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# Report of Working Group VI (Security Interests) on the work of its twenty-eighth session (Vienna, 12-16 October 2015)

## Contents



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# I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the "draft Model Law"), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June-6 July 2012).[1] At that session, the Commission agreed that, upon its completion of the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide"), the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[2]

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group had a general exchange of views on the basis of a note prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.55 and Add.1 to 4).

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission agreed that the preparation of the draft Model Law was an extremely important project to complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide. It was also agreed that, in view of the importance of modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition. In addition, it was stated that the scope of the draft Model Law should include all economically valuable assets.[3] After discussion, the Commission confirmed the mandate it had given to Working Group VI in 2012 (see para. 1 above).[4] The Commission also agreed that whether that work would include security interests in non-intermediated securities would be assessed at a future time.[5]

4. At its twenty-fourth session (Vienna, 2-6 December 2013), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 and Add.1 and 2) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (A/CN.9/796, para. 11). At its twenty-fifth session (New York, 31 March-4 April 2014), the Working Group continued its work based on a note by the Secretariat entitled "Draft Model Law on Secured Transactions"

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[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

[2] Ibid.

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 193.

[4] Ibid., para. 194.

[5] Ibid., para. 332.

(A/CN.9/WG.VI/WP.57/Add.2-4 and A/CN.9/WG.VI/WP.59 and Add.1) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/802, para. 11). The Working Group also decided to recommend to the Commission that the draft Model Law address security rights in non-intermediated securities along the lines agreed upon by the Working Group at that session (see A/CN.9/802, para. 93).

5. At its forty-seventh session (New York, 7-18 July 2014), the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities, and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.[6]

6. At its twenty-sixth session (Vienna, 8-12 December 2014), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.61 and Add.1-4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/830, para. 12). At its twenty-seventh session (New York, 20-24 April 2015), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.63 and Add.1-4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/836, para. 13).

7. At its forty-eighth session (Vienna, 29 June-16 July 2015), the Commission considered and approved in principle article 26 of chapter IV (on the registry system) of the draft Model Law and articles 1 to 29 of the draft Registry Act (see A/CN.9/852). At that session, the Commission also agreed that a draft guide to enactment should be prepared and referred that task to the Working Group.[7]

# II. Organization of the session

8. The Working Group, which was composed of all States members of the Commission, held its twenty-eighth session in Vienna from 12 to 16 October 2015. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Brazil, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Kuwait, Mexico, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Bolivia (Plurinational State of), Cyprus, Dominican Republic, Ghana, Lebanon, Luxembourg, Portugal, Qatar, Slovakia, United Arab Emirates and Viet Nam. The session was also attended by observers from the Holy See and the European Union.

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[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

[7] Ibid., para. 216.

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

(a) *United Nations system*: World Bank;

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), EU Federation for Factoring and Commercial Finance (EUF), Factors Chain International (FCI), International Bar Association, International Factors Group (IFG), International Insolvency Institute (III), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA) and National Law Centre for Inter-American Free Trade (NLCIFT).

11. The Working Group elected the following officers:

*Chairperson*: Ms. Kathryn SABO (Canada)

*Rapporteur*: Ms. Diana MUÑOZ (Mexico)

12. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.64 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.65 and Add.1-4 (Draft Model Law on Secured Transactions) and A/CN.9/WG.VI/WP.66 and Add.1-4 (Draft Guide to Enactment).

13. 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. Draft Model Law on Secured Transactions.
5. Draft Guide to Enactment of the draft Model Law on Secured Transactions.
6. Other business.
7. Adoption of the report.

# III. Deliberations and decisions

14. The Working Group considered notes by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.65 and Add.2 and 4). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the draft Model Law and the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group.

# IV. Draft Model Law on Secured Transactions

## A. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.65)

### Article 1. Scope of application

15. The Working Group agreed that no type of outright transfer of receivables needed to be excluded explicitly from the scope of the draft Model Law. It was widely felt that States that wished to exclude any type of transaction or asset could do so under subparagraph 3(f). It was also agreed that, to provide guidance to States in that regard, the draft Guide to Enactment should give a couple of examples (e.g. outright transfers of receivables for collection purposes or as part of a sale of the business out of which they arose).

16. With respect to subparagraph 3(d), the Working Group agreed that, to avoid interfering with other law governing netting agreements, all types of netting agreements, rather than only close-out netting agreements, should be excluded.

