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Report of Working Group VI (Security Interests) on the work of its eighteenth session (Vienna, 8-12 November 2010)

Contents

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I. Introduction

1. At its present session, Working Group VI (Security Interests) began its work on the preparation of a text on the registration of notices with respect to security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session, in 2010.[1] The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of a security rights registry.[2]

2. At its forty-second session in 2009, the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.[3] In accordance with that decision,[4] the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of notices with respect to security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector. The papers presented at the colloquium are available at www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

3. At its forty-third session in 2010, the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.[5]

4. The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the UNCITRAL Legislative Guide on Secured Transactions ("the Guide"), texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the Guide.[6]

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[1] *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 17* (A/65/17), para. 268.

[2] Ibid., para. 265.

[3] Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

[4] Ibid.

[5] Ibid., *Sixty-fifth session, Supplement No. 17* (A/65/17), paras. 264 and 273.

[6] Ibid., paras. 266-267.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its eighteenth session in Vienna from 8 to 12 November 2010. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Bolivia (Plurinational State of), Botswana, Brazil, Bulgaria, Canada, China, Colombia, Czech Republic, El Salvador, France, Germany, India, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Mexico, Nigeria, Norway, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Sri Lanka, Thailand, Turkey, Uganda, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Belgium, Democratic Republic of the Congo, Dominican Republic, Guatemala, Indonesia, Ireland, Lithuania, Malawi, Panama, Portugal, Romania, Slovakia, Slovenia, Tunisia, United Republic of Tanzania and Yemen.

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

(a) *United Nations system*: The World Bank and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: League of Arab States;

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Center for International Legal Studies (CILS), Commercial Finance Association (CFA), European Brands Association (AIM), Fédération Internationale des Associations de Distributeurs de films (FIAD), National Law Center for Inter-American Free Trade (NLCIFT), New York City Bar (NYCB), the European Law Students' Association (ELSA) and the Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Rodrigo LABARDINI FLORES (Mexico)

Rapporteur: Mr. Cyprian KAMBILI (Malawi)

9. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.43 (Provisional Agenda), A/CN.9/WG.VI/WP.44 and Addenda 1 to 2 (Registration of security rights in movable assets).

10. 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. Registration of security rights in movable assets.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Addenda 1 to 2). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

IV. Registration of security rights in movable assets

A. General (A/CN.9/WG.VI/WP.44, paras. 1-5)

12. At the outset, broad support was expressed in the Working Group for a text on the registration of a notice of security rights in movable assets. It was stated that empirical evidence clearly demonstrated that a secured transactions law could achieve its objectives only if complemented with an efficient registration system. It was also observed that, while there were regional texts on such registration systems, there was a need for an international text that would usefully complement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of such registration systems.

13. As to the specific form and structure of the text to be prepared, recalling the views expressed at the forty-third session of the Commission,[7] the Working Group adopted the working assumption that the text would be a guide on the implementation of a registry of notices with respect to security rights in movable assets. In addition, the Working Group generally agreed that the text could include principles, guidelines, commentary and possibly recommendations with respect to registration regulations. The Working Group also agreed that the text should be consistent with the Guide, while, at the same time, taking into account the approaches taken in modern security rights registration systems, national and international. In that connection, it was stated that, in line with the recommendation of the Guide on the implementation of an electronic registration system "to the extent possible" (see recommendation 54, subpara. (j)), the text should discuss a modern, electronic registry, while taking into account the need to accommodate a hybrid registration system in which parties could, at least, register a paper-based notice. It was also observed that the issue of coordination among registries would also be an important issue that should be discussed. In that connection, the Working Group took note with interest of the draft model regulations contained in document A/CN.9/WG.VI/WP.44/Add.2. It was felt that the model regulations could be used as a good starting point for the discussion.

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[7] *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 17* (A/65/17), para. 266.

B. Introduction (A/CN.9/WG.VI/WP.44, paras. 6-18)

14. With regard to paragraph 14, it was suggested that:

(a) The "legal efficiency", referred to in subparagraph (a), should not be limited to aspects related to registration and searching but should also cover all related services of the registry (for example, the issuance of certificates); and

(b) The phrase "equality of treatment" in subparagraph (c) might be better replaced with language along the lines of "balancing the interests of all constituents".

15. It was agreed that, for reasons of consistency with the terminology used in the Guide, reference should be made in the text to the term "notice", while it could be explained that it referred to information, a point that could be reiterated in the appropriate places in the text. It was also agreed that, as registration of a notice of a security right may be a new concept in many legal systems, it would need to be explained in some detail.

16. In response to a question, it was noted that, under the Guide, the registrar might request evidence of the identity of the registrant but not require verification of the registrant's identity or authorization of the registration by the grantor as part of the registration process (see recommendation 54, subpara. (d), and 55, subpara. (b)). It was stated that the Guide took that approach because involvement of the registrar or the grantor in the registration process would reduce the efficiency of registration, while abuse of the system could be dealt by other law with damage claims and penalties.

