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Report of Working Group VI (Security Interests) on the work of its twelfth session

(New York, 12-16 February 2007)

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I. Introduction

1. At its twelfth session, Working Group VI (Security Interests) continued its work on the preparation of a legislative guide on secured transactions pursuant to a decision taken by the Commission on International Trade Law (UNCITRAL) 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 twelfth session in New York from 12 to 16 February 2007. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Belgium, Benin, Cameroon, Canada, Chile, China, France, Gabon, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Mexico, Morocco, Nigeria, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was attended by observers from the following States: Democratic Republic of the Congo, Egypt, Hungary, Ireland, Malaysia, Mauritius, Philippines, Tonga and Yemen.

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;

(b) *International Organizations*: Asian-African Legal Consultative Organization, Council of The Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States and European Community;

(c) *International non-governmental organizations invited by the Commission*: American Bar Association, Center for International Legal Studies,

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[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.31. The reports of the first to the eleventh 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, A/CN.9/549, A/CN.9/570, A/CN.9/574, A/CN.9/588, A/CN.9/593, A/CN.9/603 and A/CN.9/617. 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 the Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 202-204, Fifty-eighth Session, Supplement No. 17 (A/58/17), paras. 217-222, Fifty-ninth Session, Supplement No. 17 (A/59/17), paras. 75-78, Sixtieth Session, Supplement No. 17 (A/60/17), paras. 186-187, and Sixty-first Session, Supplement No. 17 (A/61/17), paras. 13-78.

[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.

Commercial Finance Association, Forum for International Commercial Arbitration, International Bar Association, International Chamber of Commerce, International Insolvency Institute, International Trademark Association, Max-Planck Institute for Foreign and Private International Law, National Law Center for Inter-American Free Trade, New York City Bar Association and Union internationale des avocats.

5. The Working Group elected the following officers:

Chairman: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Maria del Pilar BONILLA DE ROBLES (Guatemala)

6. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.29 (Revised recommendations); and A/CN.9/WG.VI/WP.31 and Addendum 1 (Revised commentaries).

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 the recommendations contained in chapters III (Basic approaches to security and other general rules), IV (Creation of a security right (effectiveness as between the parties)), VIII (Rights and obligations of the parties), IX (Rights and obligations of third-party obligors), XIII (Conflict of laws), XIV (Transition) (see A/CN.9/WG.VI/WP.29), as well as revised recommendations contained in chapter XII (Acquisition financing devices) based on a proposal by the Secretariat. The Working Group also considered the terminology and rules of interpretation of the draft Guide (see A/CN.9/WG.VI/WP.31/Add.1), as well as issues relating to security rights in directly held securities, financial contracts and intellectual property, based on proposals by the Secretariat. The deliberations and decisions of the Working Group are set out below in chapter IV. The Secretariat was requested to revise the recommendations in those chapters, as well as the terminology and rules of interpretation, to reflect the deliberations and decisions of the Working Group.

IV. Preparation of a legislative guide on secured transactions

Chapter III. Basic approaches to security and other general rules

Recommendation 8 (integrated and functional approach)

9. While some doubt was expressed as to whether retention-of-title sales and financial leases should be treated as security devices, broad support was expressed for an integrated and functional approach that would result in the secured transactions law covering all devices serving security functions. It was also agreed that the bracketed text in recommendation 8 should be revised to ensure that the law would apply to all devices that served security functions, while stating the conditions under which that result would be achieved if a State adopted a non-unitary approach to acquisition financing. Subject to that change, the Working Group approved the substance of recommendation 8.

Recommendation 9 (party autonomy)

10. The Working Group approved the substance of recommendation 9 unchanged.

Recommendations 10 and 11 (electronic communications)

11. There was broad support for recommendations 10 and 11 that expressed the principle of functional equivalence of paper to electronic writing and signature reflected in article 9 (2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts. On the understanding that the meaning of writing for the purposes of the creation of a security agreement was a matter addressed in recommendation 13, the Working Group approved the substance of recommendations 10 and 11 unchanged.

12. Noting that a signed writing was required for the security agreement (recommendation 13) and for the agreement of the debtor of a receivable not to raise any defences or rights of set off against the assignee (see recommendation 116, subparagraph (c)), the Working Group decided to defer discussion of recommendation 11 until it had an opportunity to discuss recommendation 13 (see para. 16).

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

A. General recommendations

Recommendations 12 and 13 (creation of a security right)

13. It was agreed that recommendation 12 should be revised to address all the requirements for the effective creation of a security right (i.e. the agreement should reflect the intent of the parties to create a security right, the grantor should have a proprietary right in the asset or the power to dispose of the asset and the agreement should reasonably identify the encumbered asset and the secured obligation).

14. With regard to recommendation 13, it was agreed that the second bracketed text (referring to evidence of the grantor's intent to grant a security right) should be retained. It was also agreed that the reference to signature should be deleted, as it raised a question as to the types of acts that would qualify as "signature" and unnecessarily created another formal requirement for the creation of a security right. To avoid an implication that both the offer and the acceptance ought to be in writing in the case of a non-possessory security right, the Working Group agreed that the second sentence of recommendation 13 should be revised to refer to the agreement "being evidenced by a writing" rather than the agreement "being in writing".

15. Subject to those changes, the Working Group approved the substance of recommendations 12 and 13.

16. After completing its discussion of recommendations 12 and 13, the Working Group went back to recommendation 11 (see para. 12). It was agreed that, while a signed writing was required only for the waiver of defences by the debtor of a receivable, recommendation 11 should be retained. It was broadly felt that recommendation 11 stated an appropriate principle in the appropriate context of general rules. After discussion, the Working Group approved the substance of recommendation 11 unchanged.

Recommendations 15 (obligations subject to a security agreement) and 16-17 (assets subject to a security agreement)

17. The Working Group approved the substance of recommendation 15 unchanged. As to recommendation 16, it was agreed that any changes necessary to ensure that, with the exception of recommendations 23 and 24, the draft Guide did not override statutory prohibitions with respect to the transferability of assets could be discussed later in the session (see para. 117). After discussion, the Working Group approved the substance of recommendation 17 unchanged.

Recommendations 18 and 19 (creation of a security right in proceeds)

18. Noting that the definition of "proceeds" (see A/CN.9/WG.VI/WP.31/Add.1, definition (kk)) included the "civil and natural fruits" of encumbered assets and that the parties to a security agreement could always agree that a security right would not extend to proceeds or some types of proceeds, the Working Group approved the substance of recommendation 18 unchanged.

