



General Assembly

Distr.: Limited
2 December 2004*

Original: English

**United Nations Commission
on International Trade Law**
Working Group VI (Security Interests)
Seventh session
New York, 24-28 January 2005

Security Interests

Draft legislative guide on secured transactions

Report of the Secretary-General

Addendum

Contents

	<i>Paragraphs</i>	<i>Page</i>
XII. Acquisition financing devices	1-14	2
B. Recommendations	1-14	2

* This document is submitted two weeks later than the required ten weeks prior to the start of the meeting because of the need to complete consultations and to finalize consequent amendments.



XII. Acquisition financing devices

[Note to the Working Group: Part A. General remarks is contained in document A/CN.9/WG.VI/WP.17.]

B. Recommendations

Purpose

[...]

Equivalence of [acquisition financing] [purchase-money] devices to security rights

1. The law should treat [acquisition] [purchase-money] rights arising under transactions, such as sales with retention of title arrangements, purchase-money lending arrangements and financial leases, as security rights by including such rights within the definition of “security rights” and, thus, applying the rules governing security rights to these rights directly. Alternatively, the law might exclude such rights (or some of them) from the definition of “security rights,” but govern those rights under a parallel regime that is substantively identical to the rules governing security rights. In either case, the recommendations applicable to [acquisition] [purchase-money] security rights should apply, as supplemented by the recommendations applicable to [non-acquisition] [non-purchase-money] security rights.

[Note to the Working Group: The Working Group may wish to consider replicating the detailed recommendations presented in the succeeding paragraphs in the other Chapters of the Guide. Alternatively, these recommendations might be stated in the other Chapters of the Guide and incorporated in this Chapter by reference.]

Creation of [acquisition] [purchase-money] security rights as between the parties

2. The law should provide that the agreement creating [an acquisition] [a purchase-money] security right must be evidenced by a writing. Writing includes a purchase order, invoice, general terms and conditions and the like. It also includes an electronic communication (see article 6 of the UNCITRAL Model Law on Electronic Commerce and article 9, para. 2, of the draft Convention on Electronic Contracting, as well as recommendations 10 and 11 in A/CN.9/WG.VI/WP.16). The writing need not be signed by the buyer, grantor or financial lessee (referred to in these recommendations as “grantor”), provided that the seller, purchase-money lender or financial lessor (referred to in these recommendations as “acquisition financier”) can evidence by other means (e.g. course of conduct) that the arrangement has been accepted by the grantor.

[Note to the Working Group: The Working Group may wish to consider whether, in order to avoid having one recommendation for purchase-money security rights (i.e. a flexible notion of writing without signature) and a different recommendation for non-purchase-money security rights (i.e. a less flexible notion

of writing with signature, see recommendations 10 and 11 in A/CN.9/WG.VI/WP.16), recommendation 2 above should apply to both purchase-money and non-purchase-money security rights.]

Effectiveness of [acquisition] [purchase-money] security rights against third parties

3. As with security rights generally, the law should provide that, in order for a non-possessory [acquisition] [purchase-money] security right to be effective against third parties, the acquisition financier has to register a notice covering its right in the relevant secured transactions registry. If the acquisition financier registers the notice not later than [specify a short time period, such as 20 or 30 days] after delivery of the goods to the grantor, the right should also be effective against third parties whose rights arose between the time the [acquisition] [purchase-money] security right was created and its registration. If the acquisition financier registers the notice after the expiration of that period, the [acquisition] [purchase-money] security right is effective against third parties from the time the notice is registered.

Exceptions

4. The law should provide that the following non-possessory [acquisition] [purchase-money] security rights are effective against third parties when they are created without the necessity of registration:

(a) [Acquisition] [purchase-money] security rights in consumer goods [, with the exception of consumer goods with a value higher than [specify value]];

[(b) [Acquisition] [purchase-money] security rights in goods other than inventory as to which the total obligation owed by the grantor to the acquisition financier with respect to this [acquisition] [purchase-money] security right and all other [acquisition] [purchase-money] security rights created within [specify time] is lower than [specify value]; and

(c) Short-term transactions with respect to which the obligation of the grantor is satisfied within [specify time]].

[Note to the Working Group: The Working Group may wish to consider the question whether the consumer goods exception and the low-value exception should apply to inventory-related transactions, taking into account that consumer goods cannot be inventory for the grantor and that inventory normally would not fall under the low-value exception. In addition, the Working Group may wish to consider the question whether the short-term transactions exception should apply also to inventory-related transactions. Moreover, if the Working Group decides to make an exception for short-term or low value transactions, the Working Group may wish to consider whether what is short-term and low value should be included in the recommendation or left to be dealt with in the general remarks by way of examples.]

Priority of [acquisition] [purchase-money] security rights over pre-existing [non-acquisition] [non-purchase-money] security rights in future goods other than inventory

5. In the case of goods other than inventory, the law should provide that [an acquisition] [a purchase-money] security right has priority over a pre-existing security right in the same goods (even if a notice covering that pre-existing security right was registered in the secured transactions registry before the [acquisition]

[purchase-money] security right was registered) if: (i) the acquisition financier retains possession of the goods; (ii) notice of the [acquisition] [purchase-money] security right was registered within a period of [the same number of days specified in recommendation 3] after delivery of the goods to the grantor; or (iii) the [acquisition] [purchase-money] security right became effective against third parties at the time it was created under recommendation 4 (non-possessory [acquisition] [purchase-money] security rights as to which no registration is required for effectiveness against third parties).

