Group considered chapters IV (Creation), IX (Insolvency), I (Introduction), II (Key Objectives) and paragraphs 1 to 41 of chapter VI (Priority) and requested the secretariat to prepare revised versions of those chapters (see A/CN.9/543, para. 15).

II. Organization of the session

10. The Working Group, which was composed of all States members of the Commission, held its fifth session in New York from 22 to 25 March 2004. The session was attended by representatives of the following States members of the Commission: Austria, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Italy, Japan, Kenya, Mexico, Russian Federation, Sierra Leone, Spain, Sudan, Sweden, Thailand, Uganda and United States of America.

11. The session was attended by observers from the following States: Argentina, Australia, Belarus, Belgium, Cuba, Czech Republic, Ghana, Holy See, Indonesia, Ireland, Kuwait, Libyan Arab Jamahiriya, Madagascar, Mongolia, Netherlands, Nigeria, Oman, Peru, Philippines, Poland, Qatar, Republic of Korea, Serbia and Montenegro, Switzerland, Turkey and Viet Nam.

12. The session was also attended by observers from the following national or international organizations: (a) organizations of the United Nations system: International Monetary Fund (IMF), the World Bank, World Intellectual Property Organization (WIPO); (b) intergovernmental organizations: Asian-African Legal Consultative Organization (AALCO), European Bank for Reconstruction and Development (EBRD); (c) non-governmental organizations invited by the Commission: American Bar Association (ABA), Center for International Legal Studies (CILS), Centre pour la Recherche et l' Étude du Droit Africain Unifié (CREDAU), Commercial Finance Association (CFA), International Chamber of Commerce (ICC), International Federation of Insolvency Professionals (INSOL), International Insolvency Institute (III), International Law Institute (ILI), International Swaps and Derivatives Association (ISDA), International Working Group on European Insolvency Law, Max-Planck-Institute of Foreign and Private International Law, the European Law Student's Association (ELSA) and the Union Internationale des Avocats (UIA).

13. The Working Group elected the following officers:

Chairman: Kathryn Sabo (Canada)
Rapporteur: Masami Nakashima (Japan)

14. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.9 and Addenda 1 (Approaches to security), 2 (Publicity and filing), 3 (Priority), 4 (Pre-default rights and obligations), 7 (Conflict of laws) and 8 (Transition), as well as A/CN.9/WG.VI/WP.11 and Addenda 1 (Introduction and Key Objectives) and 2 (Creation).

15. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a legislative guide on secured transactions.
4. Other business.
5. Adoption of the report.

III. Deliberations and decisions

16. The Working Group considered chapters V (Publicity), VI (Priority) and X (Conflict of laws) of the draft Legislative Guide on Secured Transactions (hereinafter referred to as "the draft Guide"). The deliberations and decisions of the Working Group are set forth below in part IV. The secretariat was requested to prepare, on the basis of those deliberations and decisions, a revised version of the chapters of the draft Guide discussed at that session.

IV. Preparation of a legislative guide on secured transactions

Chapter VI. Priority (A/CN.9/WG.VI/WP.9/Add.3, paras. 78-90)

17. The Working Group recalled that, at its fourth session, it had considered paragraphs 34-41 of chapter VI (see A/CN.9/543, paras. 103-120). However, in order to have a more focused discussion and make as much progress as possible within the current session, which was shorter by one day than normal sessions, the Working Group decided to skip the general remarks (A/CN.9/WG.VI/WP.9/Add.3, paras. 42-77) and to consider the summary and recommendations contained in chapter VI (A/CN.9/WG.VI/WP.9/Add.3, paras. 78-90).

