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Report of Working Group VI (Security Interests) on the work of its eighth session (Vienna, 5-9 September 2005)

Contents

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I. Introduction

1. At its present session, Working Group VI continued its work on the preparation of a legislative guide on secured transactions pursuant to a decision taken by the Commission at its thirty-fourth session, in 2001.[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]

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its eighth session in Vienna from 5 to 9 September 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, Colombia, Czech Republic, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Poland, Republic of Korea, Russian Federation, Spain, Sweden, Switzerland, Thailand, Tunisia, Uganda and United States of America.

3. The session was attended by observers from the following States: Dominican Republic, Greece, Hungary, Indonesia, Iraq, Ireland, Latvia, Malaysia, Peru, Philippines, Romania, Senegal and Slovakia.

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

(a) United Nations system: International Monetary Fund, World Bank and World Intellectual Property Organization; and

(b) International non-governmental organizations invited by the Commission: American Bar Association, Center for International Legal Studies, Commercial Finance Association, EUROPAFACTORING, Forum for International Arbitration, International Federation of Insolvency Practitioners, Hague Conference on Private International Law, International Chamber of Commerce, International Insolvency Institute, International Swaps and Derivatives Association, International Working Group on European Security Rights, Max-Planck-Institute for Foreign and Private International Law, the Association of the Bar of the City of New York, the Cairo Regional Centre for International Commercial Arbitration and the European Law Student's Association.

5. The Working Group elected the following officers:

Chairman: Ms. Kathryn SABO (Canada)

Rapporteur: Mr. Madhukar Rangnath UMARJI (India).

6. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.21 and Addenda 1 to 5 (Recommendations), A/CN.9/WG.VI/WP.22 (Background remarks) and A/CN.9/WG.VI/WP.22/Add.1 (Introduction and key objectives).

7. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legislative guide on secured transactions.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

8. The Working Group considered recommendations in chapters VII (Pre-default rights and obligations), VIII (Default and enforcement), IX (Insolvency), X (Acquisition financing) and XI (Conflict of laws). It also considered terminology and recommendations related to: (i) negotiable instruments and negotiable documents (definitions (w) and (x), as well as recommendations 3 (d) and 24); (ii) proceeds from a drawing under an independent undertaking (definitions (y), (z), (aa) and (bb), as well as recommendations 25, 49, 62, 106 and 138); and intellectual property rights (definition (dd), and recommendation 3 (h)). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise those chapters, definitions and asset-specific recommendations to reflect the deliberations and decisions of the Working Group.

IV. Preparation of a legislative guide on secured transactions

Chapter VIII. Default and enforcement (A/CN.9/WG.VI/WP.22/Add.2, recs. 88-124)

Purpose

9. The Working Group approved the substance of the purpose section unchanged.

Recommendation 88 (scope)

10. Differing views were expressed as to whether recommendation 88 should be retained. One view was that the rule in recommendation 88 was superfluous and confusing, as the draft Guide would, in any case, apply to security devices and only where so provided by way of exception to non-security devices. Another view was that recommendation 88 was useful in that it drew a distinction between situations where the grantor was not liable for a deficiency and situations where the grantor was liable, which, if it were not made clear in recommendation 88, would need to be made clear in several recommendations in that chapter. The Working Group decided to review that matter once it had completed its consideration of the chapter on default and enforcement.

Recommendation 89 (general standard of conduct)

11. The Working Group approved the substance of recommendation 89 unchanged and decided to consider its application to other chapters of the draft Guide in the context of its discussion of each of those chapters.

Recommendations 90 and 91 (party autonomy)

12. It was agreed that the words "at any time" should be added at the end of the first sentence of recommendation 90. Subject to that change, the Working Group approved the substance of recommendation 90.

13. While there was broad support for the substance of recommendation 91, differing views were expressed as to whether recommendation 91 should also provide that a disposition in accordance with a method provided for in the security agreement was commercially reasonable unless the objecting party established that it was manifestly unreasonable. One view was that such a provision would be useful in that it would provide *ex ante* certainty (i.e. advance certainty before the conclusion of an agreement) in referring to the agreement of the parties in particular for methods of disposition about the reasonableness of which there might be some doubt, at least for a court looking at the matter once a dispute had arisen. Another view was that such a provision would be harmful in that it would change not only the burden of proof but also the general standard of conduct established in recommendation 89 and would be difficult to apply. After discussion, the Working Group approved the substance of recommendation 91 unchanged.

Recommendations 92 (rights and remedies after default), 93 (secured creditor remedies) and 94 (grantor remedies)

14. It was agreed that, at the beginning of recommendations 92 to 94, language along the following lines should be added: "As more specifically provided in subsequent recommendations of this Chapter". Subject to that change, the Working Group approved the substance of recommendations 92 to 94.

Recommendation 95 (election of remedies)

15. The Working Group agreed that the commentary should list situations to which recommendation 95 was intended to apply (including the simultaneous exercise of remedies, for example, against the grantor and against a guarantor). Subject to that clarification to be made in the commentary, the Working Group approved the substance of recommendation 95 unchanged.

Recommendation 96 (other remedies)

16. It was agreed that recommendation 96 should also apply to the converse situation (i.e. where a remedy had been exercised first with respect to the secured obligation). Subject to that change, the Working Group approved the substance of recommendation 96.

Recommendation 97 (release of the encumbered assets after full payment)

17. The Working Group approved the substance of recommendation 97 unchanged.

Recommendation 98 (judicial and extra-judicial enforcement)

18. It was agreed that the change agreed upon with respect to recommendations 92 to 94 (see para. 14 above) should be made also in recommendation 98. In addition, it was agreed that recommendation 98 should also provide for a mixed-process method of enforcement (i.e. partly judicial and partly extra-judicial enforcement). Subject to those changes, the Working Group approved the substance of recommendation 98.

Recommendation 99 (notice of intention to pursue extra-judicial enforcement)

19. Differing views were expressed as to whether recommendation 99 should be retained. One view was that recommendation 99 should be deleted. It was stated that a general advance notice of extra-judicial enforcement would cause unnecessary cost, delay, error and litigation in the case of a good-faith grantor, as such a grantor would be aware of and would comply with its obligations even without such a notice. In addition, it was observed that, in the case of a grantor acting in bad faith, such a general notice could inadvertently result in compromising the ability of the secured creditor to enforce its security right as the grantor could conceal the encumbered assets or move them beyond the reach of the secured creditor. Another view was that recommendation 99 should be retained mainly on the grounds that unnecessary cost, delay, error and litigation would not be caused. It was also stated that a notice of enforcement before repossession of the encumbered assets by the secured creditor would be essential in particular for those jurisdictions in which extra-judicial enforcement was not known. In addition, it was observed that recommendation 99 made no specific recommendation but rather raised a point that the legislator should consider. Moreover, it was said that subparagraph (f) of recommendation 99 provided for an exception in situations in which advance notice might not be useful or might be harmful. After discussion, it was agreed that recommendation 99 should be retained in square brackets.