19. Differing views were expressed as to whether recommendation 19 should be retained. One view was that, while a security right should automatically extend to assets taking the place of encumbered assets, it should not cover additional assets, such as civil and natural fruits of encumbered assets, unless otherwise agreed by the parties. However, the prevailing view was that a security right should automatically extend even to civil and natural fruits as that result would reflect the normal expectations of the parties. It was stated that a different approach would create unnecessary cost and a trap for unwary parties. After discussion, the Working Group decided to delete recommendation 19. It was also agreed that the commentary should discuss the approach suggested in recommendation 19.

Recommendations 20 and 21 (commingled proceeds)

20. It was agreed that, as recommendation 20 dealt with tracing of commingled assets, it was equally applicable to the tracing of commingled goods (i.e. a mass or product) and should thus include a cross-reference to recommendation 29 (creation of a security right in a mass or product). Subject to that change, the Working Group approved the substance of recommendation 20. After discussion, the Working Group also approved the substance of recommendation 21 unchanged.

B. Asset-specific recommendations

Recommendation 22 (effectiveness of a bulk assignment and an assignment of future, parts of and undivided interests in receivables)

21. It was agreed that the word “contractual”, contained in recommendation 22 within square brackets, should be retained without square brackets in order to limit the application of recommendation 22 to contractual receivables (as in the United Nations Convention on the Assignment of Receivables in International Trade; the “United Nations Assignment Convention”) and thus avoid interfering with statutory restrictions on the transferability of non-contractual receivables. Subject to that change, the Working Group approved the substance of recommendation 22.

Recommendations 23 (effectiveness of an assignment made despite an anti-assignment clause), 24 (creation of a security right in a right that secures a receivable, a negotiable instrument or any other obligation) and 25 (creation of a security right in a right to payment of funds credited to a bank account)

22. After discussion, the Working Group approved the substance of recommendations 22 to 25 unchanged.

Recommendation 26 (creation of a security right in proceeds under an independent undertaking)

23. It was agreed that the last sentence of recommendation 26, which appeared within square brackets, should be deleted. It was stated that the point that the transferability of the right to draw under an independent undertaking was a matter for the law and practice of independent undertakings could usefully be clarified in the commentary. Subject to that change, the Working Group approved the substance of recommendation 26.

Recommendations 27 (creation of a security right in a negotiable document), 28 (creation of a security right in attachments) and 29 (creation of a security right in a mass or product)

24. After discussion, the Working Group approved the substance of recommendations 27 to 29 unchanged.

Chapter VIII. Rights and obligations of the parties

A. General recommendations

Recommendations 106 (suppletive rules relating to the rights of the secured creditor) and 107 (mandatory rules relating to the obligations of the party in possession)

25. After discussion, the Working Group approved the substance of recommendations 106 and 107 unchanged. It was also agreed that the commentary should discuss the application of the principle of party autonomy with respect to the rights and obligations of the parties to the security agreement. In addition, it was agreed that the rights and obligations of parties to acquisition financing transactions in the context of a non-unitary approach could be discussed later in the session (see para. 130).

B. Asset-specific recommendations

Recommendations 108 (rights and obligations of the assignor and the assignee), 109 (representations of the assignor), 110 (right to notify the debtor of the receivable) and 111 (right to payment)

26. After discussion, the Working Group approved the substance of recommendation 108 unchanged. With respect to recommendation 109, it was agreed that the text in square brackets, limiting the application of recommendation 109 to contractual receivables, should be retained outside square brackets. Subject to that change, the Working Group approved the substance of recommendation 109. After discussion, the Working Group also approved the substance of recommendations 110 and 111 unchanged.

Chapter IX. Rights and obligations of third-party obligors

A. Rights and obligations of the debtor of the receivable

Recommendations 112 (protection of the debtor of the receivable), 113 (notification of the debtor of the receivable), 114 (discharge of the debtor of the receivable by payment), 115 (defences and rights of set-off of the debtor of the receivable), 116 (agreement not to raise defences or rights of set-off), 117 (modification of the original contract) and 118 (recovery of payments)

27. Noting that recommendations 112 to 118 reflected the principles embodied in articles 15 to 21 of the United Nations Assignment Convention, the Working Group approved their substance unchanged.

B. Rights and obligations of the obligor under a negotiable instrument

Recommendation 119

28. After discussion, the Working Group approved the substance of recommendation 119 unchanged.

C. Rights and obligations of the depositary bank

Recommendations 120 and 121

29. After discussion, the Working Group approved the substance of recommendations 120 and 121 unchanged.

D. Rights and obligations of the guarantor/issuer, confirmer or nominated person of an independent undertaking

Recommendations 122-124

30. It was agreed that subparagraph (b) of recommendation 122 should refer to the rights of a transferee not being affected by a security right in proceeds under an independent undertaking created by the transferor, irrespective of the time of creation of the security right. Subject to that change, the Working Group approved the substance of recommendation 122. After discussion, the Working Group also approved the substance of recommendations 123 and 124 unchanged.

E. Rights and obligations of the issuer of a negotiable document

Recommendation 125

31. After discussion, the Working Group approved the substance of recommendation 125 unchanged.

Chapter XIII. Conflict of laws

A. General recommendations

Recommendation 195 (law applicable to a security right in tangible property)

32. It was generally agreed that the creation, third-party effectiveness and priority of a security right in tangible property should be subject to the law of State in which the property was located (*lex rei sitae*). It was also widely felt that that approach would result in uncertainty as to the law applicable to tangible property of a type ordinarily used in more than one State and thus security rights in such property should be subject to the law of the State in which the grantor was located. It was also generally thought that, while ships and aircraft would always fit into the category of mobile property, motor vehicles might not fit, at least in the case of island States in which motor vehicles would very rarely cross national borders.

33. As to the provision in the third sentence of recommendation 195 with respect to tangible property that was subject to title registration, while it was agreed that a recommendation along those lines would be useful, its current formulation raised a number of concerns. One concern was that the recommendation did not make clear which law applied to the question of whether title registration was required. Another concern was that, in the case of assets subject to multiple registrations, the recommendation might inadvertently result in the application of multiple laws.

34. Deferring that issue to a later time in the session (see para. 121), the Working Group approved the substance of the remainder of recommendation 195 unchanged.