Priority of possessory security rights (para. 82)

18. With respect to paragraph 82, which dealt with the priority of possessory security rights, it was agreed that it should be revised to state three rules. The first rule was that the priority of a possessory security right could be established by possession, control or filing, whichever occurred first. The second rule was that a secured creditor who established priority by one method could change to another method, without losing its original priority ranking as long as there was no gap in the continuity of filing, possession or control. The third rule was that, in order to protect the negotiability of certain assets (e.g. documents of title), a security right in such assets perfected by possession or control should have priority even over a security right that was perfected only by filing, even if the filing occurred first. With respect to the last rule, it was agreed that it should be revised to refer explicitly to specific assets with a degree of negotiability. Still, some doubt was expressed as to the appropriateness of such a rule on the grounds that it could undermine the certainty achieved by the first-to-file priority rule.

19. Subject to the changes to the recommendations contained in paragraph 82, the Working Group approved the essence of the recommendations contained in chapter VI, with the exception of the recommendations on title-based devices which it decided to place within square brackets. The secretariat was requested to revise the recommendations contained in paragraph 82 and to align the general remarks with the revised recommendations.

20. Recalling its discussion of fixtures at its fourth session (see A/CN.9/543, paras. 23-24), the Working Group also requested the secretariat to include in chapter VI a discussion and recommendations on conflicts of priority relating to fixtures. In response to a question as to the effect of subordination agreements in the case of the insolvency of the grantor, the Working Group noted that that was an issue for the second joint session of Working Groups V (Insolvency Law) and VI (Security Interests) (see A/CN.9/WG.V/WP.71, para. 7 (e)).

Chapter X. Conflict of laws (A/CN.9/WG.VI/WP.9/Add.7, paras. 30-37)

21. The Working Group went on to discuss chapter X on the basis of the recommendations reflected in paragraphs 30 to 37.

A. Law applicable to possessory security rights over tangible property and to non-possessory security rights over intangible property (paras. 30 and 31)

22. It was generally agreed that the essence of the recommendations reflected in paragraphs 30 and 31 was acceptable. As to the formulation of those recommendations, it was agreed that money and negotiable instruments should be reflected as types of tangible property and claims as types of intangible property. It was also agreed that the reference to the term “publicity” should be replaced by a reference to the term “effectiveness against third parties” as some States might not have a publicity system.

B. Law applicable to non-possessory security rights over tangible property (para. 32)

23. With respect to the alternative recommendations contained in paragraph 32, which dealt with the law applicable to the creation, publicity (i.e. effectiveness against third parties) and priority of non-possessory security rights over tangible property, differing views were expressed. One view was that alternative 1 was preferable. It was stated that, by subjecting creation and effectiveness against third parties to the law of the grantor’s location, alternative 1 eliminated the risk of the application of multiple laws in the case of mobile goods, goods in transit and goods moved from one jurisdiction to another, as well as assets located in multiple jurisdictions. It was observed that, under such an approach, certainty with respect to the applicable law would be enhanced and transaction costs would be reduced. It was also said that, at the same time, by subjecting priority to the law of the location

of the encumbered assets, alternative 1 did not upset the legitimate expectations of parties, such as buyers of encumbered assets or judgement creditors.

24. However, the prevailing view was that alternative 2 was preferable because it reflected the widely acceptable rule of the law of the location of the asset (*lex rei sitae*). It was stated that alternative 2 was the only rule acceptable with respect to title-based devices. It was also observed that alternative 1 was problematic since it subjected the creation and effectiveness of a security right against third parties to one law (the law of the grantor's location) and priority to another law (the law of the asset's location). In addition, it was said that alternative 1 could not be easily applied in jurisdictions that made no distinction among creation, effectiveness against third parties and priority. Moreover, it was observed that alternative 1 would place on parties and courts the burden and cost of having to apply two different laws.