20. The Working Group next considered whether recommendation 99 should be merged with recommendation 111 on advance notice with respect to extra-judicial disposition of encumbered assets. One view was that, as there was significant overlap between those recommendations, they should be merged. Another view was that, while there was some overlap, there were also significant differences between the two recommendations. It was stated that, unlike recommendation 111, recommendation 99 dealt with notice before repossession of the encumbered assets and with all methods of enforcement. After discussion, the Working Group decided that recommendations 99 and 111 should not be merged.

Recommendation 100 (objections to extra-judicial enforcement)

21. The Working Group approved the substance of recommendation 100 unchanged.

Recommendation 101 (dispossession of the debtor)

22. It was agreed that recommendation 101 should make it clear that it referred to actual possession of tangibles. Subject to that change, the Working Group approved the substance of recommendation 101.

Recommendations 102 and 103 (collection of receivables)

23. It was agreed that recommendation 102 should make it clear that the secured creditor had the right, not only to instruct the account debtor to pay the secured creditor, but also to seek and to obtain payment of a receivable directly from the account debtor. Subject to that change, the Working Group approved the substance of recommendation 102.

24. It was agreed that whether the reference to guarantees in recommendation 103 should be limited to accessory guarantees only would need to be reviewed after the Working Group had the opportunity to consider the recommendations on security rights in proceeds from a drawing under an independent undertaking. Subject to later consideration of that matter, the Working Group approved the substance of recommendation 103.

Recommendations 104 and 105 (negotiable instruments)

25. The Working Group approved the substance of recommendation 104 unchanged. As to recommendation 105, the Working Group approved its substance subject to the same reservation made with respect to recommendation 103 (see para. 24 above).

Recommendation 106 (proceeds from drawings under independent undertakings)

26. The Working Group decided to postpone consideration of recommendation 106 until it had the opportunity to consider at one time all the recommendations dealing with security rights in proceeds from drawings under independent undertakings (see para. 83 below).

Recommendations 107 and 108 (bank accounts)

27. It was agreed that the second sentence of recommendation 107 should be deleted. It was stated that requiring the secured creditor to resort to court proceedings in order to enforce a security right in a bank account where the grantor was a consumer and the security right had been given for consumer purposes might be inconsistent with law applicable to set-off, receivables or even consumer-protection law. Subject to that change, the Working Group approved the substance of recommendation 107.

28. It was agreed that recommendation 108 should provide that a court order would be necessary for the enforcement of a security right in a bank account unless the depositary bank consented to enforcement without a court order. Subject to that change, the Working Group approved the substance of recommendation 108.

Recommendation 109 (negotiable documents)

29. It was agreed that recommendation 109 should refer to the rights of a holder of a negotiable document against the issuer or any other person obligated on the document. Subject to that change, the Working Group approved the substance of recommendation 109.

Recommendation 110 (disposition of encumbered assets)

30. Subject to the change made in recommendations 92 to 94 and 98 (see paras. 14 and 18 above), the Working Group approved the substance of recommendation 110.

Recommendations 111 and 112 (advance notice with respect to extra-judicial disposition of encumbered assets)

31. The Working Group considered a proposal to include in recommendation 111 language along the lines of subparagraph (d) of recommendation 99 (registration of notice) for consistency reasons. That proposal was objected to. It was observed that, while registration of the notice referred to in recommendation 99 was a suggestion for consideration rather than a recommendation, such a suggestion was not appropriate in recommendation 111 as it would unnecessarily create the risk of costs, delays, errors and litigation and should be deleted even in recommendation 99. It was also pointed out that, unlike recommendation 99, which was expressed in general terms, recommendation 111 might be reformulated to be more specific. As a matter of drafting, it was suggested that recommendation 111 might be rearranged in separate paragraphs. Subject to those changes, the Working Group approved the substance of recommendation 111.

32. The Working Group approved the substance of recommendation 112 unchanged.

Recommendations 113-115 (acceptance of encumbered assets in satisfaction of the secured obligation)

33. It was agreed that the relationship among recommendations 113, 114 and 115 should be clarified. It was also agreed that registration of the notice with the proposal of the secured creditor to accept the encumbered assets in total or partial satisfaction of the secured obligation in the security rights registry was not necessary, since the grantor and other interested persons could protect their rights by simply objecting to the proposal of the secured creditor.

34. A number of proposals were made. One proposal was that the notice with the proposal of the secured creditor to accept the encumbered assets in total or partial satisfaction of the secured obligation should specify the amount owed and the amount to be paid. It was stated that such specificity would provide the grantor and notified third parties with the information they needed to determine whether to accept or to object to the proposal. It was agreed that the commentary could clarify that a good faith estimate of the amount owed would be sufficient. While some reservation was expressed as to the need for such specificity in the notice on the grounds that, in the absence of sufficient information, the grantor or any notified third party could object and thus deprive the secured creditor of that remedy, there was sufficient support in the Working Group for the proposal.

35. Another proposal was that, in the case of partial satisfaction of the secured obligation, actual consent by the grantor should be required and not just the absence of any objection by the grantor within a short period of time after notice was given. It was stated that actual consent by the grantor might be more appropriate to protect the grantor from the risk of error or misunderstanding of the notice. That proposal did not attract sufficient support. It was stated that there was no reason to require

actual consent of the grantor and, if such a requirement were added, it should apply to both the grantor and notified third parties.

36. Yet another proposal was that the last sentence of recommendation 115, providing for a judicial or other official review of the reasonableness of the objections of the grantor and notified third parties, should be deleted. It was stated that acceptance of the encumbered assets by the secured creditor in total or partial satisfaction of the secured obligation was a voluntary, extra-judicial remedy that should not be unnecessarily burdened with the delay and cost involved in any judicial or other official process. In addition, it was observed that the reasonableness of any objection was a practical matter for the parties and not a legal matter to be addressed by a court. While there was some objection mainly on the grounds that recourse to courts should and, in some countries, would, in any case, always be available, the proposal was met with sufficient support by the Working Group.

37. Yet another proposal was that, at least, the secured creditor should be given the right to accept the encumbered assets at a fixed market price even over the objection of the grantor or a notified third party. It was stated that such an approach would not prejudice the rights of the grantor or notified third parties as the secured creditor would, in any case, pay the market price. That proposal was objected to. It was observed that such a provision was unnecessary since, if there were a fixed market price (which should be carefully defined), interested parties would normally accept the proposal of the secured creditor. It was also observed that, if interested parties objected to the proposal, the secured creditor could still sell the encumbered assets at the market price.