Recommendation 196 (law applicable to a security right in goods in transit and export goods)

35. There was broad support for recommendation 196, which allowed a secured creditor with a security right in goods in transit or export goods to create and make effective against third parties its security right under the law of the ultimate destination of the goods (exclusively or in addition to the requirements of the law of the initial location of the goods under recommendation 195), provided that the goods reached that destination within a reasonable period of time. In response to a question, it was noted that priority would still be subject, under recommendations 195 and 203, to the law of the State in which the goods would be located at the time a priority dispute arose. It was also stated that the length of a reasonable period of time would depend on factors, such as the distance of the journey and the means of transport.

36. The concern was expressed, however, that, in the case of goods covered by a negotiable document, recommendation 196 might not provide a clear rule in situations where the document was located in one State and the goods were located in another State. In order to address that concern, the suggestion was made that the scope of recommendation 196 should be expanded to cover negotiable documents moving with the goods they covered. That suggestion was objected to. It was stated that recommendation 196 would in any case apply irrespective of whether the goods were accompanied by a negotiable document or not. It was also observed that recommendation 195 was sufficient to provide that the law applicable to a security right in a document of title would be the law of the location of the document. In addition, it was said that the reliability of documents of title would be enhanced since, if the State whose law was applicable were a State that had enacted the recommendations of the draft Guide, possession of the document would give a superior right with respect to goods covered by a negotiable document.

37. After discussion, the Working Group approved the substance of recommendation 196 unchanged.

Recommendation 197 (law applicable to a security right in intangible property)

38. Broad support was expressed for recommendation 197, which provided that the creation, third-party effectiveness and priority of a security right in intangible property should be subject to the law of the State in which the grantor was located. It was noted that recommendation 197 appropriately reflected the approach of articles 22 and 30 of the United Nations Assignment Convention.

39. However, some doubt was expressed as to whether the law of the grantor's location was appropriate for security rights in financial assets (such as derivatives or repurchase agreements), directly held securities and rights to payment of funds credited to a bank account. With respect to security rights in rights to payment of funds credited to a bank account, it was agreed that reference should be made to recommendation 208, which provided for the application of a law that might be other than the law of the grantor's location. As to directly held securities and financial contracts, the Working Group deferred discussion to a later time in the session (see paras. 99-110).

40. With respect to the text that appeared in square brackets in recommendation 197, it was agreed that it mainly raised the question of the law applicable to security rights in intellectual property. It was widely felt that, as the matter raised complex questions on which diverging views were expressed, the bracketed text should be deleted and the matter referred to future work (see para. 122).

41. Subject to those changes, the Working Group approved the substance of recommendation 197.

Recommendation 198 (law applicable to a security right in proceeds)

42. After discussion, the Working Group approved the substance of recommendation 198 unchanged.

Recommendation 199 (law applicable to the rights and obligations of the grantor and the secured creditor)

43. While broad support was expressed for recommendation 199, some doubt was expressed as to the appropriateness of referring the mutual rights and obligations of the parties to a law other than the law governing the creation of a security right. It was observed that a proposed regulation under preparation by the European Commission might take a different approach. In response, it was noted that recommendation 199 reflected a well-thought approach taken in article 28 of the United Nations Assignment Convention. It was also noted that the approach taken in recommendation 199 should be taken into account so as to achieve universally uniform conflict-of-laws rules that would greatly benefit parties to such financing transactions all over the world. In any case, it was noted that regional legislation could be referred to in the draft Guide for the benefit of States from the relevant region, but could not dictate international legislation, unless it was of interest to and attracted the support of the international community as a whole.

44. After discussion, the Working Group approved the substance of recommendation 199 unchanged.

Recommendations 200 and 201 (law applicable to the enforcement of a security right)

45. Differing views were expressed with regard to the law applicable to the enforcement of a security right. One view was that enforcement should be subject to the law governing the security agreement, with the specific exception of out-of-court repossession of encumbered assets by the secured creditor without the consent of the grantor, which should be subject to the law of the State in which the relevant

assets were located (alternative B). It was stated that such an approach would result in one law governing enforcement even where various enforcement actions took place in different States or related to out-of-court enforcement. It was also observed that, in particular with respect to intangible assets, that approach would be appropriate, as the location of intangible assets could not be easily determined and, in any case, could involve multiple jurisdictions.

46. However, the prevailing view was that enforcement of a security right should be subject to the law of the State in which enforcement took place (alternative A). It was stated that enforcement related to procedural matters or, in any case, matters of public policy, and thus could be subject only to the law of the place in which it took place. It was also stated that, in a priority contest with respect to the proceeds of enforcement between two secured creditors, alternative A would result in the application of a single law, while alternative B could result in the application of different laws. In addition, it was stated that the rule could not be structured on the basis of a distinction between judicial and extra-judicial enforcement as the type of enforcement involved in each case could not be predicted by the parties at the time of the conclusion of the financing transaction or even later before default.

47. While it was agreed that alternative A should be retained with respect to the enforcement of a security right in tangible assets, it was stated that, in the case of intangible assets, an approach based on the place of enforcement could lead to the application of multiple laws as different enforcement steps (e.g. notification, collection or sale) could take place in different States.

48. After discussion, it was agreed that a different rule should be prepared with respect to the enforcement of a security right in intangible assets based on the law applicable to the creation, third-party effectiveness and priority of a security right in intangible property.

49. Further to the deletion of alternative B in recommendation 200, which referred enforcement of a security right to the law governing the security agreement, the Working Group agreed that recommendation 201 should also be deleted, as, under revised recommendation 200, enforcement of a security right in an attachment to immovable property would always take place in the State in which the immovable property was located and be subject to the law of that State.

Applicable law in insolvency proceedings

50. It was agreed that, to ensure greater consistency between recommendation 171 and recommendations 30 and 31 of the UNCITRAL Legislative Guide on Insolvency Law, recommendation 171 might need to be revised. It was widely felt that the aim of recommendation 171 was to provide that the law applicable to creation, effectiveness against third parties, priority and enforcement of a security right was the law applicable in the absence of insolvency proceedings, except to the extent otherwise provided by the relevant insolvency law. Subject to that change, the Working Group approved the substance of recommendation 171.