C. Purpose of a security rights registry (A/CN.9/WG.VI/WP.44, paras. 19-60)

17. Several suggestions were made, including the following:

(a) In paragraph 19, reference should be made to the law recommended in the Guide rather than generally to modern secured transactions regimes;

(b) In paragraphs 22 (and 36), in view of the fact that the Guide referred to security rights as rights created by agreement, reference should be made to statutory preferential claims or a similar term, rather than to statutory security rights, and the paragraph should be revised to make it clear that it stated an example of an approach taken in some legal systems rather than making a recommendation that such statutory preferential claims should be included in the scope of the registry;

(c) In paragraph 24, reference to fictional pledges might not be necessary and the last sentence should be clarified by explaining that dispossession of the grantor could also result in ensuring that the assets would not be damaged or decrease in value;

(d) In paragraph 25, it should be clarified that a possessory pledge was only "possible" (rather than "practical"), if the asset was capable of physical delivery, and that assets such as inventory would be difficult to be used as circulating assets if the secured creditor took possession of them;

(e) In paragraph 28, reference should be made to the problem of lack of "transparency" or "certainty" (rather than "secrecy"), posed by non-possessory security rights;

(f) In paragraph 29, a cross-reference should be added to the discussion of rights to assets subject to specialized registration and the reference to the maximum amount of the secured obligation should be aligned with recommendation 57, subparagraph (d), which referred to it as a possible option;

(g) In paragraph 34, reference should be made that, in practice, for a creditor to obtain an acquisition security right in inventory, the consent of an inventory financier on record might be needed (although, under the law recommended in the Guide, registration of a notice and mere notification of inventory financiers were sufficient);

(h) In paragraph 37, it should be clarified that, while priority among competing security rights would be determined according to the order of registration or the order in which they were made effective against third parties by possession, pre-registration of a security right was also possible;

(i) In paragraph 40, to clarify the relationship between the ordinary-course-of-business priority rule and inventory, a cross-reference should be included to the discussion on the registration of serial number assets;

(j) In paragraph 44, no reference should be made to the possibility that States could exclude assets subject to specialized registration from the scope of the registry as such a suggestion would be inconsistent with specific recommendations of the Guide (see recommendations 4, subpara. (a), 38, 77 and 78);

(k) In paragraph 47, reference should be made to the law applicable to a security right in intellectual property (see recommendation 248) and examples could be included to explain the various rules;

(l) In paragraph 48, it should be clarified that the issue was whether a transferee of an asset with actual knowledge of the existence of an unregistered security right should take the asset free of the security right;

(m) Paragraph 49, which was an exception to the ordinary-course-of-business priority rule, should be deleted as it addressed a different matter that was discussed in paragraph 40;

(n) In paragraph 50, it should be clarified that, while registration resulted in deemed notice to third parties, the priority of a security right should be based on a straight forward priority rule and not on notions of constructive notice (in other words, presumed knowledge);

(o) In paragraph 51, reference should be made to registration resulting in effectiveness of a security rights against third parties, including judgment creditors and the grantor's insolvency representative, and that failure to not only register but also otherwise make the security right effective against third parties would result de facto in a secured creditor being treated in the grantor's insolvency as an unsecured creditor;

(p) In paragraph 54, last sentence, it should be explained that a notice referred to a "possible" security right because notice could be registered before a

security right was created (see recommendation 68) or be on record even after the secured obligation was discharged;

(q) In paragraph 56, it should be clarified that failure to register or otherwise make a security right effective against third parties would reduce de facto the secured creditor to the status of an unsecured creditor;

(r) In paragraphs 56 and 57, reference should be made to the scope of the law recommended in the Guide which could include assets, rights in which were subject to specialized registration or not (see recommendation 4, subpara. (a)), to the priority given to a security right registered in a specialized registry as a way of coordination among registries, to common searching systems as another way of coordination among registries and to the fact that the Guide did not recommend specialized registries but simply dealt with coordination matters if such registries existed in one State or another;

(s) In paragraph 59, it should be explained that notice registration was different from document registration and the statement about registration of notice of security rights in movable assets and in immovable property in the same registry should be further explained or deleted; and

(t) In paragraph 60, reference should be made to whether a buyer of immovable property would take the property free of the security right unless it was registered in the immovable property registry and also to the draft regulation relating to registration of a security right in an attachment to immovable property.