38. Yet another proposal was that the last words of the first sentence of recommendation 115 ("but … dispositions") should be deleted. It was stated that, if the proposal of the secured creditor to accept the encumbered assets in satisfaction of the secured obligation was found by the grantor or any notified third party to be objectionable, the secured creditor should have all the other available remedies as if the proposal had never been made. There was sufficient support for that proposal.

39. After discussion, subject to the above-mentioned changes, the Working Group approved the substance of recommendations 113 to 115.

Recommendations 116 to 119 (surplus and shortfall)

40. With respect to recommendation 116, it was agreed that the net proceeds (i.e. after deduction of the costs of enforcement) should be applied to the secured obligation. With respect to recommendations 117 and 118, it was agreed that they should be revised to ensure that the priority status of the various competing claimants under the priority rules of the secured transactions law would not be changed as a result of the application of procedural rules. With respect to recommendation 119, it was agreed that it should be revised to ensure that a non-debtor grantor would not be liable for any shortfall. Subject to those changes, the Working Group approved the substance of recommendations 116 to 119.

Recommendation 120 (right of prior-ranking secured creditor to take over enforcement)

41. The Working Group approved the substance of recommendation 120 unchanged. It was suggested that the principle that prior-ranking secured creditors

prevailed was a general principle that applied to other rights beyond enforcement and should be included in the general provisions of the draft Guide. The Working Group decided to postpone consideration of that proposal until it had the opportunity to consider the general provisions of the draft Guide.

Recommendation 121 (title or other right acquired through non-judicial disposition)

42. It was agreed that the commentary should clarify that reference was made in recommendation 121 to "title or other right" since: according to recommendation 110 the secured creditor could "sell, lease, license or otherwise dispose of encumbered assets"; and the encumbered assets themselves might be a partial right as the right of a lessee or a licensee. It was also agreed that the commentary should clarify that the reference to good faith was meant to apply to situations, in which the disposition was not in accordance with the general standard of conduct set forth in recommendation 89, so as to protect the buyer who had no knowledge of that fact. After discussion, the Working Group approved the substance of recommendation 121 unchanged.

Recommendation 122 (title or other right acquired through judicial disposition)

43. The Working Group approved the substance of recommendation 122 unchanged.

Recommendation 123 (intersection of movable and immovable secured transactions law)

44. It was agreed that subparagraph (b) should be revised to provide that, if movables and immovables were disposed of in the same disposition, the movables might be disposed of in accordance with either the law of security rights in movables or the law of security rights in immovables. Subject to that change, the Working Group approved the substance of recommendation 123.

Recommendation 124 (coordination with other law)

45. The Working Group approved the substance of recommendation 124 unchanged.

Chapter VII. Pre-default rights and obligations of the parties (A/CN.9/WG.VI/WP.21/Add.2, recs. 86-87)

Purpose section

46. The Working Group approved the substance of the purpose section unchanged.

Recommendation 86 (party autonomy)

47. It was agreed that alternative B of recommendation 86 was preferable and should be placed in the context of the general provisions of the draft Guide as the principle of party autonomy applied throughout the draft Guide. In view of the importance of that principle for the relationship between the parties, it was also agreed that it should be sufficiently elaborated in the commentary of chapter VII. In

addition, it was agreed that, to avoid diluting the principle of party autonomy, any exceptions to that principle should be clearly specified, limited and aimed at protecting the grantor. Moreover, despite some doubt initially expressed, it was agreed that the rights of third parties were appropriately set out as the limits of party autonomy. It was also agreed that the general principle of party autonomy should be coordinated with the specific expressions of that principle included in chapters of the draft Guide (e.g. recommendations 90 and 91). After discussion, the Working Group approved the substance of alternative B of recommendation 86 and decided that alternative A should be deleted.

Recommendation 87 (suppletive rules)

48. The Working Group approved the substance of recommendation 87 unchanged.

Chapter X. Acquisition financing devices (A/CN.9/WG.VI/WP.21/Add.4, recs. 125-135)

Purpose

49. The Working Group approved the substance of subparagraph (a) of the purpose section unchanged. With respect to subparagraph (b), it was agreed that discussion of the alternatives reflected therein be postponed until all the recommendations relating to acquisition financing devices had been considered.

Recommendation 125 (equivalence of acquisition financing devices to security rights)

50. It was agreed that discussion of the alternatives set out in recommendation 125 with respect to the non-unitary approach be postponed until all the recommendations relating to acquisition financing devices had been considered.

Recommendation 126 (creation of acquisition security rights)

51. There was general support in the Working Group for the substance of recommendation 126, which was based on a unitary approach. It was agreed that a parallel recommendation should be prepared for States wishing to follow a non-unitary approach. It was widely felt that, in line with the decision of the Working Group at its seventh session that all providers of acquisition financing should be treated equally (see A/CN.9/574, para. 35), such recommendation should provide the same requirements and the same results for all aspects of acquisition financing devices. It was also generally felt that, for such recommendation to be readily understood and implemented in States in which retention of title and similar devices were the prevalent functional equivalents of security devices, the recommendation should be based on terminology and concepts familiar in such systems. In that context, it was stated that, in the case of retention of title, both the seller and the buyer might have ownership rights and no one granted a right to the other, and the intent to be bound could be reflected in the general terms and conditions of the seller or the buyer. In the same vein, it was observed that, if the form requirements of a sale with a retention-of-title clause were not met, the seller would remain the owner. Moreover, it was agreed that recommendation 126 should be retained only if

it were different from the general recommendation on form requirements (i.e. recommendation 8 in document A/CN.9/WG.VI/WP.21, which remained to be discussed).

Recommendation 127 (effectiveness of acquisition security rights against third parties)

52. There was general agreement in the Working Group with the substance of recommendation 127, which was based on a unitary approach. It was also agreed that a parallel recommendation should be prepared following a non-unitary approach. As to whether the same rule should apply in both cases, differing views were expressed. One view was that, if a non-unitary approach were followed, registration should not be required or, alternatively, a longer grace period should be granted to accommodate retention of title and similar devices. It was stated that registration could add cost and bureaucracy and thus undermine the efficiency of important retention-of-title transactions. However, the prevailing view was that all devices performing security functions should be subject to registration. It was stated that the availability and the cost of credit would be negatively affected if all providers of acquisition financing were not treated equally. It was also observed that the efficiency of any registration system would be seriously compromised if all transactions serving security purposes were not subject to registration. In addition, it was said that registration enhanced transparency, discouraged hidden security rights and promoted certainty in secured financing.

53. As a matter of drafting, it was agreed that the second sentence of recommendation 127 should be revised to ensure that the rights registered were effective not only as against third parties whose rights arose between the time the acquisition security right was created and registration but also as against third parties whose rights were registered subsequently.