Recommendations 202 (meaning of "location" of the grantor), 203 (relevant time when determining location), 204 (continued third-party effectiveness of a security right upon change of location), 205 (exclusion of *renvoi*) and 206 (public policy and internationally mandatory rules)

51. After discussion, the Working Group adopted the substance of recommendations 202 to 204 and 206 unchanged.

52. With regard to recommendation 204, the concern was expressed that, by requiring registration in the new jurisdiction to which the assets or the grantor might move, it might add to the cost of financing transactions. It was stated that, not only costs for double registration, namely in the country of the exporter and in the country of the importer, but also considerable costs for legal support in a foreign country in order to fulfil the requirements for registration, would be incurred. In response, it was observed that recommendation 204 reflected the approach taken under current law outside the draft Guide. It was also stated that recommendation 204 introduced a positive new element of preserving for some time after the change of location of the assets or the grantor the third-party effectiveness of a security right created and made effective against third parties under the law of another jurisdiction. In addition, it was said that recommendation 196 provided an exporter the possibility of ensuring third-party effectiveness of its security right exclusively in the country to which the relevant goods would be imported. Moreover, it was pointed out that further improvements could be left to practice. In that connection, reference was made to jurisdictions allowing national or even international registration, as well as to jurisdictions in which service providers handled multi-jurisdictional registrations at relatively low cost.

53. With regard to recommendation 205, it was agreed that a cross-reference should be included to recommendations 214 and 215, which allowed *renvoi* in the case the applicable law was the law of a multi-unit State. Subject to that change, the Working Group approved the substance of recommendation 205.

B. Asset-specific recommendations

Recommendation 207 (law applicable to receivables arising from a sale, lease or security agreement relating to immovable property)

54. After discussion, the Working Group approved the substance of recommendation 207 unchanged.

Recommendation 208 (law applicable to a security right in a right to payment of funds credited to a bank account)

55. Differing views were expressed as to the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in rights to payment of funds credited to a bank account, as well as the rights and duties of the depositary bank with respect to that security right. One view was that those matters should be subject to the law governing the bank account agreement or other law provided in the account agreement, under the condition that the bank had a branch in the State whose law would be applicable (alternative A). It was stated that that approach

provided certainty and was practical as the location of a bank account could not be determined.

56. However, the predominant view was that those matters should be referred to the law of the State in which the bank that maintained the account had its place of business or, in the case of more than one place of business, to the law of the State in which the branch maintaining the account was located. It was stated that that approach provided certainty and transparency as to the law applicable. It was also observed that that approach reflected the normal expectations of the parties and provided for the application of one law to issues relating to banking activities.

57. After discussion, despite the predominant view in favour of alternative B and in view of the strongly held views in favour of alternative A, the Working Group decided to retain both alternatives A and B. It was widely felt, however, that further efforts should be undertaken to reach agreement on one recommendation, since, if both alternative recommendations were retained and implemented by States, a different law would apply depending on the State in which a dispute arose, a result that would preserve the uncertainty as to the law applicable to that matter (for the continuation of the discussion, see paras. 123-128).

Recommendation 209 (law applicable to the third-party effectiveness of a security right in specified types of asset by registration)

58. After discussion, the Working Group approved the substance of recommendation 209 unchanged.

Recommendations 210-212 (law applicable to a security right in proceeds under an independent undertaking)

59. It was stated that recommendation 211 might need to be revised, as a nominated person would typically confirm a credit but not issue an independent undertaking. After discussion, the Working Group approved the substance of recommendations 210 to 212 unchanged.

Recommendation 213 (law applicable to the rights and obligations of third-party obligors and secured creditors)

60. After discussion, the Working Group approved the substance of recommendation 213 unchanged.

C. Special rules when the applicable law is the law of a multi-unit State

Recommendations 214-217

61. Some doubt was expressed as to whether it was appropriate to allow *renvoi* (i.e. that reference to the law of a State included the conflict-of-laws rules of the State), in cases where the applicable law was the law of a multi-unit State. In response, it was stated that, as long as the law of the State whose law was applicable applied, no uncertainty as to the applicable law would arise. It was also observed that that approach was necessary in cases where a notice about a security right had to be registered in a registry located in one of the units of a multi-unit State. After

discussion, the Working Group approved the substance of recommendations 214 to 217 unchanged (see para. 129).

Chapter XIV. Transition

62. It was widely felt that transition rules were of crucial importance for the acceptability and implementation of a new secured transactions law. It was thus agreed that the commentary should discuss steps to be taken by States to ensure the effectiveness of existing security rights under the new law, the need for commentaries, registration and other similar forms referred to in the law, as well as of educational programs to assist judges, arbitrators, practitioners and the industry in understanding and applying the new law.

Recommendation 218 (effective date)

63. The Working Group approved the substance of recommendation 218 unchanged. It was widely felt that the determination of the effective date of the new law (i.e. the date as of which it would enter into force) was an important factor for the acceptability of the new law. It was also agreed that the commentary could discuss additional criteria for the determination of the length of the effective date, such as the need to educate practitioners and enable them to participate in the implementation of the law, as well as the time necessary for parties to register a notice in the registry established by the new law.

Recommendation 219 (inapplicability of the law to disputes in litigation)

64. It was agreed that the new law should not apply to the rights of any claimant involved in litigation or other dispute resolution mechanism with respect to one or more security rights (and not just the parties to a security agreement as provided in subparagraph (a) of recommendation 219). It was also agreed that the new law should leave unaffected not only the enforcement (as provided in subparagraph (b) of recommendation 219) but also the priority of a security right if the process towards its enforcement had been initiated before the effective date of the new law. Subject to those changes, the Working Group approved the substance of recommendation 219.

Recommendation 220 (transition period)

65. With respect to subparagraph (a) of recommendation 220, it was stated that it was unnecessary, as the issue of the existence under the new law of a security right created under the old law was sufficiently addressed by recommendation 221. It was also observed that recommendation 221 was more appropriate in that it provided that a right created under the old law would exist under the new law without any time limitation. As to subparagraph (b) of recommendation 220, it was pointed out that it was equally unnecessary, as the issue of the third-party effectiveness under the new law of a security right that had been made effective against third parties under the old law was sufficiently addressed by recommendation 222.

66. It was stated, however, that the definition of the term “transition period” should be retained perhaps in recommendation 222, while criteria for the determination of its length should be discussed in the commentary. In that

connection, it was stated that the principal criterion for the determination of the length of the transition period was the need to ensure that persons affected by the new law would be given the time necessary for them to become familiar with the new law and to take the action required to preserve their rights. It was also observed that, in some States, the loss of priority as a result of failure of a party to meet the requirements of third-party effectiveness under the new law might be treated as illegal deprivation of property, unless the transition period was found to be reasonable. It was also observed that the number of transactions with respect to which a notice would need to be registered in the new registry might also be taken into account in determining the length of the transition period.