D. Key characteristics of an effective security rights registry (A/CN.9/WG.VI/WP.44, paras. 61-73)

18. Several suggestions were made, including the following:

(a) In paragraph 62, it should be clarified that the registry provided a record of a "possible" security right on whatever asset the grantor had at that time or would acquire in the future, as well as that the grantor could have ownership of, or simply the power to encumber, the encumbered assets; and

(b) In paragraphs 63, it should be clarified that registration was normally not required for true leases and that with respect to true leases registration was merely a protective measure against the possibility that a court might find that what appeared to be a true lease was really a secured transaction.

19. During the discussion of paragraphs 64-68, differing views were expressed as to whether registrations with respect to certain types of asset (such as motor vehicles and other high-value equipment with respect to which there was a secondary resale market) should be indexed and retrieved by reference to a serial number. One view was that such an approach was inconsistent with recommendation 54, subparagraph (h), which referred to notices being indexed and retrieved by searchers according to the identifier of the grantor. It was stated that serial number identification had a drawback as it imposed an additional burden on the registrant and limited the possibility of registering notices with respect to future assets and a changing pool of assets (such as inventory) as the secured creditor would need to amend the registration and enter the serial number of assets every

time the grantor acquired such assets. In response, it was stated that the registration text did not recommend serial number registration for inventory.

20. Another view was that the commentary of the Guide discussed the possibility of supplementary asset-based indexing with respect to high-value, durable assets for which there was a resale market (but not inventory; see the Guide, chapter IV, paras. 34-36), and thus the commentary of the registration text should also discuss the matter in a way that would be consistent with the Guide. It was stated that the main advantage of asset-based indexing and searching by serial number would be that it would allow a searcher to identify security rights created by the predecessors in title of a transferee from the original grantor, which would otherwise be difficult as a notice would contain only the original grantor's name and not the name of the current transferee.

21. It was also observed that the discussion in the commentary should refer to the consequences of the failure of a registrant to include in the registration the serial number of the encumbered assets. However, with respect to that matter also, differing views were expressed. One view was that failure of the registrant to refer to the serial number of the encumbered assets should not render the registration ineffective nor have any priority consequences. Another view was that, if such an approach was followed, reference to the serial number would be of no use, registrants would not refer to it and the problem of identifying security rights created by the grantor's predecessors in title could not be addressed. It was stated that the registration text should discuss the approach taken in some legal systems whereby: (a) failure to include the serial number of the encumbered assets made the security right ineffective against a buyer of the assets; and (b) a subsequent secured creditor that included in the registration the serial number of the encumbered assets should have priority over a prior secured creditor that did not include such information in its notice. It was observed that such an approach was followed with respect to motor vehicles and high-value equipment for which there was a secondary resale market in legal systems that did not have a title certification system allowing a security right to be made effective against third parties by a notation on the certificate.

22. In addition, with respect to paragraphs 64-68, the following suggestions were made:

(a) Reference should be made to possible coordination between grantor-based registries and asset-based registries that permitted serial number indexing;

(b) Reference should be made to alphanumerical identification as serial numbers included numbers as well as letters;

(c) Reference to serial numbers should be expanded to include other alphanumerical methods for identifying assets (for example, an asset could have an identification number which would not necessarily be a serial number);

(d) With regard to intellectual property, other information (for example, the title of the work) might be provided as, in some cases, the intellectual property would have a longer life span than the grantor and some discussion should be included in the commentary as an intellectual property right could have multiple identifiers (for example, with respect to patents and trademarks, one number was

assigned at the time of the application and a different number at the time of the grant);

(e) In paragraph 68, the last sentence should be deleted as it was inconsistent with the Guide which always required the grantor's identifier.

23. After discussion, the Working Group requested the Secretariat to revise paragraphs 64-68, taking into account all the suggestions made, for a decision on serial number indexing and searching to be made by the Working Group at a later stage.

24. With regard to paragraphs 69-73, several suggestions were made, including the following:

(a) In paragraph 71, reference should be made to the possibility of notice registration increasing transaction costs for third-party searchers since the registry contained only minimal information; in response, it was stated that the Guide had adopted notice registration since it would reduce transactions costs for both registrants (because they did not need to register all the security documentation) and for third-party searchers (because they would not extend credit unless the grantor provided any additional information required);

(b) In paragraph 72, it should be clarified that an unauthorized registration did not give any right to the unauthorized or fraudulent registrant, the Guide provided a procedure for the grantor to cancel or amend such registration and any other measures (such as damages or penalties) were left to other law; and

(c) In paragraph 73, last sentence, expiry of a registration should be explained by reference to recommendation 69 and cancellation should be explained by reference to recommendations 72 and 73.