54. After discussion, the Working Group, recalling its decision at its seventh session (see A/CN.9/574, para. 46), decided that, whether a State followed a unitary or a non-unitary approach, all acquisition financing devices should be subject to registration and the grace period should be as short as possible.

Recommendation 128 (exceptions to the principle of registration)

55. It was agreed that acquisition financing transactions relating to consumer goods should not be subject to registration, whether the consumer goods had a resale value or not. It was also agreed that that exception did not affect registration in specialized registries or title certificate systems. Subject to those changes, the Working Group approved the substance of recommendation 128.

Recommendation 129 (priority of acquisition security rights over pre-registered non-acquisition security rights in future goods other than inventory)

56. There was general agreement in the Working Group that recommendation 129 was sufficient for the purposes of a unitary approach. As a matter of drafting, in order to avoid confusion with a security right registered before its creation, it was agreed that reference should be made, not to pre-registered security rights, but rather to security rights registered earlier. While some doubt was expressed as to whether subparagraph (i) would be appropriate in the context of a recommendation reflecting

the non-unitary approach, it was widely felt that a purchase-money lender and a retention-of-title seller would have super-priority (i.e. priority even over a security right that had been registered earlier) if they retained actual possession of the goods, registered a notice in the security rights registry within a certain period of time after actual delivery of the goods to the grantor or buyer, or upon creation of the security right if no registration was required under recommendation 128 (subject to compliance with any other applicable registration system, such as for vehicles). Subject to the above-mentioned change, the Working Group approved the substance of recommendation 129 reflecting a unitary approach and requested the Secretariat to draft a parallel recommendation to implement a non-unitary approach.

Recommendations 130 and 131 (priority of acquisition security rights over pre-registered non-acquisition security rights in future inventory)

57. It was agreed that the change made in recommendation 129 (concerning the reference to "pre-registration") should be made in recommendation 130 as well (see para. 56 above). After discussion, it was also agreed that it was not necessary for the notice to refer to the priority rank of the acquisition security right. It was stated that the notice should be easy for business people to formulate and, in any case, acquisition financiers did not have to give, in essence, to inventory financiers on record legal advice about the priority status of acquisition security rights. Subject to those changes, the Working Group approved the substance of recommendation 130 as part of a unitary approach.

58. It was also agreed that that a parallel recommendation should be prepared for States wishing to follow a non-unitary approach. It was stated that such recommendation would need to deal not with priority but rather with the question whether the retention-of-title seller could set up its ownership rights against third parties (it was clarified that that point applied to recommendation 129 as well).

59. In that connection, the suggestion was made that, in order to avoid creating delays, costs and unnecessary formalities for retention-of-title transactions, they should not be subject to registration or, at least, be subject to registration within a sufficiently long grace period (3-6 months), without treating inventory differently from goods other than inventory. It was stated that registration could undermine retention-of-title transactions that were based on concepts shared by a number of European countries and reflected in European Union legislation. That suggestion was objected to for the same reasons given at the discussion of that matter at the seventh session of the Working Group (see A/CN.9/574, paras. 55 and 56). It was observed that the Working Group should bear in mind the interests of all States and not just of any region in particular. It was also pointed out that law and practice of retention of title differed widely even among countries of the same region, and that European Union legislation on retention of title referred it to national legislation.

60. It was widely felt, however, that, in order to make recommendation 130 more easily understandable to civil law lawyers, the commentary could explain their impact. The commentary could explain, in particular, that, once security rights in future assets were made possible, conflicts that could currently arise only in very few retention-of-title jurisdictions that permitted the sale of future assets with retention of title, could arise between a retention-of-title seller and a lender. The commentary could also explain that, under the system of the draft Guide, retention-of-title sellers would be able to register and notify for a period of five years,

covering multiple sales transactions between the same parties, and thus ensure that their rights would be effective against third parties and have priority even over the rights of parties that had made an earlier registration.

61. After discussion, the Working Group approved the substance of recommendation 131 unchanged and requested the Secretariat to prepare a parallel recommendation for a non-unitary approach.

Recommendation 132 (cross-collateralization)

62. It was stated that recommendation 132 dealt with multiple security rights rather than cross-collateralization. It was also observed that recommendation 132 might not be necessary as there was nothing in the draft Guide to suggest that an acquisition financier was not an acquisition financier merely because it also had a non-acquisition security right in the goods covered by the acquisition security right or the acquisition security right also secured other obligations. After discussion, it was agreed that recommendation 132 could be deleted and the matter could be addressed in the commentary.

Recommendation 133 (priority of acquisition security rights in proceeds of inventory)

63. It was agreed that recommendation 133 should make it clear that the notice referred to in the proviso clause with respect to proceeds of inventory could be given at the same time it was given to an inventory financier on record under recommendation 130 (i.e. before actual delivery of the inventory to the grantor). It was also agreed that, in any case, that notice ought to be given no later than the time the proceeds arose.

64. In response to a query, it was stated that, by requiring that notification be given to financiers on record with a right in the same kind of assets as the proceeds, such as receivables, recommendation 133 eased the burden on the searcher who would know to search for security rights in both inventory and receivables of the grantor. It was agreed that the commentary could elaborate on the concept and the effect of the notice.

65. Subject to those changes, the Working Group approved the substance of recommendation 133 and requested the Secretariat to prepare a parallel recommendation following a non-unitary approach, as well as a similar recommendation (without the proviso clause) on priority of security rights in proceeds of equipment.

Recommendation 134 (enforcement)

66. It was agreed that the alternative of recommendation 134 addressing the unitary approach should refer to all remedies of an acquisition financier (including the acceptance of the assets in total or partial satisfaction of the secured obligation and collection of receivables) and not only to the right to repossess and dispose of the assets. Subject to that change, the Working Group approved the substance of the unitary approach-related alternative of recommendation 134.

67. With respect to the alternative of recommendation 134 addressing the non-unitary approach, a number of concerns were expressed. One concern was that the

rights and remedies of a retention-of-title seller could not be the same as those of a purchase-money lender. Another concern was that no reference was made to obligations. Yet another concern was that the words "to the maximum extent possible" might not be sufficient to produce the desired equivalence in the treatment of all acquisition financing devices, whether a unitary or a non-unitary approach was followed. Yet another concern was that the current text might not be sufficient for States that might introduce the notion of an acquisition security right for lenders while preserving retention of title for sellers and lessors. In order to address those concerns, several suggestions were made. Once suggestion was that the recommendation based on a unitary approach could apply equally to a non-unitary approach. That suggestion was objected to. It was stated that, while the preconditions and the results should be the same, the rights and remedies (or the way to achieve the desired equivalence) were different. Another suggestion was that the recommendation could read along the following lines: "The law should provide that, in the case of default on the part of the buyer, grantor or financial lessee, an acquisition security right should be enforced in such a manner that: (i) the same principles and objectives as those governing enforcement of security rights generally are complied with; and (ii) the same results are obtained." As there was sufficient support for that suggestion, the Working Group requested the Secretariat to revise the non-unitary approach-related alternative of recommendation 134 along those lines.