25. After discussion, while it was suggested that both alternatives should be retained for further consideration, the Working Group decided to delete alternative 1. It was widely felt that harmonization of law, which was one of the main objectives of the draft Guide, would be better served if the draft Guide included clear recommendations without many alternatives. The Working Group also agreed that alternative 2 should be supplemented by a definition of the term "mobile goods" and by a reference to the point in time that was relevant for the determination of the location of the encumbered assets. As to the exception contained in alternative 2 with respect to security rights in mobile goods (the law of the grantor's location), while some doubt was expressed, it was generally found to be acceptable on the assumption that the term "mobile goods" meant assets with respect to which there were no special registration systems such as those existing for aircraft, ships and similar assets.

C. Law applicable to security rights over goods in transit (para. 33)

26. As to the recommendation contained in paragraph 33 with respect to security rights in goods in transit, while it was generally agreed that a recommendation was necessary, some doubt was expressed as to whether an approach based on the law of the place of destination was the most appropriate one. It was suggested that other alternatives should also be considered, such as, for example, the law of the place in which the party holding an interest in the goods received a document of title relating to the goods.

D. Law applicable to security rights in proceeds (para. 34)

27. There was general agreement in the Working Group that the same law should apply to the priority of a security right, irrespective of whether the relevant assets were original encumbered assets or proceeds. However, differing views were expressed as to the law applicable to the creation of security rights in proceeds. One view was that that matter should be subject to the law governing the creation of the right in the original encumbered assets from which the proceeds arose. Another view was that the creation of security rights in proceeds should be subject to the law governing the creation of assets of the same type as proceeds. In the case of goods

being original encumbered assets in State A and receivables being proceeds in State B, under the first view the creation of the right in proceeds would be subject to the law of State A, while under the second view, that matter would be subject to the law of State B. It was noted that both approaches were consistent with the United Nations Convention on the Assignment of Receivables in International Trade since they both referred priority issues to the law of the grantor's (assignor's in the terminology of the Convention) location.

E. Law applicable to security rights in goods that were moved from one jurisdiction to another (para. 35)

28. There was general agreement with the essence of the recommendation contained in paragraph 35 that, if goods were moved from State A to State B, creation issues would remain subject to the law of State A, while priority issues would be subject to the law of State B and secured creditors with priority under the law of State A would preserve their priority provided that they perfected their right under the law of State B within a certain period of time after the goods were moved to State B. As to the formulation of paragraph 35, it was agreed that it needed to be revised so as to state that rule more clearly.

F. Law applicable to the enforcement of security rights (para. 36)

29. There was both support and criticism in the Working Group for all of the alternatives contained in paragraph 36. In support of alternative 1, it was stated that an approach based on the law of the place of enforcement would reflect a generally acceptable rule. It was also observed that such an approach would result in the law of remedies being the same with the law applicable to procedural issues and, in many cases, with the law of the location of the assets. On the other hand, it was pointed out that alternative 1 could be subject to manipulation.

30. In support of alternative 2, it was said that the application of the law governing the creation of a security right would be consistent with the expectations of the parties and provide a stable rule. On the other hand, it was mentioned that alternative 2, applied with the *lex rei sitae* as the law governing the creation of a security right, would result, in the case of enforcement against assets in multiple jurisdictions, in the application of the law of all those jurisdictions. It was observed that the impact of such an approach could be minimized if alternative 2 were refined to refer to the law governing priority.

31. In support of alternative 3, it was pointed out that the law governing the contractual relationship between the creditor and the grantor would correspond to the parties' expectations but put at disadvantage third parties that had no means of ascertaining the nature of remedies of a secured creditor. It was also stated that, if an approach on the basis of alternative 3 were adopted, exceptions should be introduced to protect interests of third parties, such as employees for wages and the State for taxes. In response, it was observed that a limitation to the application of the applicable law so as to preserve the public policy or mandatory rules of the forum State was inherent in all alternatives.