E. Legal rules applicable to the registration and search process (A/CN.9/WG.VI/WP.44/Add.1, paras. 1-68)

25. Several suggestions were made, including the following:

(a) In paragraph 2, reference should be made to "existing or future security rights" and the reference to the establishment of the registry facilitating job creation should be deleted or toned down as, for cost reasons, an efficient registry should operate with a limited number of staff;

(b) In paragraphs 2-7, some discussion should be included as to who would be entitled to register in the case of joint creditors;

(c) In paragraph 3, the statement that the initial registrant might cancel or amend a registration should be qualified by reference to some legal systems;

(d) In paragraph 4, the parenthetical in the second sentence should be revised to refer to an agreement entered before the security agreement, as the security agreement constituted sufficient authorization and the last sentence should be deleted as it was inconsistent with recommendation 71 and, in any case, establishing a communication line between the registry and the grantor might add cost and complexity;

(e) In paragraph 7, unauthorized or mistaken cancellations or amendments of registrations should be discussed by reference to recommendations 72-74 and 96, as well as other approaches taken in legal systems to the problem of the priority of a security right whose registration was reinstated after an interruption as against intervening secured or other creditors;

(f) In paragraph 9, reference should be made to the cancellation or amendment of a registration by the secured creditor pursuant to a request by the grantor;

(g) In paragraph 10, last sentence, reference should be made to the need for multiple registrations where a security agreement mentioned a maximum amount of the obligation secured and to an amendment that, under recommendation 70, would be effective as of the time it was made;

(h) In paragraph 12, it should be clarified that description by reference to a serial number was not suitable for a changing pool of assets such as inventory and that the address in the registry may not be sufficiently reliable for serving legal notices to the grantor;

(i) In paragraph 13, it should be clarified that the grantor's address was one of the elements that should be included in a notice under recommendation 57, subparagraph (a), and the reasons for that approach might need to be explained;

(j) In paragraph 14, the statement about the need to include in a notice the name of the grantor (rather than a third-party debtor) should be reinforced;

(k) In paragraphs 16 and 17, it should be clarified that there was only one database for individuals and legal entities and reference should be made to names in a way that would be suitable irrespective of the different naming conventions in one country or another;

(l) In paragraphs 18-26, it should be clarified that the discussion for the identification of the grantor was descriptive (rather than prescriptive), that ultimately it would be up to each State to determine how a grantor (whether an individual or legal entity) would ultimately be identified and that, under recommendations 57, subparagraph (a), and 58, an inaccurate identification of the grantor would render a registration ineffective only if the notice could not be retrieved by a searcher using the correct identifier;

(m) In paragraph 22, it should be clarified that, if the additional information required for the identification of the grantor was inaccurate, the registration should not be rendered ineffective and that, if the identifier used by a searcher was not correct, whether the search would return several similar names (and the searcher would have to use additional information to narrow down the possibilities) or no name at all was a matter of the design of the registry;

(n) In paragraph 24, reference should be made to legal entities or persons and their identification should be left to national corporate law; and

(o) In paragraphs 25 and 26, syndicates, trusts and sole proprietorships should not be equated with legal entities and the reference to the insolvency representative should be deleted as, even in the case of insolvency, a legal entity should be identified with its name and not that of the insolvency representative.

26. In addition, with respect to paragraphs 24-59 the following suggestions were made:

(a) With respect to identifiers for trusts and insolvency estates, paragraph 25 should be aligned with article 22 of the draft model regulations;

(b) In paragraphs 27 and 28, it should be clarified that:

(i) The former stated the approach recommended in the Guide and the latter another approach;

(ii) The issues of what constituted an error and who might raise the issue should be discussed separately; and

(iii) In the former, reference should be made to the "correct" (rather than the "legal") grantor identifier and, in the latter, the term "software" should be replaced with the term "search logic";

(c) In paragraph 29, reference should be made to the branch of the bank or other financial institution that gave the loan rather than to the bank or other financial institution as a whole;

(d) Paragraph 30 should be revised to emphasize that the description of an encumbered asset was an essential component of registration and clearly set out the reasons supporting that statement;

(e) Paragraph 30 should provide guidance on the meaning of the description of encumbered assets recommended in the Guide and also illustrate ways of describing assets both in a generic and a specific way;

(f) Paragraph 32 should stress that the description of the encumbered assets in the notice should correspond with their description in the security agreement and address the consequences in situations where the description of the assets in the notice was broader than that authorized by the grantor (for example, the effectiveness of such a notice, remedies available to the grantor and possible measures against the secured creditor);

(g) In paragraph 33, reference should be made to alphanumeric identifiers and to assets of high value for which there was a resale market and the text should be generally in line with the discussion of the text on supplementary asset-based indexing (see paras. 19-21 above);

(h) Paragraphs 37 and 38 should be revised to reflect more clearly the approach recommended in the Guide (see recommendations 39 and 40 and the relevant commentary);

(i) Paragraphs 39 and 40 should be aligned more closely with recommendations 64 and 65 on incorrect statements or insufficient descriptions of assets in a registration, and explain how those recommendations would apply in the case of a registration relating to a security right in proceeds;