67. After discussion, the Working Group decided that recommendation 220 should be deleted subject to the inclusion of the definition of the term “transition period” in recommendation 222. It was also agreed that the commentary should discuss criteria for determining the length of the transition period.

Recommendations 221-224 (creation and third-party effectiveness of a security right)

68. After discussion, the Working Group approved the substance of recommendations 221 to 223 unchanged. Subject to removing the brackets around the text in recommendation 224, the Working Group approved the substance of recommendation 224.

Recommendations 225-227 (priority of a security right)

69. After discussion, the Working Group approved the substance of recommendations 225 to 227 unchanged.

Chapter XII. Acquisition financing devices

General remarks

70. The Working Group considered a revised version of the recommendations on acquisition financing devices on the basis of a proposal by the Secretariat. It was noted that it was not possible for those recommendations to be made available well in advance of the present session of the Working Group, as they were prepared by the Secretariat to address the views expressed and the suggestions made during the eleventh session of the Working Group (Vienna, 4-8 December 2006). However, the view was expressed that final decision with respect to those recommendations would have to be postponed until the Commission session.

71. Differing views were expressed as to whether the presentation of the material in the chapter should remain as it was, with the unitary approach being followed by the non-unitary approach, or whether the unitary approach should be integrated into the other relevant chapters of the draft Guide, leaving the discussion of the non-unitary approach in a separate Chapter.

72. One view was that the discussion and the recommendations of the unitary approach should be integrated into the other relevant chapters. It was stated that in that way the unitary approach would be simpler and easier for legislators to

understand and implement. It was also observed that, in order to keep a parallel structure, the unitary approach was made more complicated than it actually was.

73. The prevailing view, however, was that the current parallel structure should be preserved. It was stated that such a presentation of the material would be of greater assistance to those States considering which approach to adopt or seeking to understand the changes that a law reform in the direction of the unitary approach would involve. It was also observed that having a chapter only on the non-unitary approach might result in that approach appearing as the only approach recommended in the draft Guide with respect to acquisition financing rights.

74. After discussion, the Working Group agreed that the current presentation of the material with a discussion of the unitary and the non-unitary approach to acquisition financing devices should be preserved.

75. It was also agreed that the commentary could usefully clarify that two alternative approaches were proposed with regard to acquisition financing devices and provide some guidance as to the consequences for the ownership of an asset subject to an acquisition financing device (e.g. consequences of failure to effect registration of a notice with respect to a retention-of-title sale).

Terminology

76. The Working Group approved the substance of the definitions of the terms “acquisition security right”, “acquisition secured creditor” and “acquisition financier” unchanged.

77. With regard to the definition of the term “acquisition financing right”, it was observed that, while it listed some typical acquisition financing transactions, it also included language that would cover any transaction in which title was used to finance the acquisition of a tangible asset. The example was given of sales with deferred transfer-of-title provisions that could be acquisition financing devices or not, depending on whether title was used to secure the payment of the price.

78. The Working Group agreed to include in the definition of the term “acquisition security right” an express reference to another common type of acquisition financing transaction, hire-purchase agreements. The Working Group also agreed to replace references to the terms “assets” or “goods” with the term “tangible property” to ensure that the recommendations on acquisition financing would apply only to tangible assets (see para. 113). Subject to those changes, the Working Group approved the substance of the definition of the term “acquisition financing right”.

79. In the discussion, the question was raised as to whether the definition of “acquisition financing right” would cover repurchase transactions (“repos”). It was noted that repos typically involved indirectly held securities and would thus fall outside the scope of the draft Guide (see recommendation 5). It was also noted, however, that repos of tangible assets would be covered by the definition of “security right” and, as a result, the recommendations of the draft Guide would apply to such repos.

80. The Working Group approved the substance of the definition of an “acquisition financing transferee”, noting that the commentary should provide guidance on the interpretation of the definition (e.g. that it covered a lessee although it was not a transferee).

81. With regard to the definition of the term "retention-of-title right", it was suggested that it should be revised to reflect the understanding in several jurisdictions that retention of title involved a conditional transfer of title. There was support for that suggestion on the understanding that the definition of the term "acquisition financing right" would include language to ensure that other types of retention-of-title clauses were also covered.

82. After discussion, the Working Group approved the substance of the definition of the term "financial lease" unchanged, noting that it included language to cover hire-purchase agreements.

A. Unitary approach to acquisition financing devices

83. After discussion, the Working Group approved the substance of recommendations 181 to 197 unchanged.

B. Non-unitary approach to acquisition financing rights

84. An objection was raised with respect to the principle of functional equivalence of security rights and acquisition financing rights and in particular with respect to the registration of a notice about a retention-of-title sale or a financial lease. However, it was widely felt that that principle was one of the fundamental elements of a modern secured transactions regime and should be preserved. It was stated, in particular, that a modern notice-registration system that would apply to all devices serving security functions was a *conditio sine qua non* (a necessary condition) for an effective and efficient secured transactions regime.

85. The concern was expressed that the functional approach might inadvertently result in re-characterization of a title device to a security device. In response, it was stated that the re-characterization of certain title devices as security devices was common practice in most jurisdictions (in particular in the case of insolvency). It was also observed that, even in jurisdictions in which retention of title was the main acquisition-financing device, title was bifurcated to the extent that the seller retained ownership and the buyer acquired an expectation of ownership (i.e. a sufficient right to encumber the goods purchased). In addition, it was said that, in any case, that result did not affect fundamental notions of property or other law.

86. In response to a question as to the differences between the unitary and the non-unitary approach, it was stated that the main difference arose in the case of enforcement (within and outside insolvency). It was also observed that, in the context of a unitary approach, the principles applicable to the enforcement of any security right would apply equally to the enforcement of an acquisition security right. In addition, it was said that, in the context of a non-unitary approach, functional equivalence would be preserved to the extent compatible with the regime applicable to the enforcement of ownership rights.

87. While in view of that difference, some doubt was expressed as to whether a distinction between a unitary and a non-unitary approach was useful, strong support was expressed for preserving the non-unitary approach for States that would prefer to enact the recommendations of the draft Guide while relying on existing laws to

some extent and without having to undertake a major overhaul of their secured transactions regimes. It was stated that the non-unitary approach to acquisition financing devices constituted one of the major achievements of the draft Guide in promoting harmonization of the law of security interests.