Recommendations on the treatment of acquisition financing devices in the case of insolvency

68. The Working Group decided to defer consideration of the recommendations dealing with acquisition financing devices in the case of insolvency until it had the opportunity to consider all insolvency-related recommendations.

Recommendation 135 (conflict of laws)

69. It was agreed that all conflict-of-laws recommendations should apply to acquisition financing rights, including those relating to security rights in intangibles, so as to cover proceeds of tangibles subject to an acquisition financing right that could be intangibles. Subject to that change, the Working Group approved the substance of recommendation 135.

Intellectual property rights

(A/CN.9/WG.VI/WP.21, rec. 3 (h) and A/CN.9/WG.VI/WP.22/Add.1, paras. 13-14 and 21 (dd))

70. The Working Group first considered the question whether security rights in intellectual property rights should be included in the scope of the draft Guide. It was widely felt that intellectual property rights should be included in the scope of the draft Guide. It was stated that it was important to facilitate the use of intellectual property rights as a source of credit and to recognize the growing importance and value of intellectual property rights as business assets, particularly to small- and medium-size enterprises throughout the world. In addition, it was observed that intellectual property rights were so inter-connected with other assets, such as

equipment and inventory, that it would be extremely difficult to separate them from those assets and exclude them from the draft Guide. Moreover, it was said that exclusion of intellectual property rights from a secured transactions regime would not only impede access to credit in respect of intellectual property but would also limit the benefits of the draft Guide and leave States with no guidance on security rights in intellectual property rights.

71. On behalf of the World Intellectual Property Organization (WIPO), it was stated that WIPO supported UNCITRAL in that endeavour, and was prepared to provide assistance to the Working Group on the basis of WIPO's mandate and expertise in the field of intellectual property. In addition, it was observed that intellectual property should be included in the scope of the draft Guide for the reasons mentioned above. However, the issue that needed to be addressed was that the draft Guide made recommendations that might require adjustment so as to avoid a negative impact on intellectual property industry, as well as the finance community, and any conflict following the implementation of the recommendations of the draft Guide on pre-existing intellectual property laws and treaty obligations, and the business practices that had developed over time to give effect to those laws and obligations. While recognizing the need for modernization of secured transactions laws, WIPO urged the Working Group to be sensitive to the need in doing so to avoid a negative effect on the exercise of intellectual property rights. WIPO recognized the need to give States and legislators guidance on issues of intellectual property and security rights and to review the draft Guide's recommendations to identify where adjustments to those recommendations might be needed, why those adjustments might be necessary and how they might be made. It was observed that that guidance was not given in the draft Guide in its current state.

72. It was, therefore, announced that WIPO would undertake a process of consultation with a specially constituted working group of intellectual property experts at WIPO to report and give guidance to States on intellectual property and security rights, to review the recommendations of the draft Guide to ensure that they were appropriate for intellectual property assets and to suggest adjustments to those recommendations where necessary. In particular, it was mentioned that the WIPO initiative would seek to enhance awareness of the use of intellectual property in secured transactions in countries where familiarity and understanding of those issues was relatively undeveloped. It was also stated that WIPO would communicate with UNCITRAL, to ensure that that cooperation was appropriately managed to ensure that WIPO's work was effectively coordinated with the work of the Working Group, so as to provide maximum assistance and guidance to States in reforming law relating to intellectual property and security rights.

73. After discussion, the Working Group agreed that intellectual property rights should be included in the scope of the draft Guide.

Recommendation 3 (h) (A/CN.9/WG.VI/WP.21)

74. The Working Group next turned to the formulation of recommendation 3 (h), noting that it was discussed in paragraphs 13 and 14 of chapter I, Introduction, while intellectual property rights were defined in paragraph 21 (dd) of chapter I (A/CN.9/WG.VI/WP.22/Add.1). It was generally thought that the recommendation was appropriately formulated to ensure that the draft Guide would generally apply to security rights in intellectual property rights not only without the need for the

Working Group to examine the application of each and every recommendation to security rights in intellectual property, which was generally thought to be a task that went beyond the current project, but also without interfering with intellectual property legislation. The suggestion to defer not only to intellectual property law, whether national or international, but also to business practices was not met with support. It was stated that such an unqualified reference to all business practices would be too broad and could inadvertently result in excluding intellectual property rights from secured transactions legislation altogether. It was also observed that, if necessary, reference could be made in the commentary to certain business practices that were generally acceptable, widely used and reflected in legislation. After discussion, the Working Group approved the substance of recommendations 3 (h) unchanged.

Proceeds from drawings under independent undertakings (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y), (z), (aa) and (bb), A/CN.9/WG.VI/WP.21, rec. 25, A/CN.9/WG.VI/WP.21/Add.1, recs. 49 and 62, A/CN.9/WG.VI/WP.21/Add.2, rec. 106, A/CN.9/WG.VI/WP.21/Add.5, rec. 138)

75. It was generally agreed that the draft Guide should deal with security rights in proceeds from drawings under independent undertakings (i.e. commercial and standby letters of credit and independent guarantees). It was stated that such an approach would reflect the wide acceptance of proceeds of drawings under independent undertakings as a source of credit. In addition, it was observed that the draft Guide would supplement other international efforts to unify the law relating to independent undertakings, particularly the work of the International Chamber of Commerce (ICC). As to the asset that would be subject to the security right, it was agreed that it should not be the independent undertaking itself nor the right to demand payment under an independent undertaking, but rather the right to receive such payment. In that connection, a view was expressed that, while proceeds from drawings under independent undertakings could be addressed in the draft Guide, there was no need to elaborate specific recommendations since the recommendations applicable to general receivables could apply. However, the Working Group noted that the right to receive payment under an independent undertaking should be treated, like the right to receive payment of the balance in a bank account, as a special kind of receivable subject to certain asset-specific recommendations reflecting the needs of parties to the relevant transactions.

Definitions (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y), (z), (aa) and (bb))

76. The Working Group next turned to the definitions of the relevant terms (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y), (z), (aa) and (bb)). It was stated that the words “subject to law other than secured transactions law” in the definition of “independent undertaking” (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (y)) were not necessary as there was sufficient reference to the relevant body of law and, in any case, the definition was not intended to set forth a rule.