(j) In paragraph 43, reference should be made to the possibility of combining the statutory term and the self-selected term (which was consistent with the Guide) and that the sliding tariff for the registration fees was an escalating one to discourage parties from registering overly long duration;

(k) With respect to incorrect statements in the notice as to the duration of registration, new text should be added to track the text of recommendation 66 (with respect to the protection of third parties that relied on such notices) and the relevant commentary of the Guide (see chapter IV, paras. 89-91);

(l) In paragraphs 44 and 45, it should be clarified that:

(i) The Guide in recommendation 14, subparagraph (e) left it to States to determine whether the maximum amount for which the security right could be enforced should be indicated in the notice;

(ii) The maximum amount registered in the notice was the maximum amount for which the security right could be enforced, and not the maximum amount of the secured obligation;

(iii) The purpose of indicating that maximum amount in the notice was to simply allow grantors to gain access to additional credit and to protect subsequent secured creditors that relied on such indication, as noted in recommendation 66;

(iv) In circumstances where the maximum amount referred to in the notice was greater than the amount of the secured obligation, the security right would be enforceable only up to the amount actually owed (for capital, interests and expenses under the security agreement); and

(v) In circumstances where the maximum amount referred to in the notice was less than the amount of the secured obligation, the security right would be enforceable only up to that maximum amount so as to protect third parties that relied on that amount (however, as between the secured creditor and the grantor, the security right would be enforceable up to the full amount of the secured obligation);

(m) In paragraph 46, it should be clarified that, as an accessory right, the security right could be transferred only together with the secured obligation and that another reason for updating the registration in such a case was that otherwise the transferor (and not the transferee) could amend or cancel the registration;

(n) In paragraph 47, it should be clarified why a notice needed to be registered with respect to a subordination agreement that could not affect the interests of third parties, that the amendment of a registration to record a subordination agreement was not addressed in the Guide and thus the paragraph introduced a new suggestion for States to consider, and that the subordinated secured creditor would be the one entitled to register the amendment;

(o) In paragraphs 48-49, reference should be made to recommendation 62 and to the relevant commentary of the Guide along with relevant examples;

(p) In paragraph 50, it should be clarified that new assets could be added to the encumbered assets mentioned in the registered notice either by way of an amendment or a new notice, and that, in either case, the registration of the amendment or the new notice with respect to the additional encumbered assets would be effective as of the time the amendment or the new notice was registered and became available to searchers;

(q) In paragraph 51, reference should be made to an approach combining the two approaches recommended in the Guide (see recommendation 69), which was not inconsistent with the recommended approaches and under which the registrant could select the duration of the registration up to a maximum number of years (see subpara. (j) above);

(r) In paragraph 52, it should be clarified that, under recommendations 47 and 96, in the case of an erroneous lapse or cancellation of the registration, a new registration had to be made and the priority of the security right would date as of the time of the new registration;

(s) In paragraphs 53-54, it should be clarified that:

(i) In cases where a paper notice was submitted to the registry, there would be a time lag between the time of the registration and the time the notice became available to searchers;

(ii) In such a case, if the registration was effective at the time of registration, the risk of loss would be on third-party searchers (that could not retrieve the registration until it was entered into the record), while, if the registration was effective at the time the registration became available to searchers, the risk of loss would be shifted to the secured creditor (whose security right could be junior in priority to security rights created after, but registered before, the security right of the initial secured creditor); and

(iii) The last three sentences of paragraph 54 should be revised or deleted;

(t) In paragraph 56, the text should track more closely the language of recommendation 72; and

(u) In paragraph 58, the text should be aligned with the Guide, which, having recommended registration without verification of the existence of authorization for registration by the grantor, advance registration and registration relating to possible security rights in future assets and assets not identified specifically, to protect the interests of the grantor, gave emphasis to summary administrative proceedings that could be administered by the registrar or another administrative body (see chapter IV, para. 108).

27. In addition, with respect to paragraphs 60-68, the following suggestions were made:

(a) In paragraph 60, last sentence, it should be clarified that asset description (whether by serial number or registration number) was not a search criterion;

(b) In paragraph 62, while emphasizing the privacy concerns of States, it should be clarified that the approach, followed in some States, of requiring authorization for searches (as provided in the last three sentences) was not consistent with the Guide;

(c) In paragraph 65, while illustrating the usefulness of registration numbers as a search criterion, it should also be clarified that registration numbers were not necessarily available to third parties;

(d) In paragraph 66, the term “global amendment” and the role of service providers would need to be further clarified, and it should be emphasized that, if the

secured creditor requested a global amendment, the registry staff would have to implement it without exercising any discretion;

(e) In paragraph 68, reference should be made to other relevant issues (foreign enterprises, multinational corporations, use of special characters, entities that might be identified in two or more languages) and to practical solutions, while a cross-reference could be made to the discussion in the text of the issues relating to the grantor's identifier.