88. The Working Group reiterated its approval of the functional approach and the distinction between unitary and non-unitary approach to acquisition financing devices. It was also agreed that a different set of recommendations should apply in the context of each approach and decided to delete a recommendation leading to the contrary result.

89. After discussion, the Working Group approved the substance of recommendations 181 bis-195 and 197 unchanged. With respect to the creation and third-party effectiveness of a security right in consumer goods, it was agreed that the commentary should clarify that the threshold of the written form requirement was low and related to an indication of the financier's intent to have an acquisition security right, and that no registration was required for security rights in consumer goods.

90. With respect to the enforcement of an acquisition financing right (recommendation 196), the Working Group approved a text along the following lines:

> "The law should provide, with respect to post-default rights relating to an acquisition financing right, that:
>
> (a) The same principles and objectives indicated in the Guide's recommendations with respect to post-default rights relating to security rights are applicable;
>
> (b) Even if the rules effectuating those principles and objectives in the context of acquisition financing rights differ from those applicable to security rights, the rules should produce results that are the functional equivalent of results obtained in the context of security rights; and
>
> (c) In seeking to provide for functionally equivalent results, the rules applicable to post-default enforcement of an acquisition financing right under a current regime be modified to the extent necessary to produce congruity with the security rights regime recommended by the Guide to the greatest extent possible without compromising the coherence of the ownership regime, and divergences from the rules applicable to security rights under the Guide be made only to the extent necessary to preserve the coherence of the ownership regime. Any divergences from the rules applicable to post-default rights relating to security rights under the Guide should not have the effect of limiting, overriding or otherwise affecting the application of the Guide's recommendations relating to creation, third-party effectiveness, registration and priority of acquisition financing rights."

Terminology and rules of interpretation

91. Having completed its discussion of the recommendations of the draft Guide (see A/CN.9/WG.VI/WP.29), the Working Group considered terminology and rules

of interpretation (for the terminology and rules of interpretation, see A/CN.9/WG.VI/WP.31/Add.1).

92. The Working Group approved the substance of recommendations (a) to (z) unchanged. The Working Group also agreed that a definition of the term "money" should be added along the following lines: "'Money' means currency in use as a medium of exchange authorized by a Government." It was noted that, under the draft Guide: money meant tangible money and not just a book entry, which could be a "receivable"; money in a bank account was "funds credited to a bank account"; a cheque was a "negotiable instrument"; and money held by a coin dealer as part of a collection was not "money".

93. With respect to definition (aa) ("independent undertaking"), it was agreed that it should be revised to clarify that the list of types of independent undertaking in parenthesis was indicative and not exhaustive.

94. With respect to definition (bb) ("proceeds under an independent undertaking"), it was agreed that the commentary should explain that a draft accepted or obligation incurred could give rise to proceeds under an independent understanding only together with payment. In that connection, it was agreed that the term "honour" in the context of an independent undertaking, which meant a two-step process (i.e. acceptance of a draft or incurring an obligation and payment), could be usefully defined. It was also agreed that definition (bb) should be conformed to the terminology used in the latest version of the Uniform Customs and Practice for Documentary Credits (i.e. UCP 600).

95. Subject to those changes, the Working Group approved the substance of definitions (aa) and (bb).

96. After discussion, the Working Group approved the substance of definitions (cc)-(uu) and (yy) unchanged.

97. With respect to definitions (vv), (ww) and (xx) ("buyer in the ordinary course of business", "lessee in the ordinary course of business" and "licensee in the ordinary course of business"), the Working Group confirmed its earlier decision that the thrust of those definitions would be moved to the appropriate recommendations (A/CN.9/617, para. 48) and agreed that the language in square brackets could be left out, while the definitions could be deleted.

98. In the discussion, the view was expressed that the definitions should be listed in alphabetical order in all language versions. That suggestion received support. Subject to the editorial rules of the United Nations, the Secretariat was requested to list the definitions in alphabetical order so as to make the terminology more user-friendly.

Security rights in directly held securities

99. Recalling its decision to address in the draft Guide directly held securities, i.e. securities held directly by their owner and not through an intermediary (see A/CN.9/WG.VI/WP.29, recommendation 5, and A/CN.9/617, para. 15), the Working Group noted that directly held securities might be represented by certificates, such as stock certificates or bonds ("certificated" securities) or reflected as a book entry

(“uncertificated” or “dematerialized” securities, which should not be confused with certificated securities held in a securities account through an intermediary).

100. It was also noted that: with respect to directly held certificated securities, the Working Group might wish to consider whether the recommendations should closely parallel the recommendations applicable to negotiable instruments; and with respect to directly held dematerialized securities, the Working Group might wish to consider whether the recommendations should closely parallel the recommendations applicable to rights to payment of funds credited to a bank account.

101. Differing views were expressed as to whether certain types of directly held securities should be covered in the draft Guide. One view was that the draft Guide should address certain types of directly held securities along the lines proposed above. It was stated that transactions relating to directly held securities, such as those in which a parent company obtained credit by offering as security shares of its wholly-owned subsidiaries, were extremely important in facilitating small- and medium-size- enterprises’ access to credit. It was also observed that failure to address such directly held securities in the draft Guide would leave a big gap in the draft Guide and inadvertently result in depriving many enterprises from access to credit. In that connection, it was noted that neither the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, prepared by the Hague Conference on Private International Law, nor the draft UNIDROIT Convention on harmonized substantive rules regarding securities held with an intermediary, currently being prepared by the International Institute for the Unification of Private Law (UNIDROIT), addressed securities that were not held through an intermediary.

102. Another view was that directly held securities should not be addressed in the draft Guide at all. It was stated that addressing directly held securities in the draft Guide would be extremely difficult as there was no universally acceptable definition of directly held securities. In addition, it was said that that addressing directly held securities in the draft Guide at the present time might create overlap and conflict with the draft Convention being prepared by UNIDROIT. Moreover, it was pointed out that conflict with the UNIDROIT draft Convention could arise, for example, because the UNIDROIT draft Convention treated title-transfer transactions as functionally equivalent but did not equate them fully to security rights. Moreover, it was pointed out that addressing directly held securities in the draft Guide might create overlap and conflict with European Union law. In that connection, it was mentioned that the re-characterization of title transactions as security transactions and the application of the law of the grantor’s location were matters of particular concern.