77. A number of proposals were made regarding the definition of the term “proceeds from a drawing under an independent undertaking” (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (z)). One proposal was that the term

"payment made" be replaced by "payment due or to become due", the words "a deferred payment obligation incurred" be deleted and the words "to be" be added before the word "delivered". Another proposal was that use of the word "proceeds" in the defined term itself should be replaced by language along the lines "the right to receive payment under an independent undertaking". It was stated that use of the term "proceeds" might create confusion in view of the fact that it was used in the draft Guide in the sense of "whatever was received in respect of an encumbered asset" (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (ee)). Yet another proposal was that the term "receivable" could be used instead. In response to both proposals, it was observed that the term "proceeds from the drawing under an independent undertaking" was more familiar to the relevant industry and was used in relevant texts. It was also stated that, in view of the relevant law and practice, use of the term "receivable" would be inappropriate.

78. It was suggested that in the definition of "guarantor/issuer" (see A/CN.9/WG.VI/WP.22/Add.1, para. 21 (aa)) reference should also be made to counter-guarantors.

79. After discussion, the Working Group requested the Secretariat to revise the definitions, taking into account the views expressed and the suggestions made.

Recommendation 25 (A/CN.9/WG.VI/WP.21)

80. There was general support in the Working Group for recommendation 25.

Recommendation 49 (A/CN.9/WG.VI/WP.21/Add.1)

81. A number of suggestions were made. One suggestion was that the definition in the note to recommendation 49 could replace the definition of "control" with respect to independent undertakings (and a similar wording could replace the definition of "control" with respect to bank accounts). Another suggestion was that the definition of "control" should refer to the right to dispose. Yet another suggestion was that a separate recommendation might be necessary to ensure that, irrespective of the creation, third-party effectiveness or priority of a security right in proceeds from the drawing under an independent undertaking, the guarantor/issuer did not have to pay the secured creditor against its will. Yet another suggestion was that subparagraph (d) should be revised since an independent undertaking did not automatically follow the receivable, the payment of which it supported. It was stated that a separate act of transfer was necessary under article 10 (1) of the United Nations Assignment Convention. After discussion, the Working Group requested the Secretariat to revise recommendation 49, taking into account the views expressed and the suggestions made.

Recommendation 62 (A/CN.9/WG.VI/WP.21/Add.1)

82. A number of suggestions were made. One suggestion was that subparagraph (b) should be deleted as acknowledgement was a form of control already covered in subparagraph (a). It was stated that the element of inconsistent acknowledgements could be incorporated in subparagraph (a). Another suggestion was that subparagraph (c) should be limited to situations envisaged in recommendation 49 (b) in which possession was a condition to payment. Yet another suggestion was that, if registration were to be preserved as a method of achieving

third-party effectiveness, a priority rule should be introduced in recommendation 62 to address the priority of registered security rights. Yet another suggestion was that subparagraph (d) should be deleted since a fundamental aspect of the independent character of an undertaking was that it did not follow the receivables the payment of which it supported. It was stated, however, that the expectation of the parties would be that supporting obligations would follow the receivable. In an effort to bridge the gap between those views, it was observed that in either case, absent its consent, the guarantor/issuer or nominated person would not have to pay the secured creditor, as provided in recommendation 106 (A/CN.9/WG.VI/WP.21/Add.2). In that connection, it was suggested that recommendation 106 should be recast as a principle of general application even outside enforcement. After discussion, the Working Group requested the Secretariat to revise recommendation 62, taking into account the views expressed and the suggestions made.

Recommendation 106 (A/CN.9/WG.VI/WP.21/Add.2)

83. There was general support in the Working Group for the substance of recommendation 106. The suggestion to recast it as a general principle applicable to all chapters of the draft Guide was reiterated.

Chapter XI. Conflict of laws (A/CN.9/WG.VI/WP.21/Add.5, recs. 136-149)

Purpose

84. It was agreed that the words “as appropriate” in the second paragraph of the purpose section should be deleted. It was also agreed that the examples given in that paragraph should be separated as transfer of title was a security right in both unitary and non-unitary systems, while the situation was different with respect to retention of title and financial leases in a non-unitary system.

Recommendation 136 (security rights in tangible property)

85. The Working Group agreed that recommendation 136 appropriately applied to security rights in negotiable instruments and negotiable documents. It was suggested, however, that the third-party effectiveness of a non-possessory security right in a negotiable instrument should be subject to the law of the State of the grantor’s location (i.e. the law provided for in recommendation 137). It was widely felt that that approach was appropriate, since a secured creditor could refer to the law of one jurisdiction to make effective against third parties security rights in negotiable instruments issued in various countries.

86. The suggestion was made that recommendation 136 should be reformulated to refer to the law of the location of the asset all issues relating to a security right and not just its creation, third-party effectiveness and priority. It was stated that exceptions should be limited and clearly stated. There was no sufficient support for that suggestion. It was observed that the draft Guide was divided in those categories of issues. It was also said that any issue not covered in recommendation 136 (e.g. enforcement) was addressed in subsequent recommendations (e.g. 149).

87. With respect to mobile assets, it was observed that the rule in the second sentence of recommendation 136 would not apply if they were subject to specialized registration systems, which, as provided in the third-party effectiveness chapter, were to be preserved.

88. After discussion, the Working Group approved the substance of recommendation 136 unchanged, and requested the Secretariat to include in the commentary appropriate explanation of the matters addressed above. The Secretariat was also requested to prepare a draft recommendation referring the third-party effectiveness of a non-possessory security right in a negotiable instrument to the law of the grantor's location.

Recommendation 137 (security rights in intangible property)

89. It was questioned whether recommendation 137 should apply to intellectual property rights. It was agreed that the commentary could clarify that matter. On behalf of WIPO, it was stated that recommendation 137 was among the recommendations that required adjustments so as to apply to intellectual property rights. After discussion, the Working Group approved the substance of recommendation 137 unchanged.

Recommendation 138 (security rights in proceeds from a drawing under an independent undertaking)

90. A number of suggestions were made. One suggestion was that the reference to enforcement in subparagraph (a) should be deleted. It was stated that the enforcement of a security right in proceeds from a drawing under an independent undertaking should be subject to the law applicable to enforcement (recommendation 149), and not to the law of the grantor's location. Another suggestion was that subparagraph (b) should be recast as a recommendation dealing with the law applicable to the obligations of the guarantor/issuer or nominated person and coordinated with subparagraph (c). It was stated that the new provision should track, to the extent possible, the language of recommendation 148 dealing with the relationship between the account debtor and the assignee. Yet another suggestion was that a recommendation along the lines of recommendation 140 should be prepared for security rights in proceeds from a drawing under an independent undertaking. After discussion, the Working Group requested the Secretariat to revise recommendation 138, taking into account the views expressed and the suggestions made.