32. With respect to all of the alternatives in paragraph 36, it was mentioned that, while the term "substantive matters" was used to draw a distinction from procedural matters and, in any case, their characterization was left to the law of the forum, it still needed to be further clarified. It was also stated that the alternatives should be compared and analysed on the basis of their relevant costs and benefits. For example, if alternative 3 were to be preferred and resulted in the application of a law that allowed self-help remedies, the result should be evaluated on the basis of its impact on the availability and the cost of credit. The suggestion was also made that the rule implied in all alternatives, namely, that procedural matters should be governed by the law of the State in which enforcement was sought, should be stated explicitly.

33. After discussion, the Working Group requested the secretariat to revise the alternatives in paragraph 36 to take into account the views expressed and the suggestions made.

G. Law applicable to the enforcement of security rights in the case of insolvency (para. 37)

34. It was generally agreed that the commentary and the recommendations in chapter X with respect to the law applicable to the enforcement of a security right in the case of insolvency should be comprehensive and self-standing but aligned with the relevant discussion and recommendations in the draft Guide on Insolvency Law. The Working Group found the principles contained in the current text of the draft Guide on Insolvency Law (see A/CN.9/WG.V/WP.72, paras. 179-181) to be generally acceptable. In particular, it was agreed that the commencement of insolvency proceedings should not displace the general, pre-insolvency conflict-of-laws rules applicable to the creation and effectiveness of a security right against third parties. It was also agreed that commencement of insolvency proceedings should not displace the law applicable to priority of security rights, except to the extent explicitly provided in insolvency law. In addition, it was agreed that commencement could displace the rules applicable to the enforcement of security rights since enforcement should be subject to the insolvency law of the State in which the insolvency proceedings were commenced. With respect to that principle, the view was expressed that it should apply to the enforcement of security rights in assets located in the State in which insolvency proceedings were commenced but not to the enforcement of rights in assets in other jurisdictions. In response, it was observed that that issue was an issue of insolvency law for the draft Guide on Insolvency Law to address.

Chapter V. Publicity (A/CN.9/WG.VI/WP.9/Add.2)

35. The Working Group focused on the summary and recommendations contained in chapter V (paras. 97-103). At the outset, it was agreed that while the principle of publicity was common to most legal systems, it had different degrees and was understood in various ways. It was stated that, as the draft Guide was based on a distinction between creation of a security right as between the parties to the security agreement and its effectiveness against third parties, it was important for publicity to be analysed in terms of the steps necessary to render a security right effective as

against third parties (or in the sense of ensuring that third parties were not misled by the grantor's apparent ownership). In that connection, it was observed that the economic benefits (to all parties involved) of providing certainty and predictability as to the rights of third parties could be usefully discussed in the draft Guide. After discussion, the Working Group agreed that the draft Guide should recommend that publicity should be a pre-condition of the effectiveness of security rights against third parties and of ensuring the protection of third parties. The Working Group went on to consider the various modes of publicity in the order they were discussed in chapter V.

A. Dispossession (paras. 7-16)

36. It was generally agreed that transfer of possession of the encumbered assets to the secured creditor was a good way to alert third parties that the grantor no longer had unencumbered title. It was also agreed that to achieve that result, dispossession of the grantor had to be real and not just fictive. In addition, it was agreed that transfer of possession to the secured creditor could not work well in the case of intangibles and in cases where the grantor needed to retain possession of the assets to generate the income necessary to repay the loan.

B. Notification and control (paras. 17-23)

37. It was stated that notification of the debtor of a receivable was a method of publicizing the creation of a security right in the receivable to the extent that third parties could find out from that debtor whether the receivable had been encumbered. However, it was agreed that such notification was not an effective way of publicity since debtors were not obliged to provide to third parties any information or accurate information and, in many transactions, notification was not desirable.

38. As to the notion of "control", a number of concerns were expressed. One concern was that it was new and was not universally understood in the same way. It was observed, for example, that placing the account in the name of the secured creditor was treated in many jurisdictions as an assignment rather than as a transfer of control over the account. Another concern was that, for no apparent reason, deposit accounts were treated differently from receivables. Yet another concern was that, without a discussion of other methods of publicizing security rights in deposit accounts, the discussion of control was difficult to follow. After discussion, it was agreed that the discussion of control and security rights in deposit accounts should be revised to address those concerns.