103. Yet another view was that addressing issues relating to directly held securities should be treated as a subject for future work. It was stated that it would be useful to address the taking of security in directly held securities but such work needed further careful study. It was also observed that deferring the matter to future work would allow States to take stock of the achievements of the UNIDROIT draft Convention and then decide whether further work could be undertaken. Matters that mentioned among those that required additional work included: definitions of the relevant terms; identification and exclusion of title-transfer arrangements, such as repurchase agreements, stock loans and other title-transfer collateral arrangements, all of which could relate to directly or indirectly held securities; anti-assignment

agreements; priority issues (e.g. control giving a right superior to registration); and applicable-law issues.

104. In an effort to reach agreement, several suggestions were made. One suggestion was to ensure that intermediated securities were excluded in a clear and unambiguous way. It was stated that most of the transactions mentioned as not fitting in the draft Guide related to intermediated securities. Another suggestion was to include transactions in which an individual investor or enterprise granted a security in shares held directly without the involvement of any intermediary to obtain credit. Yet another suggestion was to exclude financial contracts relating to securities. A further suggestion was to address directly held securities in the draft Guide, but only to the extent that its provisions were not inconsistent with national law or international agreements governing securities, while the Commission could be invited to consider future work on directly held securities. While interest was expressed in all those suggestions, it was widely felt that further work was necessary before a decision could be made.

105. An additional suggestion was to list in the draft Guide a limited number of specific transactions to be covered (in which securities held directly by their owner could be used as security for credit), while financial contracts relating to securities and any intermediated securities covered by UNIDROIT's work could be excluded. Examples of securities that would be covered included shares of a subsidiary held by a parent company and untraded shares of small- and medium-size companies.

106. While interest was expressed in proceeding on the basis of a concrete and limited list of transactions to be covered, it was widely felt that more work was necessary to define those transactions and to reach agreement as to how they should be covered. On the other hand, there was support for the idea that that suggestion, supplemented by the principles reflected above as to how to address the relevant issues in the draft Guide (see para. 100), provided a reasonable basis for further discussion. It was stated that a proposal along those lines could be prepared by interested States to assist the Commission in addressing the treatment of those transactions in the draft Guide.

107. After discussion, the Working Group agreed that the text that appeared in recommendation 5 within square brackets, limiting the exclusion to indirectly held securities, should be retained within square brackets. It was also agreed that the Commission might wish to consider whether certain defined and limited types of securities should be covered in the draft Guide or whether that matter should be addressed in the context of future work.

Security rights in financial contracts

108. Leaving aside securities-related transactions discussed above (e.g. repurchase agreements and stock-lending transactions), the Working Group focused on other financial contracts relating to netting agreements (e.g. derivatives). The suggestion was made that those transactions should be excluded from the scope of the draft Guide or, at least, of recommendation 197 (law applicable to security rights in intangible property). It was stated that the law of the State in which the grantor was located was not appropriate, as the debtor of the receivable would not be able to know which law applied to priority issues. It was also stated that excluding such

financial contracts at least from the scope of recommendation 197 would be consistent with the approach taken in the United Nations Assignment Convention (see articles 4, paragraph 2 (b), and 5, subparagraphs (k) and (l)), and would ensure that the draft Guide would not be inconsistent with other law.

109. The suggestion to exclude financial contracts relating to netting agreements from the scope of the draft Guide or just recommendation 197 (see para. 108) was objected to. It was stated that the basic approach taken in the draft Guide was that, with limited specific exceptions with respect to which the law was well developed and application of the draft Guide was not necessary or appropriate, all types of movable property, whether tangible or intangible, could be used as security for credit. It was also observed that, under the United Nations Assignment Convention, issues of priority and the law applicable to priority were separate from issues of debtor protection and the law applicable thereto, and did not concern the debtor of a receivable. In addition, it was said that the proposed exclusion of financial contracts would inadvertently result in the draft Guide failing to provide guidance to States on a number of important issues. Moreover, it was pointed out that the scope of the Convention as an international text and of the draft Guide as a text relating to national law had to be different. In that connection, it was mentioned that the Convention referred priority issues to domestic law and the Guide was designed to provide guidance precisely on the contents of domestic law.

110. After discussion, the Working Group confirmed its decision that, with the exception of a specific and limited number of assets, all types of movable property, whether tangible or intangible, including financial contracts, could be used as security for credit in accordance with the provisions recommended in the draft Guide.

Security rights in intellectual property

111. It was noted that, at its thirty-ninth session in 2006, the Commission had requested the Secretariat to prepare, in cooperation with other organizations and in particular the World Intellectual Property Organization, a note discussing future work by the Commission on security rights in intellectual property. It was also noted that, at that session, the Commission had also requested the Secretariat to organize a colloquium to obtain the views of governmental and non-governmental experts (A/61/17, paragraph 86).

112. The Working Group noted that that colloquium had taken place in Vienna on 18 and 19 January 2007, and that, while support had been expressed for work by the Commission, at the same time several concerns had been expressed with respect to the treatment of security rights in intellectual property in the draft Guide. It was also noted that some of those concerns could be addressed by clarifying the text of some definitions and recommendations without changing policy decisions made by the Working Group. In addition, it was noted that other concerns would be discussed in a note by the Secretariat on future work to be considered by the Commission at its upcoming fortieth session (Vienna, 25 June-12 July 2007).

Terminology

113. With regard to the definitions of the terms “acquisition security right”, “acquisition financing right”, “retention-of-title right” and “financial lease”, the Working Group agreed to refer explicitly to “tangible property”, so as to ensure that those definitions and the relevant recommendations applied only to tangible property and not to intellectual property, leaving the important issue of financing of the acquisition of intellectual property to future work (see para. 78).

114. It was also agreed to delete from the definition of the term “receivable” the reference to “the performance of non-monetary obligations”, so as to clarify that the definition and the recommendations relating to receivables applied only to receivables and not, for example, to the rights of a licensee or the obligations of a licensor under a contractual licence of intellectual property.

115. In addition, it was agreed that reference should be added to the definition of the term “intellectual property” to service marks, trade secrets and designs. It was also agreed that the commentary should refer to the main international agreements concerned, such as, for example, article 2 (viii) of the Convention Establishing the World Intellectual Property Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).