F. Registry design, administration and operation (A/CN.9/WG.VI/WP.44/Add.1, paras. 69-88)

28. Several suggestions were made, including the following:

(a) Paragraph 69 would need to be further elaborated to explain the registry design, administration and operation issues as discussed in the Guide;

(b) In paragraphs 70 and 71, a discussion of best practices could be included;

(c) In paragraph 73, the term "specialized communications systems" should be clarified by reference, for example, of direct networking systems;

(d) In paragraph 75, it should be clarified that, to preserve the integrity of the registry database, users should be able to access the registry interface but not the registry database, and that infrequent users should be treated in equal terms as frequent users;

(e) Paragraph 76 should be qualified to explain that the method provided therein was only an example of an approach taken in some legal systems;

(f) In paragraph 79, it should be clarified that database storage capacity depended on the design of the system to accommodate paper-based or only electronic notices and that the availability of such capacity had increased in view of recent technological developments;

(g) Paragraph 80 should be revised to:

(i) Refer to "security breaches" rather than "hacking";

(ii) Clarify that database programs might be either commercial or publicly available and that gathering of statistical data should not be limited to registrations and searches; and

(iii) Emphasize the principle of technological neutrality;

(h) In paragraph 83, it should be clarified that a registry operated with a primary and a secondary server where data were recorded concurrently and in addition there was a back-up server for cases when both servers failed (see also para. 41 below);

(i) With respect to the liability of the registry and its staff, in paragraphs 84-85, it should be clarified that:

(i) Paragraph 84 was subject to the statement in the last part of paragraph 91, referring to removing any contact of registry staff with cash fee payments;

(ii) The general law of that State on liability would generally govern such matters (including when the functions were delegated to a private entity);

(iii) A distinction needed to be made between the liability of the registry and that of its staff (also depending on whether there was supervision);

(iv) In any case, it would be quite burdensome to pursue liability against the State;

(v) There was no reason to limit the liability to "verbal" advice or information as provided in paragraph 85 (lack of access should also be covered);

(vi) The issue should be discussed in more detail by reference to the relevant commentary of the Guide; and

(j) In paragraph 86, it should be emphasized that the registry fees should be kept at a minimum, cost-recovery level, because fees, transaction taxes and other ancillary costs (for example, notarization) levied on the registration as well as other formal requirements would significantly deter utilization of the registry and limit its potential beneficial impact on the availability and the cost of credit.

29. In the context of its discussion of the liability of the registry, the Working Group discussed the priority consequences of events that could not be attributed to the secured creditor, but were caused, for example, by system malfunction. While differing views were expressed as to whether recommendation 47 applied in such a case, the Working Group agreed that system malfunction was a rare occurrence and, therefore, there was no need to attempt to address that matter, at least, at its present session.

G. Additional issues (A/CN.9/WG.VI/WP.44/Add.1, paras. 89-93)

30. With respect to paragraph 90, it was suggested that it might not be necessary as the identification of a security right in the notice as an acquisition security right would be useful only to secured creditors that had already registered a notice with respect to their security rights and any secured creditors that registered subsequently would have a lower priority status.

H. Draft model regulations (A/CN.9/WG.VI/WP.44/Add.2)

31. The Working Group engaged in a discussion of the key concepts and issues addressed in the draft model regulations.

32. Several suggestions were made, including the following:

(a) Definitions should be included in the draft model regulations, in particular, on terms not addressed in the terminology of the Guide, which should be incorporated in an appropriate way;

(b) The draft model regulations should provide flexible guidance with alternatives to accommodate the various approaches taken by States that were consistent with the law recommended in the Guide;

(c) Article 3 should provide that the deputy registrar had the same powers as the registrar;

(d) Article 6 and subsequent articles should provide that registry users could obtain access to the registry from any computer facilities and that an agreement might be required for access for the purpose of registration but not searching;

(e) Article 7 should provide alternatives with respect to fees, taking into account, in particular, the notion of cost recovery, whether the registry was operated by the State or a private entity and the purpose for conducting a search;

(f) Article 8 should be aligned with recommendations 54, subparagraph (d), and 56, include alternatives;

(g) Article 9 should be revised to state the principle of third-party effectiveness by registration of a notice with respect to a security right;

(h) Article 10 should be revised to state the time when a registration was effective and that the registry should assign to each registration a date and time;

(i) Article 11 should be aligned with recommendation 69;

(j) In article 14 and subsequent articles, reference should be made to the grantor's identifier for reasons of consistency with the terminology used in the law recommended in the Guide;

(k) Article 15 should be revised to cover the situation where the registry system was designed to remove notices automatically when they expired or were cancelled;