17. With respect to subparagraph 3(e), the Working Group agreed that it should be deleted. It was widely felt that, in view of the broad definition of the term "financial contract" (see art. 2, subpara. (l)), subparagraph 3(d) was sufficient to cover also payment rights arising under or from foreign exchange transactions addressed in subparagraph 3(e).

18. With respect to paragraph 5, the Working Group agreed that, to avoid creating questions of interpretation, it should be aligned more closely with article 4, paragraph 4 of the Assignment Convention.

19. Subject to the above-mentioned changes, the Working Group adopted article 1.

### Article 2. Definitions and rules of interpretation

**"Acquisition security right"**

20. It was agreed that, to simplify and shorten the definition of the term "acquisition security right", the words "an obligation incurred or credit otherwise provided" could be replaced by the words "other credit extended". It was also agreed that that definition should be revised to ensure that only a security right securing an obligation to pay credit actually used for the acquisition of an asset would be afforded the special priority status that an acquisition security right would have under the draft Model Law.

**"Bank account"**

21. It was agreed that the term "bank" was too narrow to cover all relevant institutions and should thus be replaced by words along the following lines: "financial institution authorised to receive deposits from the public", "an institution to be specified by the enacting State" or "by a bank as defined in [another law to be specified by the enacting State]" and "[any institution to be specified by the enacting State]".

22. It was also agreed that the words "other than a securities account" that appeared within square brackets in the definition of the term "bank account" could

also be deleted on the understanding that the draft Guide to Enactment would clarify that the draft Model Law did not apply to the right to payment of funds credited to a securities account. Alternatively, it was suggested, article 1, subparagraph 3(c), should be revised to also exclude securities accounts. Finally, it was agreed that, as the type of bank account to be covered might differ from State to State, the second and the third sentences of the definition of the term "bank account" should be deleted and discussed as examples in the draft Guide to Enactment.

**"Competing claimant"**

23. Diverging views were expressed as to whether both the chapeau and the list of types of competing claimant should be retained in the definition of the term "competing claimant". After discussion, it was agreed that, at least for educational reasons, both the chapeau and the list of types of competing claimant should be retained.

24. As to the formulation of that definition, it was agreed that: (a) the words "in conflict" that appeared in the chapeau should be replaced with the words "in competition"; (b) the words "whether as an original encumbered asset or proceeds" that appeared in parenthesis in subparagraph (i) were redundant and should thus be deleted, while the draft Guide to Enactment could discuss the matter addressed by those words; (c) the words "such as a judgement creditor or" that appeared in subparagraph (ii) should be deleted so that it would be left to the enacting State to specify the types of creditor that might have a right in the same encumbered assets, while the draft Guide to Enactment could give examples; and (d) for reasons of consistency with the articles in which those words were used (e.g. arts. 29 and 30), the words "or other transferee" that appeared in subparagraph (iv) within square brackets should be retained outside square brackets.

**"Consumer goods"**

25. To ensure that goods used incidentally for personal, family or household purposes would not be treated as consumer goods in the draft Model Law, the Working Group agreed that reference should be made to such goods being "primarily" used for such purposes and thus the word "primarily" that appeared within square brackets in the definition of the term "consumer goods" within square brackets should be retained outside square brackets. The Working Group also agreed that reference should be made in that definition to "the" grantor, rather than to "a" grantor (in the definitions of the terms "equipment" and "inventory" as well).

**"Debtor of the receivable"**

26. Diverging views were expressed as to whether a different term should be used to avoid confusing the "debtor of the receivable" with the "debtor" of the secured obligation. After discussion, for reasons of consistency with the Assignment Convention and the Secured Transactions Guide, it was agreed that the term "debtor of the receivable" should be retained as it was. At the same time, it was agreed that, to make the distinction between those terms sufficiently clear, reference should be made in the definition of the term "debtor of the receivable" to the payment of an "encumbered receivable" or "a receivable that was subject to a security right".

**“Encumbered asset”**

27. As the definitions of the terms “tangible asset” and “intangible asset” referred to movable assets, it was agreed that the term “movable” in the definition of the term “encumbered asset” was redundant and should thus be deleted (in the definition of the term “future asset” as well).