Recommendation 4 (aircraft, railway rolling stock, space objects, ships and intellectual property)

116. The Working Group noted that the draft Guide would not apply to intellectual property to the extent of any inconsistency between the secured transactions law and national or international intellectual property laws (see A/CN.9/WG.VI/WP.29, recommendation 4 (b)) and that the commentary would draw the attention of States to the need to adjust their laws in order to avoid any inconsistency. In addition, the Working Group noted that the commentary would list some examples of recommendations that might need to be adjusted, such as: recommendation 197 on the law applicable to security rights in intangible property; recommendations 41 and 79 on registration in a specialized registry; recommendation 83 (c) on a licensee in the ordinary course of business; and recommendations in which the question arose as to whether a security right in goods should extend to any intellectual property involved in their use or operation.

Recommendations 16 and 17 (assets subject to a security agreement)

117. It was agreed that, to avoid overriding statutory limitations to the transferability of assets (with the exception of the limited rules of recommendations 23 and 24 dealing with receivables), a new recommendation should be added in the draft Guide along the following lines:

> “The law should provide that, except as provided in recommendations 23 and 24, it does not override provisions of any other law to the extent that they limit the creation or enforcement of a security right in, or the transferability of, specific types of asset.”

Recommendation 23 (effectiveness of an assignment made despite an anti-assignment clause)

118. It was agreed that the term "receivable" should be added after the term "assignment" so as to ensure that that recommendation (as well as all recommendations dealing with receivables) would apply only to receivables, and not to intellectual property.

Specialized registration

119. Noting that registration was not necessary for the creation of some intellectual property rights, such as copyright, and in order to avoid any implication that the draft Guide might require registration in that respect, it was agreed that the commentary should clarify that whether registration in a specialized registry was required was a matter for other law. It was also agreed that the commentary should also explain that, if other law required registration in a specialized registry, a right so registered would be superior to a right registered in the general security rights registry (see recommendation 79).

Recommendation 143 (disposition of encumbered assets)

120. In order to ensure that the secured creditor could enforce only the grantor's rights in the encumbered asset, it was agreed that recommendation 143 should be revised along the following lines: "The law should provide that after default a secured creditor is entitled to sell or otherwise dispose of, lease or license an encumbered asset to the extent of the grantor's rights in the encumbered asset."

Other matters

Recommendation 195 (law applicable to a security right in tangible property)

121. Recalling that it had deferred to a later time in the session discussion of the bracketed text in recommendation 195 (see para. 34), the Working Group resumed its discussion and requested the Secretariat to prepare a revised text and place it in square brackets for the consideration of the Commission. It was widely felt that the revised text should take into account the following considerations: refer to asset registration rather than specialized registration; refer also to title certificate systems; and refer to such a specialized registration system only if that system allowed registration of security rights.

Recommendation 197 (law applicable to a security right in intangible property)

122. Recalling its decision to delete the bracketed text in recommendation 197 (see para. 40) and its discussion of security rights in intellectual property (see para. 116), the Working Group agreed that the commentary should explain that recommendation 197 was not appropriate for security rights in intellectual property and that the matter should be considered in the context of future work.

Recommendation 208 (law applicable to a security right to payment of funds credited to a bank account)

123. Recalling its decision to retain both alternatives A and B, despite the predominant view in favour of alternative B and in view of the strongly-held views in favour of alternative A (see para. 57), the Working Group resumed its discussion in an effort to reach agreement. Another alternative along the following lines was suggested:

> "(a) The law of that State in which the depositary bank conducts its operations, in the case where the depositary bank conducts operations in only one State;
>
> "(b) Otherwise, the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable in all such issues, that other law. However, the law of the State determined pursuant to the preceding sentence applies only if the depositary bank has at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts; or
>
> "(c) If none of the above rules apply, the applicable law would be determined by fallback rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights of Securities Held with an Intermediary."

124. That suggestion did not receive sufficient support. It was felt that it was essentially identical with alternative A.

125. With respect to alternative B, a number of suggestions were made. One suggestion was that reference should be made to "places of business in more than one State" rather than to "more than one place of business". It was stated that if more than one place of business was in the same State, the same law would apply, except in the context of a multi-unit State, which would address the conflict of laws of its various units in its internal law. That suggestion received sufficient support.

126. Another suggestion was that reference should be made in alternative B to the law of the State whose law governed the bank-client relationship. That suggestion was objected to on the grounds that a branch might be subject both to the regulatory law of the State of its location and of the State in which the head office was located. It was also stated that regulatory law would apply irrespective of which law applied to the bank-client relationship. Yet another suggestion was that reference should be made in alternative B to the law of the State in which a bank account was opened, as a bank account could be maintained in another State, a fact that might not be known to the account holder or third parties. While interest was expressed in that suggestion, there was not sufficient support for it.

127. In the discussion, it was stated that one of the disadvantages of alternative B was that it was not appropriate for bank accounts opened through electronic means of communication with a bank, which might be incorporated in a certain jurisdiction without, however, maintaining a physical office in any State.

128. Subject to the change referred to above (see para. 125), the Working Group approved the substance of alternative B.

Special rules when the applicable law is the law of a multi-unit State

129. Recalling that, under recommendations 214 and 215, *renvoi* was allowed if the applicable law was the law of a multi-unit State (see para. 61), the Working Group agreed that the commentary should explain that those recommendations were applicable to federal States but not to other States with multiple units and jurisdictions in which application of *renvoi* could lead to great uncertainty with respect to the law applicable. It was widely felt that the commentary should also explain that in such States those recommendations would not need to be enacted into national law.

Rights and obligations of parties to acquisition financing transactions (non-unitary approach)

130. The Working Group agreed that the commentary should explain that the rights and obligations of parties to acquisition financing transactions (non-unitary approach) that would not be covered by recommendations 106 and 107 would be left to other law (e.g. sale or lease law). It was stated that such matters were typically addressed in general terms and conditions, which differed from case to case depending on the type of transaction involved.

V. Future work

131. It was noted that the thirteenth session of the Working Group was scheduled to take place in Vienna from 24 to 28 September 2007, those dates being subject to approval by the Commission at its fortieth session, which was scheduled to take place in Vienna from 25 June to 12 July 2007. The Working Group also noted that the draft Guide was expected to be considered by the Commission from 25 June to 2 July with final adoption expected to take place on 6 July 2007. In addition, the Working Group noted that from 9 to 12 July 2007 a congress on international trade law would take place in the context of the Commission session for delegates and experts to discuss relevant issues for future reference.