Recommendations 139 and 140 (security rights in bank accounts)

91. Differing views were expressed with regard to the alternatives presented in recommendation 139. In support of alternative A, it was stated that the rule applicable to securities under the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary (i.e. the law governing the account) was preferable since bank accounts and securities accounts were very similar and it was difficult to distinguish between the two particularly when a bank provided both services to its customers. In addition, it was observed that such an approach would provide certainty and predictability as lenders would expect to receive a copy of the account agreement (or even obtain a control agreement) before extending credit on the basis of a bank account. Moreover, it was

said that alternative C (the law of the location of the bank where the account was held and the "closest connection" test) would cause uncertainty as there was no universally acceptable system to locate bank accounts and the closest connection test was vague. It was also mentioned that application of the law governing the bank account would not cause any changes in practice since banks already applied that rule with respect to securities accounts.

92. In favour of alternative C, it was stated that the law applicable to security rights in bank accounts should be different from the law applicable to such rights in securities accounts, since bank accounts were different from securities accounts both conceptually and operationally. The bank account, it was stated, involved a bilateral relationship between the customer and the bank and not the intermediated multi-tier holding systems that were found in securities accounts. It was also stated that, although cash could be held also in securities accounts, it was considered to be ancillary to the securities account and was held temporarily in separate sub-accounts for specific purposes, such as for the purchase of securities or the deposit of dividends. It was further said that the Hague Convention was not designed for bank accounts and, while studies were being conducted on the impact of the rules on securities accounts, there was no information as to any parallel studies with respect to the impact of similar provisions on bank accounts. The scope of the Hague Convention, it was observed, extended to dematerialized securities whose operation was much more complex than bank accounts.

93. In addition, it was observed that a bank account could be traced to a specific branch with relative ease, so a rule based on that connecting factor would provide *ex ante* certainty (advance certainty, i.e. before a transaction had been concluded)). To the contrary, it was said, it would be difficult for third parties to ascertain the choice of law in an account agreement because those documents were usually confidential. It was further observed that application of the law of the account agreement could have serious adverse effects on banking practice, since the rights and duties of the bank or enforcement would be made subject to a law other than that of its location. It was also mentioned that third parties would have no way of determining the law applicable to the account as the account agreement would be protected by bank secrecy. It was also said that party autonomy was not appropriate in the case of proprietary law issues. In response, it was stated that, whatever the law applicable to bank accounts might be, it would not affect the law applicable to regulatory, tax, accounting or criminal law issues, which would remain subject to the law of the bank's relevant location. It was also said that bank secrecy was not an issue since borrowers were prepared to give lenders copies of the bank account agreements so as to obtain credit on the basis of those agreements, and often lenders would obtain a control agreement with the consent of the depositary bank. In addition, it was observed that analysis based on the principle of party autonomy was not very helpful, since alternative B referred to some objective connecting factors and alternative C eventually involved some degree of choice by the parties as to the location of an account.

94. In the discussion, the question was raised as to whether recommendation 139 would apply to transfers of accounts. In response, it was noted that it would apply to conflicts of priority involving transfers of bank accounts by virtue of the definition of "competing claimant", which included a transferee (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (gg)). For the same reason, the priority

recommendations of the draft Guide would apply to a conflict involving a transferee of a bank account. However, whether the draft Guide as a whole applied to transfers of bank accounts was questionable since, while recommendation 3 (f) (see A/CN.9/WG.VI/WP.21) provided that in general outright transfers of receivables were within the scope of the draft Guide, bank accounts were excluded from the definition of "receivable" (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (o)).

95. After discussion, the Working Group decided to retain in recommendation 139 alternative B (which reflected the approach taken in alternative A in a concise way which was more suitable to the draft Guide) and alternative C (without the reference to the "closest connection test"). It was widely felt that as the choice between those alternatives depended on whether, as a matter of fact or practice, the location of bank accounts could be easily determined, information about the relevant practices should be collected and introduced into the discussion. As to recommendation 140 and the reference to it in the chapeau of recommendation 139, the Working Group decided that they should be retained outside square brackets.

Recommendation 141 (proceeds)

96. The Working Group approved the substance of recommendation 141 unchanged.

Recommendation 142 (goods in transit and export goods)

97. It was noted that a security right in goods in transit and export goods could be created and made effective against third parties, under recommendation 136, in accordance with the law of the country of their origin, or, under recommendation 142, in accordance with the law of the country of their ultimate destination. It was widely felt that there was no need to refer in recommendation 142 to negotiable documents. It was stated that in the normal situation in which the documents would travel with the goods, recommendation 142 was sufficient. It was also observed that recommendation 142 was sufficient also for situations where the goods travelled but not the documents. As to the rare situation in which the goods were not in transit but the documents were, it was said that recommendation 136 would apply to provide for the application of the law of the location of the encumbered asset (i.e. the document). After discussion, the Working Group agreed that the matters discussed above could be usefully clarified in the commentary and approved the substance of recommendation 142 unchanged.

Recommendation 143 (meaning of "location" of the grantor)

98. The Working Group approved the substance of recommendation 143 unchanged.

Recommendation 144 (relevant time when determining location)

99. It was agreed that priority disputes exclusively among claims created before relocation of the assets or the grantor should be subject to the law of the original location and not to the law of their location at the time the conflict of priority arose. Subject to that limited change, the Working Group approved the substance of recommendation 144.

Recommendation 145 (continued third-party effectiveness upon change of location)

100. It was agreed that, at the end of recommendation 145, language should be added along the following lines: "and, in determining priority under the law of the enacting State, for the purposes of any rule in which time of registration or other method of achieving third-party effectiveness is relevant, that time is the time at which that event occurred under the law of that other State.". It was stated that the effect of that wording would be to clarify the time third-party effectiveness had been achieved. It was also agreed that the reference to the "enacting State" might be revised to avoid an implication that the other State would be a State that had not enacted the recommendations. It was explained that the recommendation had been drafted from the point of view of the receiving State, as the law of that State would normally apply, and on the basis of the assumption that that State would be an enacting State as, otherwise, the recommendations would not apply. Subject to those changes, the Working Group approved the substance of recommendation 145.

Recommendation 146 (*renvoi*)

101. It was stated that the title of recommendation 146 should be revised to indicate that renvoi was excluded (e.g. exclusion of *renvoi* or no *renvoi*). It was also observed that the commentary could explain the reference to the "law in force". Subject to those changes, the Working Group approved the substance of recommendation 146.

Recommendation 147 (law governing the rights and obligations of the grantor and the secured creditor)

102. The Working Group agreed to retain outside square brackets the phrase "with respect to the security right" to align the scope of that provision to the subject matter of the draft Guide, by making the rule applicable to the parties' rights and obligations that related to the security right. The Working Group also agreed to retain outside square brackets the words "by law" to make the rule applicable to rights and obligations relating to the security right which, although originating from the creation of the security right (and in that sense having an origin in the security agreement), arose from law in that they were not expressly or impliedly dealt with in the security agreement but became part of the security right as a matter of law. An example given was the nature and extent of the secured party's duty to care for the collateral while it was in its possession, an obligation not strictly arising from the security agreement but being part of the security right as a matter of law.