C. Registration in title-based registries (paras. 24-31)

39. It was agreed that notations on title certificates or registration in title registries were acceptable modes of publicity.

D. Registration in secured transactions registries (paras. 32-33)

40. It was stated that registration in a secured transactions registry could involve registration of the transaction document or a notice about the transaction. It was also observed that States interested in introducing a comprehensive secured transactions law with a view to developing competitive financial markets should establish a single, centralized secured transactions registry for publicizing notices with respect to all types of security right in all types of asset to enable third parties to assess their priority risk with greater certainty and predictability. In addition, it was pointed out that it was necessary to coordinate registration in secured transactions registries and in asset-specific registries in order to ensure the efficient operation of both.

41. While the view was expressed that registration of a notice in a secured transactions registry might inadvertently increase transaction costs, the prevailing view was that such registration could provide the certainty and predictability necessary for creditors to assess the relevant risks in a reliable way and thus have a positive impact on the availability and the cost of credit.

42. It was stated that publicity was a generally acceptable principle of secured transactions law and was intended to provide protection for third parties. Dispossession of the grantor, notification of the debtor of a receivable, transfer of control over an intangible, such as a deposit account, and registration in a secured transactions registry were mentioned as being among the modes of publicity prevailing in various legal systems. In addition, it was pointed out that there was an economic need to facilitate the granting of non-possessory security rights and that publicity of security rights by registration was the most effective mode of publicity for such rights. Moreover, it was said that, if there were other effective modes of publicity, they should be mentioned and their relative advantages and disadvantages should be discussed in the draft Guide. In that connection, it was stated that the disadvantages of secured transactions registries should also be discussed. Examples of such disadvantages that were mentioned included: potential cost, time and effort involved; and failure of the registry to protect the secured creditor in cases where the grantor was not the owner or where the asset did not exist. It was also observed that, instead of enhancing credit, registries could lead to new bureaucracy and, therefore, create impediments to credit. In response, it was said that registries would not necessarily create bureaucracy if they were structured in the appropriate way as recommended in the draft Guide and, quite to the contrary, could result in economic efficiency.

43. On the basis of the broad support expressed in the discussion for secured transactions registries and after having noted the objections and concerns expressed, the Working Group decided that the draft Guide should include a recommendation that registration in a secured transactions registry was an acceptable mode of publicity and went on to consider the particular aspects of such registration.

E. Notice v. document registration (paras. 34-37)

44. It was agreed that the draft Guide should include a recommendation that registration of a notice was preferable to registration of the document of a

transaction. It was widely felt that notice registration simplified the registration process and minimized administrative and other costs and burdens.

F. Asset v. grantor indexing (paras. 38-42)

45. It was agreed that the draft Guide should include a recommendation for a grantor-based index. It was stated that such an index facilitated registration of security rights in all of the grantor's present and after-acquired assets or in generic categories of assets through a single registration. With respect to uniquely identifiable assets, it was agreed that reference should be made to registration in asset-specific registries. However, it was widely felt that asset-specific registries needed to be coordinated with secured transactions registries so that a search in one registry would reveal registration in the other registry as well. Otherwise, third parties would need to search in both registry systems. In addition, it was agreed that a priority rule needed to be introduced to deal with priority conflicts between rights registered in the secured transactions registry and rights registered in the asset-specific registry.

G. Content of registered notice (paras. 43-53)

46. There was general agreement in the Working Group that the recommended contents of a registered notice should be the identification of the grantor, the identification of the secured creditor and a general description of the encumbered assets. It was observed that limiting the content of the notice to the necessary information would maximize efficiency and minimize cost. On the other hand, the concern was expressed that a notice with limited data might not provide sufficient protection to third parties.