**“Equipment”**

28. It was agreed that all the bracketed wording contained in the definition of the term “equipment” (“other than inventory”, “primarily” and “or intended to be used”) added clarity and should thus be retained. It was also suggested that, to avoid having to exclude in the definition of the term “equipment” the types of reified intangible asset that were included in the definition of the term “tangible asset”, reference should be made to “goods” rather than to tangible assets (in the definitions of the terms “inventory”, “mass or product” and “tangible asset” as well). However, it was noted that the term goods was not always understood in the same way in all legal systems. The drafting was therefore referred to the Secretariat.

**“Independent undertaking”**

29. It was agreed that, in line with the approach taken in the definition of the term “independent undertaking” in the Secured Transactions Guide, the definition of that term in the draft Model Law should also refer to commercial letters of credit. Noting that the term “independent undertaking” was used in article 1, subparagraph 3(a), and in article 13, option A, paragraph 2, the Working Group agreed that, depending on its decision with respect to article 13, the matter could be addressed in article 1, subparagraph 3(a), and the definition of that term could be deleted (see para. 60 below).

**“Insolvency representative”**

30. It was suggested that, to cover situations in which the insolvent debtor remained in possession of the insolvency estate, reference should also be made in the definition of the term “insolvency representative” to the supervision (and not only to the administration) of reorganization or liquidation proceedings by the insolvency representative. It was agreed that that point should be addressed in the definition or in the draft Guide to Enactment in a way that would be consistent with the Secured Transactions Guide and the UNCITRAL Legislative Guide on Insolvency Law (the “Insolvency Guide”).

**“Inventory”**

31. It was agreed that, as inventory could not be held partly for sale or lease in the ordinary course of business and partly for other purposes, the reference to the primary purpose of the grantor holding inventory that appeared in the definition of the term “inventory” could be deleted. It was also agreed that the draft Guide to Enactment should clarify that, in States that treated a lease of goods as a licence, reference should also be made in that definition to a “licence” of goods.

**“Money”**

32. It was agreed that the word “currently” that appeared in the definition of the term “money” should be deleted and the draft Guide to Enactment should explain that that word was deleted as redundant, since, if currency was not “currently authorized” as “legal tender”, it would not qualify as “legal tender”.

**“Netting agreement”**

33. Recalling its decision with respect to article 1, subparagraph 3(d) (see para. 16 above), the Working Group agreed that the term to be defined should be “netting agreement”, rather than “close-out netting agreement” and thus the words “close-out” that appeared within square brackets in the definition of the term “netting agreement” should be deleted.

**“Notification of a security right in a receivable”**

34. It was agreed that the second sentence of the definition of the term “notification of a security right in a receivable” contained a substantive rule and should thus be moved to the relevant article (i.e. art. 56). Diverging views were expressed as to whether what was left of that definition should also be moved to the relevant article. After discussion, it was agreed that it should be retained in article 2 as a definition or rule of interpretation. As to the form of a notification of a security right in a receivable, the Working Group noted that, since the term “notice” was defined as a communication in writing and the term “notification of a security right in a receivable” was defined as a particular type of notice, a notification of a security right should be in writing.

**“Possession”**

35. It was agreed that the reference to “actual possession” in the definition of the term “possession” was sufficient to exclude deemed or constructive possession from the concept of “possession”. It was also agreed that the reference to possession being “physical” that appeared within square brackets in the definition of the term possession was redundant, as only tangible assets could be subject to possession, and should thus be deleted.

**“Priority”**

36. The Working Group agreed that the definition of the term “priority” should be revised to read along the lines of article 5, subparagraph (g), of the Assignment Convention and thus to refer to the right (not just the economic benefit) of a person (not just a secured creditor) in preference to the right of a competing claimant.

**“Proceeds”**

37. Diverging views were expressed with respect to whether the definition of the term “proceeds” should be limited to proceeds received by the grantor and not extend to proceeds received, for example, by a transferee of the original encumbered asset. In support of that approach, it was stated that, without that limitation, the rights of third-party transferees would be unduly prejudiced, as they would have no way of finding out that the assets were proceeds of another asset in which somebody else had a security right, at least where the proceeds were cash