(l) Article 18 should be revised to clarify that the contents and the accuracy of information registered was the responsibility of the registrant, and not the registry;

(m) Article 19, subparagraph (d), should be aligned with recommendation 69;

(n) Article 20, paragraph 1, should be aligned with recommendation 58;

(o) Articles 21 and 22 should be retained but revised to provide alternatives to accommodate naming conventions and rules followed in various States;

(p) Registration forms might be included in the draft regulations that might simplify the drafting of articles referring to identifiers of grantors and secured creditors, as well as to the description of encumbered assets;

(q) Article 21, paragraph 4, might need to be revised to avoid any inconsistency with recommendation 59;

(r) Article 21, paragraph 6, should refer to the time of registration, as registration could take place in advance of the transaction and refer to multiple future transactions;

(s) Article 22, subparagraph 2 (b), should provide alternatives to accommodate both a system where abbreviations were used in the names of corporations and a system where such abbreviations might be automatically omitted by the system to ease the burden for both registrants and searchers;

(t) Article 22, subparagraph 2 (g), should clarify that the term "insolvency representative" was used as defined in the Guide to include both a natural and a legal person;

(u) Article 22, subparagraphs 2 (g) and (h), should be clarified to ensure that the grantor was the insolvent person and that it should be described in accordance with insolvency law of each State; and

(v) In article 22, at the end a timing provision should be added along the lines of article 21, paragraph (6).

33. The Working Group requested the Secretariat to revise all draft model regulations, taking into account the views expressed and the suggestions made during the discussion of the regulations and the commentary of the registration text. States were invited to submit written comments.

I. Coordination with UNCITRAL texts on electronic communications

34. It was noted that, as the Guide was consistent with the guiding principles of UNCITRAL e-commerce texts[8] (such as the principle of functional equivalence and media neutrality), the text on registration should also be consistent with those texts. It was also noted that, in order to achieve that result, the terminology of the UNCITRAL e-commerce texts could be taken into account in the formulation of the text on registration. With respect to policy matters, it was noted that the UNCITRAL e-commerce texts could provide a starting point for the discussion and, if the Working Group found that a different rule would be more appropriate, it could provide a reason for such departure. There was broad agreement in the Working Group that Guide was consistent with the UNCITRAL e-commerce texts and that it was important to maintain consistency also with respect to the text on registration.

35. The Working Group went on to consider specific issues arising in the text on registration. It was noted that a clear distinction should be drawn between the term registry "system", used in the Guide in a broad sense to refer to the various sets of legal rules as well as devices and equipments, and the term "system" used in the registration text in a narrow sense, to refer to a set of computer devices, equipments and programs used together to constitute an electronic security rights registry. The Working Group generally agreed with that approach.

36. In addition, it was noted that in discussing the impact of error in registration information (see A/CN.9/WG.VI/WP.44/Add.1, paras. 27-29 and 39-42), article 14 of the United Nations Convention on the Use of Electronic Communications in International Contracts ("ECC") on "error in electronic communication" might provide incentives for registry systems to include a mechanism for correcting input errors and also make it easier for registrants to correct such errors, without having to go through the process of registering a cancellation or amendment notice. It was widely felt that article 14 of the ECC was not relevant for the text on registration. It was stated, while in a contractual context like that contemplated by the ECC it was

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[8] UNCITRAL texts on e-commerce include the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (ECC), the UNCITRAL Model Law on Electronic Commerce, 1996 (MLEC), and the UNCITRAL Model Law on Electronic Signatures, 2001 (MLES).

appropriate for a person to informally correct errors in electronic communications, it was not appropriate in the text on registration, since once the notice was submitted it was relied upon by third parties. In addition, it was observed that, to avoid undermining the reliability of the registry, correction of such a notice should take place only through registration of a notice of cancellation or amendment, which, in an electronic context, did not raise any difficulty. Moreover, it was pointed out that, in any case, modern security rights registry made it possible for registrants to do an edit check of the notice before submitting it.

37. Moreover, it was noted that, in discussing the effective time of registration (see A/CN.9/WG.VI/WP.44/Add.1, paras. 53-54 and A/CN.9/WG.VI/WP.44/Add.2, article 10), article 10 of the ECC on "time and place of dispatch and receipt of electronic communications" might provide guidance to the meaning of "entered into the registry records so as to be available to searchers of the registry record". It was widely felt that article 10 of the ECC and the notions of dispatch and receipt would not apply to the time of effectiveness of a registration with respect to a possible security right. While there was a call for a flexible approach in that regard, it was generally felt that the issue had been discussed and resolved in the Guide through recommendation 70, according to which the time of effectiveness of a registration was the time when the registered notice became available to searchers. It was explained that that time was the time when the notice was entered into the registry index and searchers were able to retrieve it.