47. Noting that the identification criteria might vary from State to State and that it would not be appropriate for the draft Guide to prescribe the criteria to be used, the Working Group agreed to recommend that the criteria used be simple and clearly stated in the secured transactions law. The suggestion was also made that the commentary should state that a registry should provide a facility for updating identification details of the parties, in the event that they might change as a result of a name change, a merger or sale of business, or an assignment of the security right.

48. Differing views were expressed as to whether the registered notice should include a statement of the maximum value of the secured obligation. One view was that such an approach would allow the grantor to utilize the remaining value of its assets to obtain credit from another lender. Another view was that such a requirement would result in difficulties in calculating the amount to be secured and inflated calculations. After discussion, the Working Group decided that the matter needed to be discussed in the draft Guide but no recommendation should be made, at least at the current stage.

49. Differing views were also expressed as to whether there should be an obligation on the part of the secured creditor on record to respond to a demand for information by certain third parties. One view was that the secured creditor should be obliged to respond to such requests for information by parties that had an interest but no independent way to evaluate their claims against the grantor (unsecured

creditors, insolvency administrator, co-owners of encumbered assets). It was stated that such an obligation could be introduced subject to the grantor's authorization who would have an interest in providing information to a potential lender. Another view was that the imposition of such an obligation should not be recommended. It was observed that interested third parties had a variety of sources of information at their disposal and that the system needed to be simple. After discussion, the Working Group agreed that the draft Guide needed to discuss that matter but no recommendation should be made, at least at the current stage.

50. The Working Group agreed that the draft Guide should include further discussion with respect to discharge, amendment and correction of notices.

H. Duration of registration (paras. 56-58)

51. The Working Group agreed that no recommendation should be made with respect to the duration of registration. It was stated that the duration of registration depended on a number of factors (e.g. technological advancement and ease to expunge notices from the record or to make multiple registrations) on which States differed. At the same time, the Working Group agreed that the draft Guide should provide the national legislator with sufficient guidance as to the possible approaches and their relative merits. In that connection, in addition to fixed duration and duration selected by the parties, two approaches were mentioned, namely registration with an indefinite duration and registration with a duration selected by the parties but with a maximum limit set by law.

52. In support of registration with an indefinite duration, it was stated that it would simplify registration without undue prejudice to the rights of the grantor, who could always request the removal of a notice from the public record. It was also observed that such an approach would encourage long-term credit transactions. On the other hand, it was said that such an approach would inappropriately place on the grantor the burden of having to take action in cases where the secured creditor failed to remove a notice from the record. In support of selection of the desired term by the parties up to a maximum time limit, it was stated that it combined the flexibility required for parties to meet their needs with the necessary protection of the grantor.

I. Technological considerations (paras. 59-61)

53. The Working Group agreed that the recommendation with respect to technological considerations should be that "the registration and searching process should be simple, transparent and as accessible as possible". It was also suggested that reference should be made to the efficiency of a computerized registry system.

J. Liability for system error (paras. 62-64)

54. With respect to liability for system error, it was agreed that the draft Guide should recommend that the matter be addressed clearly in legislation without prescribing a uniform solution for all States, which might not be possible in view of the different approaches of States to the issues of liability and sovereign immunity.

K. Registration fees (para. 65)

55. It was generally agreed that the draft Guide should include a strong recommendation for nominal registration fees to cover the cost of the system. It was widely felt that such an approach would encourage use of the system, while covering its capital and operational costs within a reasonable period of time.

L. Privacy and confidentiality considerations (paras. 66-67)

56. It was stated that, in the context of a public registration system, it was not appropriate to focus on confidentiality since the contents of a registered notice were part of the public record. On the other hand, it was observed that a balance needed to be struck between the need to ensure sufficient publicity and the need to protect confidential and private information. It was also said that data filed in a secured transactions registry should not be used as a commercial product for sale or as a way of obtaining a competitor's client lists. After discussion, it was agreed that, without making a firm recommendation, the draft Guide should discuss that matter in terms of the need to facilitate use of information only for the purpose it was collected and made available.