proceeds and thus a security right in such proceeds would be effective against third parties without the registration of an amendment notice (see art. 17, para. 1). It was also observed that the rights of the secured creditor of the transferor would be sufficiently protected in any case, as, subject to limited exceptions (see, for example, art. 29, paras. 2 and 3), the security right would typically follow the asset in the hands of any transferee and any other person that would obtain a right in the asset from the transferee. In opposition to that limitation of the concept of "proceeds", it was stated that, with that limitation, even where the transferee of an encumbered asset acquired the asset subject to a security right, it could sell the asset and keep the proceeds. It was also observed that, in any case, the limitation of the concept of "proceeds" would not be necessary to protect transferees that were already protected under other provisions of the draft Model Law. After discussion, it was agreed that, while the definition of the term "proceeds" should be retained as it was, the draft Guide to Enactment should explain the possible impact of that definition and ways to avoid a prejudice to third-party transferees that were not otherwise protected by other provisions of the draft Model Law.

**"Receivable"**

38. It was agreed that the reference to "a right to receive the proceeds under an independent undertaking" that appeared in the definition of the term "receivable" should be deleted, as under article 1, subparagraph 3(a), the draft Model Law did not apply to that type of asset. It was also agreed that a reference to non-intermediated securities that gave rise to rights to payment (i.e. debt securities) should also be made in the definition of the term "receivable" so that they would also be excluded from the scope of the term "receivable".

**"Right to receive the proceeds under an independent undertaking"**

39. In view of the fact that the draft Model Law did not apply to any rights arising from an independent undertaking (see para. 38 above), the Working Group agreed that the definition of the term "right to receive the proceeds under an independent undertaking" should be deleted.

**"Secured obligation"**

40. With respect to the wording in the definitions of the terms "grantor", "secured creditor", "secured obligation", "security agreement" and "security right" dealing with outright transfers of receivables, it was agreed that two alternative formulations should be prepared; one that would deal with the issue in one provision that would be placed in article 1; and another in which the relevant wording should be retained in each relevant definition, but in a more streamlined way to provide, for example, that the term "secured creditor" meant: (a) a creditor that had a security right; and (b) a transferee in an outright transfer of receivable.

41. Subject to the above-mentioned changes, the Working Group adopted article 2.

**Article 3. International obligations of this State**

42. In view of the diverging approaches followed from State to State with respect to the hierarchy between treaty obligations and domestic law of a State, the Working Group agreed that article 3 should be deleted and the matter addressed therein left to

other law of the enacting State. It was also agreed that the draft Guide to Enactment could give examples of approaches followed by various States with respect to the hierarchy between national law rules and international obligations of a State.

**Article 4. Party autonomy**

43. The Working Group noted that article 4 was based on article 6 of the Assignment Convention and recommendation 10 of the Secured Transactions Guide. With respect to paragraph 1, it was agreed that it should be revised to ensure: (a) clarity, as the provisions referred to therein did not provide explicitly that they were mandatory law rules; (b) the list of mandatory law rules contained therein would be complete and accurate; and (c) the ability of competing claimants to enter into a subordination agreement would not be impaired.

44. Diverging views were expressed as to whether paragraph 2 should be retained, as it appeared to set out the general principle of contract law that an agreement between two parties could not affect the rights of third parties. After discussion, it was agreed that paragraph 2 should be retained, since the draft Model Law dealt also with relationships in which an agreement between two parties (e.g. the grantor and the secured creditor) might have or appear to have an impact on the rights of third parties (e.g. the debtor of the receivable). For reasons of simplicity and consistency with the provisions on which article 4 was based, it was also agreed that the word “negatively” that appeared within square brackets in paragraph 2 should be deleted.

45. Subject to the above-mentioned changes, the Working Group adopted article 4.

**Article 5. General standards of conduct**

46. It was agreed that subparagraph 2(a) was not necessary and should thus be deleted, as article 4 already stated that the rule embodied in paragraph 1 could not be waived unilaterally or varied by agreement. It was also agreed that subparagraph 2(b) should be deleted, as, in the case of an outright transfer of a receivable without recourse against the transferor: (a) the transferee still had towards the debtor of the receivable the obligation to comply with the standards of conduct set forth in paragraph 1; and (b) it was obvious that the transferor had no remaining right or obligation. Subject to those changes, the Working Group adopted article 5.