103. As to the fallback rule applicable in the absence of a choice of law by the parties, differing views were expressed. One view was that no fallback rule should be provided on the assumption that one would not be needed since in most cases parties to secured transactions would include a choice-of-law clause in their agreements. Another view was that, in the absence of a choice of law by the parties, reference should be made to the law of the grantor's location. However, the prevailing view was that the law applicable to the rights and obligations of the parties should be aligned with the law applicable to the purely contractual rights and obligations, an approach that would most likely be in line with the expectations of the parties. After discussion, the Working Group decided that the reference to the law governing the security agreement should be retained and the reference to the

law of the grantor's location should be deleted. Subject to the changes mentioned above, the Working Group approved the substance of recommendation 147.

104. In the discussion, the suggestion was made that, to recognize rules of practice and usages, reference should be made to "rules of law". That suggestion did not attract support.

Recommendation 148 (law governing the rights and obligations of the account debtor and the assignee)

105. It was agreed that the parts of the recommendations on security rights in proceeds from drawings under independent undertakings and in bank accounts that dealt with the relationship between the account debtor and the assignee should be, to the extent possible, aligned with recommendation 148. After discussion, the Working Group approved the substance of recommendation 148 unchanged.

Recommendation 149 (enforcement matters)

106. There was support in the Working Group for both alternatives A and B. In support of alternative A, it was stated that enforcement involved procedural matters that should be subject to the law of the place of enforcement. It was observed, however, that such a rule could result in the application of more than one law where enforcement action, including out-of-court measures, was taken in various jurisdictions. In the same vein, it was mentioned that it was not easy to determine the place of enforcement with respect to intangibles, but even with respect to tangibles in particular when an action from a different place was required (e.g. the mailing of a notice). In support of alternative B, it was observed that it was suitable to address both court and out-of-court measures in various countries and sufficient to preserve legitimate interests of the forum in case of repossession of the assets by the secured creditor or inconsistency between an enforcement measure and mandatory law or public policy of the forum. On the other hand, it was stated that, while party autonomy could work in the case of extra-judicial enforcement, it was not appropriate in the case of judicial enforcement. It was also observed that enforcement of intangibles would take place in the "location" of the receivable (i.e. the account debtor) and would typically involve a request for payment by the creditor to the account debtor.

107. As a matter of drafting, it was suggested that the words "outside insolvency proceeding" be deleted as they might cause confusion as to whether they required that an insolvency proceeding had been opened or not. The suggestion attracted support, provided that some other way was found to avoid interference with the insolvency-related recommendations. It was also suggested that the mandatory law and public policy exceptions in alternative B were applicable to all the conflict-of-laws recommendations and should be reformulated as such. That suggestion was met with interest, subject to a determination of the impact of those exceptions to the conflict-of-laws recommendations.

108. After discussion, the Working Group decided that both alternatives should be retained for the continuation of the discussion. The Secretariat was requested to prepare drafts to address the suggestions made.

Impact of insolvency on conflict-of-laws rules

109. The Working Group agreed to defer discussion of the insolvency-related conflict-of-laws recommendations until it had an opportunity to consider all the insolvency-related recommendations.

Multi-Unit States

110. The Secretariat was requested to prepare recommendations to address the application of the conflict-of-laws recommendations in multi-unit States.

Chapter IX. Insolvency (A/CN.9/WG.VI/WP.21/Add.3)

Insolvency Guide recommendations

111. With respect to the recommendations of the Insolvency Guide included in the Secured Transactions Guide, the Working Group decided that they should all be retained with appropriate explanations in the commentary. It was also agreed that some additional definitions from the Insolvency Guide (e.g. on financial contracts) might be usefully included in the Insolvency Chapter of the Secured Transactions Guide and any differences with the definitions of the Secured Transactions Guide explained.

Draft additional recommendations

Recommendations A and B

112. The Working Group agreed that both approaches be retained. It was widely felt that, in the context of a non-unitary approach, application of the principle of equivalence should lead to the various acquisition financing devices being treated in the same way. It was also agreed that in recommendation B a reference to the purchase-money lender should be added to reflect the equivalence principle. But it was also agreed that the characteristics of acquisition financing rights in law and practice should be respected. In addition, it was generally thought that the commentary should explain with examples the treatment of acquisition financiers both in the unitary and the non-unitary approach. Moreover, it was agreed that the commentary should clarify the terminology in particular with respect to the non-unitary approach.

Recommendations C to E and G to K

113. The Working Group retained recommendations C and D unchanged.

Recommendation F

114. It was agreed that recommendation F should make it clear that the insolvency representative would be entitled to recover costs and expenses on a first priority basis. Subject to that change, the Working Group retained recommendation F.

Negotiable instruments and negotiable documents (A/CN.9/WG.VI/WP.22/Add.1, para. 21 (w) and (x), and A/CN.9/WG.VI/WP.21, recs. 3 (d) and 24)

115. The Working Group approved the substance of the definitions of "negotiable instrument" and "negotiable document", subject to the deletion of the reference to other law.

Recommendation 3 (d) (A/CN.9/WG.VI/WP.21, rec. 3 (d))

116. The Working Group approved the substance of recommendation 3 (d) and agreed that all the square brackets be deleted.

Recommendation 24 (A/CN.9/WG.VI/WP.21)

117. The Working Group approved the substance of recommendation 24, reserving final decision on whether the recommendation should be based on the characterization of the right as accessory or independent. It was also agreed that the recommendation should deal only with negotiable instruments and not with other payment obligations.

V. Future work

118. The Working Group noted that its ninth session was scheduled to take place in New York from 30 January to 3 February 2006 and that the following session was scheduled to take place in Vienna from 18 to 22 September 2006, the latter dates being subject to approval by the Commission at its thirty-ninth session scheduled to take place in New York from 19 June to 7 July 2006. In addition, the Working Group noted that it could have an additional session in New York from 1 to 5 May 2006, which was subject to a decision by the Working Group in January 2006.

Notes

[1] Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3), para. 358. For a history of the project, see A/CN.9/WG.VI/WP.22. The reports of the first to the seventh sessions of the Working Group are contained in documents A/CN.9/512, A/CN.9/531, A/CN.9/532, A/CN.9/543 and A/CN.9/549, A/CN.9/570 and A/CN.9/574. The reports of the first and the second joint sessions of Working Group V (Insolvency Law) and VI (Security Interests) are contained in documents A/CN.9/535 and A/CN.9/550. The consideration of those reports by the Commission is reflected in documents A/57/17 (paras. 202-204), A/58/17 (paras. 217-222), A/59/17 (paras. 75-78) and A/60/17 (paras. 185-187).

[2] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 455, and *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 347.