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Security interests

Draft legislative guide on secured transactions

Comments of the European Community and its member States

Note by the Secretariat*

On behalf of the European Community and its member States, the European Commission submitted to the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) comments concerning the UNCITRAL draft legislative guide on secured transactions. The comments are reproduced in the annex to the present note as received by the secretariat.

* The present note is submitted three weeks less than the required 10 weeks prior to the start of the meeting because it was received only on 17 April 2007 and required clarification of certain points before submission.



Annex

Comments submitted by the European Community and its member States to the secretariat of the United Nations Commission on International Trade Law

The European Community and its member States follow with attention the progress made by the United Nations Commission on International Trade Law (UNCITRAL), and in particular its Working Group VI (Security Interests), in developing a legislative guide on secured transactions.

The European Community and its member States believe that the future guide could be an important step towards creating a global standard for the development of modern secured transaction laws and may contribute to the availability of low-cost secured credit.

We recognize that experts from all over the world helped in drafting the draft guide and that it builds upon the work of UNCITRAL and other organizations, as this is vital to ensure that as many States as possible will be able to use it effectively.

In order to achieve the widest possible use, it is important not only that the future guide combines best practices, but that it is also sufficiently flexible to accommodate already well-established legal regimes and practices.

The European Community and its member States appreciate that at the next session of UNCITRAL, in June 2007, after 12 sessions of Working Group VI, the moment has come to assess whether the guide on secured transactions is sufficiently mature to be finalized or whether further work should be undertaken.

The European Community and its member States have carefully analysed the draft guide and for several reasons believe that the latter would be the more prudent approach. The main reasons are following:

1. There is a risk of overlap between the draft guide and the draft convention on substantive rules regarding intermediated securities that is currently being negotiated in the framework of the International Institute for the Unification of Private Law (Unidroit), especially following the recent decision of the Working Group, in December 2006, to include directly held securities within the scope of the guide. The Unidroit convention will hopefully be finalized in the course of 2008 and it is of the utmost importance that both instruments will be fully compatible and consistent.
2. It appears that the conflict-of-law rules applicable to security assignments and title transfer arrangements would merit further study and articulation, in particular because there appears to be a lack of transparency in relation to the proprietary consequences of the assignment of a debt or the creation of a security interest therein.
3. Further attention should be given to the scope of the future guide. In particular a carve-out for the use of collateral comprising “financial contracts” (not defined, but likely to include derivatives, letters of credit,

foreign exchange transactions and contracts for the transfer of securities etc.) should be considered, given their special character.

4. More work seems required on security interests in intellectual property rights (such as patents, trademarks, copyright and related rights).
5. The flexibility which the draft guide should provide with the respect to acquisition financing rights (chapter XII), in particular retention of title, should be re-examined, given their special character.

The European Community and its member States have acquired much experience in this field, notably through the adoption of Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements, and will continue to share its experience in order to obtain the best possible result.