47. In the discussion, the Working Group considered whether a provision should be added to deal with the interpretation of, and the filling of gaps, in the draft Model Law. After discussion, the Working Group agreed that such a provision should be added at the end of chapter I. The Working Group also agreed that the matter could be discussed in the draft Guide to Enactment by reference to the harmonization effect of an UNCITRAL model law and the key objectives and fundamental policies of the draft Model Law (see A/CN.9/WG.VI/WP.66, paras. 37-40, 44 and 45).

## B. Chapter II. Creation of a security right (A/CN.9/WG.VI/WP.65)

### Article 6. Security agreement

48. It was agreed that: (a) the heading of article 6 should be revised to better reflect its content; (b) paragraphs 3 and 4 should be merged for the conditions set forth in paragraph 3(b) through (e) to apply only to written security agreements and for paragraph 3(a) to apply to both written and oral security agreement; and (c) no reference should be made in paragraph 5 to control. With respect to the last matter, while diverging views were expressed, it was agreed that, whether control was automatic or achieved by way of a control agreement, it was not equivalent to possession (which provided a warning to third parties that the grantor's rights in the encumbered asset might not be unencumbered) or to a written security agreement (that had to satisfy the requirements of paragraph 3). It was also agreed that the draft Guide to Enactment would make clear that formal words were not necessary to create a security right. Subject to those changes, the Working Group adopted article 6.

49. In the discussion, the suggestion was made that a provision should be added, perhaps in the chapter of the draft Model Law on enforcement, to effectuate the policy embodied in article 6, subparagraph 3(e), with respect to the maximum amount for which the security right might be enforced. After discussion, the Working Group agreed to consider that suggestion when it had the opportunity to discuss the chapter on enforcement.

### Article 7. Obligations that may be secured

50. After discussion, the Working Group adopted article 7 unchanged.

### Article 8. Assets that may be encumbered

51. The Working Group noted that subparagraphs (c) and (d) dealt with the description of encumbered assets, a matter addressed in article 9. However, it agreed that those provisions should be retained because of their importance and the fact that their adoption would introduce significant changes to many legal systems. After discussion, the Working Group adopted article 8 unchanged.

### Article 9. Description of encumbered assets

52. It was agreed that, to align the wording of article 9 more closely with that of article 8, subparagraph (c), the word "generic" should be added before the word "category" in paragraph 2. Subject to that change, the Working Group adopted article 9.

53. In the discussion, it was noted that, pursuant to the changes to article 6 (see para. 48 above), article 9 would only apply to a written security agreement.

### Article 10. Proceeds and proceeds in the form of funds commingled with other funds

54. It was agreed that: (a) the heading of article 10 should be revised to reflect more closely its contents (e.g. "right to proceeds and commingled funds"); (b) paragraph 1 embodied the very important principle that a security right in an

asset extended to its proceeds and should thus be separated from paragraphs 2-4, which dealt with commingled funds and could be combined in a new paragraph; (c) in the new paragraph, the wording of paragraph 2 should be revised to read along the following lines: “notwithstanding the fact that proceeds in the form of funds are not identifiable as a result of commingling with other assets of the same type, the security right extends to the commingled assets”; and (d) in the new paragraph, the wording of paragraph 3 should be revised to read along the following lines: “the security right in the commingled assets is limited to …” (and thus avoid any confusion with the optional wording, which refers to the maximum monetary amount and which is contained in art. 6, para. 3 (e)). Subject to those changes, the Working Group adopted article 10.

**Article 11. Tangible assets commingled in a mass or product**

55. Diverging views were expressed as to whether the same rules should apply to tangible assets when they were commingled in a mass or in a product. One view was that a rule along the lines of recommendation 22 of the Secured Transactions Guide should apply to both masses and products where there were no competing rights, while paragraph 4 was sufficient to apply to situations where there were competing rights. Another view was that, to deal with commodity price fluctuations, paragraph 2 with the first set of bracketed words should apply to masses and paragraph 3 with the second set of bracketed words should apply to products. After discussion, the Working Group requested the Secretariat to prepare two options reflecting the views expressed for further consideration. With respect to paragraph 4, the Working Group agreed that it should be retained outside square brackets. Subject to those changes, the Working Group adopted article 11.