Priority of [acquisition] [purchase-money] security rights over pre-existing [non-acquisition] [non-purchase-money] security rights in future inventory

6. In the case of inventory, the law should provide that [an acquisition] [a purchase-money] security right has priority over a pre-existing security right in the grantor's inventory (even if that pre-existing right became effective against third parties before the [acquisition] [purchase-money] security right became effective against third parties) if: (i) the acquisition financier retains possession of the goods; or (ii) before delivery of the inventory to the grantor, the acquisition financier: (a) registers a notice covering its right in the relevant secured transactions registry; and (b) notifies the holder of the pre-existing security right in writing that the acquisition financier intends to enter into one or more transactions pursuant to which that person will have a higher-ranking [acquisition] [purchase-money] security right with respect to the additional inventory of the grantor described in the notification. The notification to holders of pre-existing security rights may cover multiple [acquisition] [purchase-money] transactions between the same parties. However, the notification should be effective only for [acquisition] [purchase-money] security rights created within a period of [specify time, such as five years] after the notification is given.

[Note to the Working Group: The Working Group may wish to consider whether a grace period should be given for the registration of a purchase-money security right in inventory (but not for the notification of non-purchase money inventory financiers on record).]

Cross-collateralization

7. The law should provide that [an acquisition] [purchase-money] security right is subject to the recommendations in this Chapter regarding effectiveness against third parties and priority even if the acquisition financier: (i) also has a security right in the goods securing [non-acquisition] [non-purchase-money] obligations of the grantor; or (ii) has a security right in other assets of the grantor securing the payment obligation relating to the [acquisition] [purchase-money] security right.

Priority of [acquisition] [purchase-money] security rights in proceeds of inventory

8. The law should provide that the priority, provided under recommendation 6, for [an acquisition] [a purchase-money] security right in inventory over a pre-existing security right in the same goods does not apply to the proceeds of such inventory. *[Note to the Working Group: As to purchase-money proceeds of goods other than inventory, the recommendation applicable to non-purchase-money proceeds should apply (see recommendation 41 in A/CN.9/WG.VI/WP.16).]*

Enforcement

9. [Except as provided in recommendation 10,] the law should provide that, in the case of default on the part of the grantor, the acquisition financier is entitled to repossess and dispose of the goods subject to the same rules applicable to security rights generally.

10. [If, after default of the grantor, the acquisition financier who has priority over competing claimants with respect to the goods repossesses the goods, the acquisition financier is under no obligation to dispose of the goods. If such an acquisition financier does not dispose of the goods, that person has no further claim against the grantor with respect to the obligation secured by the [acquisition] [purchase-money] security right. If such an acquisition financier disposes of the goods, that person shall be entitled to retain any surplus remaining after application of the proceeds of disposition to its claim against the grantor, but has no further claim in the event that there is a deficiency remaining after such application beyond a claim of damages for breach of contract.]

Insolvency

11. [Except as provided in recommendation 12,] the law should provide that, in the case of the insolvency of the grantor, the acquisition financier has the same rights and duties as a person holding a security right.

12. [The insolvency administrator of the grantor may pay the outstanding balance of the purchase price and retain the goods, sell the contract to another person who may pay the outstanding balance of the purchase price and retain the goods, or reject the contract and return the goods subject to reimbursement by the acquisition financier of the price paid by the grantor after deducting the rental value of the goods while in the possession of the grantor, the amount by which the value of the goods has decreased as a result of their use by the grantor or damages determined under a similar formula.]

[Conflict of laws]

[Note to the Working Group: The following recommendations are the same as the recommendations for non-purchase-money security rights. However, they are included here because of slight modifications in terminology. The Working Group may wish to consider the formulation of these recommendations.]

13. The law should provide that the creation as between the parties, effectiveness against third parties and priority over competing claimants of [acquisition] [purchase-money] security rights are governed by the law of the State in which the asset is located, except for:

(a) tangible assets of a type ordinarily used in more than one State in which case such issues are governed by the law of the State in which the grantor is located;

(b) goods in transit, with respect to which such rights may also be created as between the parties and made effective against third parties under the law of the State of destination, provided that the goods arrive in that State within a certain specified time period; and

(c) export goods, with respect to which such rights may also be created as between the parties and made effective against third parties under the law of the

State of destination if the goods [arrive in the State of destination] [leave the enacting State] within a specified period of time from the time of creation of the right.

14. The law should also provide that [acquisition] [purchase-money] security rights created as between the parties and made effective against third parties under the law of a State other than the enacting State are effective against third parties under the law of the enacting State for a period of [to be specified] days after the location of the grantor or the assets (as applicable) has changed to the enacting State. If the requirements of the enacting State to make such rights effective against third parties are fulfilled prior to the end of that period, the third-party effectiveness acquired in the State other than the enacting State also continues thereafter in the enacting State.]

Transition

[Note to the Working Group: The Working Group may wish to consider a longer transition period or other exceptions to the transition rules applicable to non-purchase-money security rights for the new law to take effect with respect to purchase-money security rights.]