M. Advance registration (paras. 68-70)

57. It was agreed that the draft Guide should include a recommendation that advance registration (i.e. registration before the conclusion of the security agreement) should be possible. It was stated that advance registration permitted a lender to gain time in ensuring its priority position and thus facilitated transactions that might otherwise be impossible or more costly. It was also agreed that so-called "grace periods", allowing a lender to file within a certain period of time after conclusion of an agreement and obtain priority as of that time rather than as of the time of registration undermined the certainty of the registration system and thus should be allowed only in very limited and clearly prescribed cases. In addition, it was agreed that, if no credit were extended after an advance registration and the secured creditor failed to expunge a notice from the public record, the grantor should have a right to do so through a summary administrative proceeding.

58. The Working Group also agreed that, as notice was not supposed to relate to a specific security agreement or security right, a single notice could cover successive security agreements.

N. Qualifications on priority (paras. 71-73)

59. With the exception of the point that registration did not prejudice the rights of buyers of encumbered assets in the ordinary course of business, which could be retained, it was agreed that the discussion of priority should be left to the chapter on priority.

O. Registration and enforcement (paras. 74-75)

60. It was agreed that, while the registration of notice of default and enforcement could be briefly mentioned, discussion should be left to the chapter on enforcement. Differing views were expressed as to the advisability of requiring registration of notice of default and enforcement.

P. Registration of title and similar devices (paras. 76-83)

61. The Working Group agreed to postpone consideration of the question of registration of title and similar devices until it had an opportunity to discuss the overall treatment of such devices in the draft Guide. Recalling the decision reached at its last session that transfer of title for security purposes should be treated as a security device for the purposes of creation and insolvency (see A/CN.9/543, para. 73), in the interest of consistency, the Working Group approved a recommendation that the same approach should be taken for the purposes of publicity.

62. In the context of its discussion of secured transactions registries, the Working Group heard a statement by the representative of the European Bank for Reconstruction and Development (EBRD) with respect to work of the EBRD towards a registry guide. The Working Group noted with interest the work of the EBRD and emphasized the importance of coordination with a view to providing comprehensive and consistent guidance to States.

Q. Other modes of publicity (paras. 84-85)

63. It was stated that modes of publicity other than those currently discussed in the chapter on publicity should also be considered. In addition, it was observed that the chapter should include a more detailed discussion of the relevant advantages and disadvantages of all the various systems with respect to publicity. Moreover, it was said that the terminology used in the chapter might need to be reconsidered to better reflect different understandings of the terms “publicity” and “registration”. In that context, it was noted that the Working Group had expressed a preference for neutral terminology that was not system-specific.

R. Effectiveness of unpublicized security rights (paras. 86-96)

64. It was stated that an unpublicized security right might have no effects against third parties or only limited effects against certain third parties, such as buyers of encumbered assets with knowledge of the existence of the security right and parties that received those assets as a gift. It was observed that the former approach had the advantage of simplicity and certainty. After discussion, the Working Group decided to recommend that an unpublicized security right should have no effects against third parties.

V. Future work

65. The Working Group noted that its sixth session was scheduled to be held from 27 September to 1 October 2004 in Vienna, those dates being subject to approval by the Commission at its thirty-seventh session to be held from 14 June to 2 July 2004 in New York. It was noted that, in view of the urgency in providing States with guidance in the area of secured transactions law, the Working Group should complete its work as soon as possible, perhaps by submitting the draft Guide to the Commission in 2005 for approval in principle and in 2006 for final approval.

Notes

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 358.

[2] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 455, and *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 347.

[3] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 459.

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

[5] Ibid., para. 357.

[6] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 202-204.

[7] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 215-222.