**Article 11bis. Extinction of a security right**

56. As a matter of policy, it was agreed that, even if the balance in a revolving credit account was temporarily zero, a security right should not be extinguished as long as there was a further commitment by the secured creditor to extend credit. However, as a matter of drafting, diverging views were expressed as to how that policy should be reflected in article 11bis. One view was that, for reasons of legal certainty, the principle that full payment of all secured obligations should result in the extinction of a security right should not be diluted with references to any other issue. It was stated that issues relating to revolving credit arrangements could be discussed in the draft Guide to Enactment. Another view was that revolving credit arrangements were extremely important and thus article 11bis should avoid giving the impression that the security right could be extinguished while the secured creditor had an open commitment to extend further credit. It was observed that, in the absence of the proviso in article 11bis, it would not be clear that it covered conditional secured obligations.

57. After discussion, it was agreed that article 11bis should be revised to provide that a security right would be extinguished only upon full payment or other satisfaction of all present and future secured obligations, including conditional obligations. It was also agreed that the draft Guide to Enactment would clarify that the reference to future, including conditional, secured obligations was intended to address the obligation of a secured creditor to extend further credit on the basis of revolving credit agreements.

58. Subject to the above-mentioned changes, the Working Group adopted article 11bis.

**Article 12. Contractual limitations on the creation of a security right**

59. It was agreed that: (a) for reasons of clarity in the text and consistency with article 9 of the Assignment Convention and recommendation 24 of the Secured Transaction Guide, on which article 12 was based, paragraphs 1 and 2 should be revised to refer only to contractual limitations on the creation of a security right in a receivable; (b) the last set of bracketed words in paragraph 2 should be retained outside square brackets; and (c) in subparagraph 4 (d), the first set of bracketed words should be revised to avoid repetition of elements already contained in the definition of the term "netting agreement" (see art. 2, subpara. (w)) and retained outside square brackets, while the second bracketed set of words should be deleted. Subject to those changes, the Working Group adopted article 12.

**Article 13. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument**

60. It was agreed that paragraph 1 of option A and paragraph 2 of option B should be retained, while paragraph 2 of option A and paragraphs 3-5 of option B should be deleted and the matters addressed therein should be discussed in the draft Guide to Enactment. It was also agreed that the draft Guide to Enactment should explain that the rule in article 12 applied to contractual limitations on the creation of a security right not only in a receivable but also in personal or property rights securing payment or other performance of a receivable or other intangible asset, or negotiable instrument (see rec. 25, subpara. (d), of the Secured Transactions Guide). Subject to those changes, the Working Group adopted article 13.

61. In view of its decision to limit article 12 to receivables, the Working Group agreed that the article implementing recommendation 26 of the Secured Transactions Guide, which dealt with contractual limitations on the creation of a security right in a right to payment of funds credited to a bank account and which had been deleted, should be reinstated (see A/CN.9/830, para. 63).

**Article 14. Negotiable documents and tangible assets covered**

62. It was agreed that article 14 or the definition of the term "possession" contained in article 2 should be revised to address situations in which the issuer of a negotiable document held the document through various persons responsible to perform various parts of a multimodal transport contract. It was also agreed that the heading of article 14 (and all articles with the same heading) should be reviewed to ensure that it accurately reflected its contents. Subject to those changes, the Working Group adopted article 14.

**Article 15. Tangible assets with respect to which intellectual property is used**

63. The Working Group adopted article 15 unchanged.

## C. Chapter III. Effectiveness of a security right against third parties (A/CN.9/WG.VI/WP.65)

### Article 16. General methods for achieving third-party effectiveness

64. It was agreed that the reference to specialized registration in article 16 should be deleted and the matter discussed in the draft Guide to Enactment in order to ensure coordination between the Registry foreseen in the draft Model Law and existing, well-functioning specialized registration systems relating to assets to which the draft Model Law applied (e.g. intellectual property). It was also agreed that article 16 should be revised to clarify that possession was a third-party effectiveness method only for security rights in tangible assets. Subject to those changes, the Working Group adopted article 16.

65. In the discussion, a number of suggestions were made. One suggestion was that article 16 should be revised to refer to all methods of third-party effectiveness. Another suggestion was that reference should be made to notation on an invoice as method of third-party effectiveness of outright transfers of receivables. There was no sufficient support for those suggestions.

### Article 17. Proceeds

66. A number of suggestions were made. One suggestion was that the order of paragraphs 1 and 2 should be reversed. Another suggestion was that the words "without any further action by the grantor or the secured creditor" should be replaced by words along the following lines: "automatically when the proceeds arise". There was no sufficient support for those suggestions. After discussion, the Working Group adopted article 17 unchanged.