38. Moreover, it was noted that a time lag (see A/CN.9/WG.VI/WP.44/Add.1, para. 54) might also occur in an electronic registry system in the sense that the time the notice was entered into the electronic record through an online platform might still be different from the time that information was searchable by a third party through a similar online platform, and as a result, the issue might arise as to who should bear the risk in such circumstances. It was widely felt that no real problem arose in that regard. It was stated that, as mentioned in the Guide, in a fully electronic system, the time when a notice was registered and the time when it became available to searchers was virtually simultaneous and the problem of a time lag was virtually eliminated. It was also observed that, in registration systems that permitted the registration of paper-based notices, there would inevitably be some delay, but such delay should not cause a problem as long as searchers were informed of the possibility of such delays and notices became available to searchers in the order they were registered.

39. It was also noted that, with respect to storage of information (see A/CN.9/WG.VI/WP.44/Add.1, para. 70; see also recommendation 54 (j) (i) of the Guide), reference might be made to article 10 of the UNCITRAL Model Law on Electronic Commerce ("MLEC") which discussed the retention of data messages. There was general agreement in the Working Group that, as both the Guide (see recommendation 74) and the registration text referred to preservation of notices, whether they were paper-based or electronic, there was no inconsistency between the Guide or the registration text and article 10 of the MLEC, which could usefully be referred to (provided that reference was made mainly to the time the notice became available to searchers, and not the time it was sent or received).

40. It was also noted that the method of using access codes and passwords was only one example to preserve the security and integrity of the registry database and should not be construed as the only recommended method

(see A/CN.9/WG.VI/WP.44/Add.1, para. 76). The Working Group agreed that that approach was in line with the views expressed in the discussion of that matter at the present session (see para. 28, subpara. (e) above).

41. It was also noted that the statement that electronic records were less vulnerable than paper-based records should be qualified as the nature of electronic records made them more vulnerable to unauthorized access and duplication (see A/CN.9/WG.VI/WP.44/Add.1, para. 83). It was agreed that that statement could be revised to emphasize that, to protect data from being lost or interfered with, there should be back-up servers. It was also agreed that, while electronic records were less vulnerable to physical damage than paper-based records, they were more vulnerable to unauthorized access and interference than paper-based records.

42. It was noted that in article 8, subparagraph (b), of the draft model regulations caution should be exercised so that it would not deter the utilization of electronic registries. It was widely felt that article 8, subparagraph (b), was consistent with recommendation 56 and accurately reflected modern approaches with regard to electronic security rights registries.

43. It was noted that, with regard to article 10 of the draft model regulations, reference might be made to article 10 of the ECC. The Working Group referred to a decision with respect of the commentary of the registration text (see para. 37) and agreed that such a reference was not necessary and could even be confusing as article 10 of the ECC referred to the time of registration, while recommendation 70 referred to the time a notice became available to searchers.

44. It was noted that, with regard to articles 16 and 17, the question might arise whether separate rules based on the purpose of accessing the registry (one for registration and one for searches) would be necessary as the registry system might be designed to provide general access for multiple purposes. The Working Group agreed that separate rules were necessary because of the different security requirements applicable to registration and searches.

45. It was noted that an assignment of a user identification number and a password by the registry, in article 16 of the model registrations, as the only mode to access the registry might be contrary to the technological neutrality principle as there were many other methods for verifying the identification of the person accessing the registry, including, for example, a third-party verification system. The Working Group agreed that article 16 reflected standard approaches taken in security rights registries and did not violate the principle of technological neutrality. It was stated that, if there was another relevant method, it could be referred to, but third-party verification was not relevant as the verification process had to be under the control of the registry.

46. It was noted that, in articles 21 and 22 of the draft model regulations, caution should be exercised so as to avoid limiting the methods through which grantor information might be entered into the registry record, as this could be contrary to the technological neutrality principle. The Working Group agreed that articles 21 and 22 were appropriate in that they took into account the requirements of the registry, without violating the principle of technological neutrality.

47. It was noted that, in article 30, the term “notice” was different from the term “notice” of the security right which was subject to registration and might simply

be replaced with the words “verification (notification)” or “acknowledgment (notification)”. It was also noted that, in that context, the Working Group might wish to consider whether article 14 of the MLEC on the acknowledgement of receipt may be applicable in an electronic registry context. The Working Group agreed that article 30 could be revised to use terms consistent with the terminology of the Guide and in particular, recommendation 55, subparagraphs (d) and (e). It was stated that referring to article 14 of the MLEC was not necessary and could even be confusing as that article referred to the time of receipt rather than the time when a notice became available to searchers, as provided in recommendation 70.

V. Future work

48. The Working Group noted that its nineteenth session was scheduled to take place in New York from 11 to 15 April 2011.