### Article 18. Changes in the method for achieving third-party effectiveness

67. It was agreed that paragraph 1 should be deleted, as its thrust was already reflected in paragraph 2. Subject to that change, the Working Group adopted article 18.

### Article 19. Lapse in third-party effectiveness

68. It was agreed that article 19 should be revised to read along the following lines: "If the third-party effectiveness of a security right lapses, it may be re-established, but the security right is effective against third parties only as of that time". Subject to those changes, the Working Group adopted article 19.

### Article 20. Impact of a transfer of an encumbered asset

69. It was agreed that the principle of the *droit de suite* of a security right embodied in article 20 was sufficiently addressed in article 29, and thus article 20 should be deleted.

### Article 21. Continuity in third-party effectiveness upon a change of the applicable law to this Law

70. It was agreed that, under paragraph 1, the security right remained effective against third parties under the law of the enacting State, if: (a) the

third-party effectiveness requirements of the law of the enacting State were satisfied within a short period of time (e.g. 60-90 days); and (b) at that time, the security right was effective against third parties under the law of the State whose law was previously applicable (i.e. its third-party effectiveness had not lapsed). In addition, it was agreed that the draft Guide to Enactment should explain the policy of article 21. Moreover, it was agreed that article 21 should be retained in the third-party effectiveness chapter and not moved to the conflict-of-laws chapter, as it dealt with continuity of third-party effectiveness (even if the issue arose as a result of a change of applicable law). Subject to any changes necessary to clarify its policy, the Working Group adopted article 21.

**Article 22. Acquisition security rights in consumer goods**

71. It was agreed that article 22 should be revised to include two options. The first option should provide that, upon its creation, an acquisition security right in the goods would be automatically effective against third parties except buyers of consumer goods. The second option should provide for the automatic third-party effectiveness of an acquisition security right in consumer goods, but only if the value of the consumer goods was below a low amount to be specified by the enacting State. Subject to those changes, the Working Group adopted article 22.

**Article 23. Rights to payment of funds credited to a bank account**

72. The Working Group adopted article 23 unchanged and agreed that the issue of how a secured creditor might become the account holder should be discussed in the draft Guide to Enactment.

**Article 24. Negotiable documents and tangible assets covered**

73. It was agreed that, as in the chapeau of articles 23 and 25, the word “also” should be inserted in paragraph 2 to ensure that registration was always available as a general method of third-party effectiveness. Subject to that change, the Working Group adopted article 24.

**Article 25. Uncertificated non-intermediated securities**

74. It was agreed that subparagraph (a) should be revised to clarify that the two methods for achieving third-party effectiveness were alternatives for the enacting State to choose from. Subject to that change, the Working Group adopted article 25.

## D. Chapter V. Priority of a security right (A/CN.9/WG.VI/WP.65/Add.2)

**Article 27. Competing security rights**

75. The Working Group agreed that, in view of their importance, article 27, paragraph 1, and article 28 should be merged and form the first article of the chapter on priority. It was also agreed that paragraphs 2 to 8 should be set forth separately. The Working Group also agreed that paragraph 2 that appeared within square brackets should be retained outside square brackets, properly revised to read along

the following lines: “Subject to article 27, priority among competing security rights created by different grantors in the same encumbered asset is determined according to the order of third-party effectiveness”. In response to a statement that paragraph 3 might not be accurate, as a change in the method of third-party effectiveness could change the order of priority, it was noted that, by definition, asset-specific rules would modify the general rules in each chapter. It was agreed that that matter could usefully be clarified in the draft Guide to Enactment. Subject to those changes, the Working Group adopted article 27.

**Article 28. Competing security rights in the case of advanced registration**

76. It was agreed that option A should be retained, as it was clearer and simpler than option B, and moved to article 27 as paragraph 2, while option B should be deleted. Subject to those changes, the Working Group adopted option A unchanged.

**Article 29. Rights of buyers or other transferees, lessees or licensees of an encumbered asset**

77. The suggestion was made that paragraphs 4, 5, 7 and 8 should refer to “goods” rather than to “tangible assets”, as the latter term included negotiable instruments and other similar reified intangible assets (see art. 2, subpara. (kk)), to which those paragraphs should not apply. While it was agreed that those paragraphs should not apply to those types of asset, it was widely felt that that change was not necessary, since the relevant asset-specific rules addressed those matters and, by definition, modified general rules like that contained in article 29. It was also agreed that the draft Guide to Enactment should clarify that the words “buyer or other transferee, lessee or licensee” included donees. After discussion, the Working Group adopted article 29 unchanged.

**Article 30. Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration**

78. In view of its decision on article 16 (see para. 64 above), the Working Group agreed that article 30 should be deleted and the matters addressed therein discussed in the draft Guide to Enactment.

**Article 31. Rights of the insolvency representative**

79. It was agreed that, while all of article 31 dealt with insolvency law issues, paragraph 1 should be retained because of its importance, while paragraphs 2 and 3 should be deleted. It was also agreed that the matters addressed in paragraphs 2 and 3 should be discussed in the draft Guide to Enactment, to also highlight with appropriate references to the Secured Transactions Guide and the Insolvency Guide, the need for the enacting State to coordinate its secured transactions and insolvency laws. It was also agreed that the title of article 31 should be modified to reflect its content. Subject to those changes, the Working Group adopted article 31.

**Articles 32, 38-44**

80. The Working Group adopted articles 32, 38-44 unchanged.

**Article 33. Rights of judgement creditors**

81. It was agreed that paragraph 2 should be aligned more closely with recommendation 84 of the Secured Transactions Guide and refer to an "extension" rather than to a "disbursement" of credit and to the notification being received by the secured creditor. Subject to those changes, the Working Group adopted article 33.

**Articles 34-37**

82. It was agreed that articles 34-37 should be revised to: (a) clearly describe the types of asset that were subject to each rule; (b) refer to consumer goods being used "primarily" for personal, family or household purposes; and (c) refer to the need for registration to occur "not later than" a specified number of days after delivery of the goods (rather than "within", which might be read as precluding registration before delivery). Subject to those changes, the Working Group adopted articles 34-37.

**Article 45. Intellectual property**

83. It was agreed that the words that appeared within square brackets in article 45 should be retained. Subject to that change, the Working Group adopted article 45.

**Article 46. Non-intermediated securities**

84. It was agreed that option A of paragraph 5 should be retained, as it was clearer than option B, while option B should be deleted. Subject to that change, the Working Group adopted article 46.

## E. Chapter VIII. Conflict of laws (A/CN.9/WG.VI/WP.65/Add.4)

85. The Working Group agreed that the draft Guide to Enactment should explain that the conflict-of-laws rules should apply without a prior determination that the laws of different States would be involved in any particular case. It was widely felt that requiring a determination as to whether a situation involved a choice of laws would create uncertainty because a court might view the issue as involving a choice of laws, while another court might treat the issue differently.

**Articles 78, 84, 86 and 89**

86. The Working Group adopted articles 78, 84, 86 and 89 unchanged.

**Article 79. Law applicable to a security right in a tangible asset**

87. In view of its decision with respect to specialized registration issues (see para. 64 above), the Working Group agreed that the words "subject to paragraph 4, the" that appeared within square brackets in paragraph 3, and paragraph 4 as a whole, should be deleted, while the rules contained therein should be discussed in the draft Guide to Enactment. It was also agreed that the words contained in parenthesis in paragraph 5 should be deleted as the types of asset referred to therein (e.g. negotiable instruments) would not be captured by the expression "tangible assets in transit or to be exported". Subject to those changes, the Working Group adopted article 79.

**Article 80. Law applicable to a security right in an intangible asset**

88. It was widely felt that article 80 appropriately addressed the issue of the law applicable to the creation of a security right, which was a matter of property law, and not the mutual rights and obligations of the parties, which was a matter of contract law and subject to party autonomy (see art. 78). Thus, it was agreed that articles 78 and 80 were consistent with articles 28 and 30 of the Assignment Convention and recommendations 208 and 216 of the Secured Transactions Guide. After discussion, the Working Group adopted article 80 unchanged.

**Article 81. Law applicable to a security right in receivables arising from a sale or lease of or a transaction secured by immovable property**

89. It was agreed that paragraph 1 should be deleted, as it simply reiterated the rule embodied in article 80, and paragraph 2 should be revised to: (a) begin with the words "Notwithstanding article 80"; and (b) to refer to the priority of a security right in a receivable that was "registrable" (rather than registered) in the immovable property registry. It was widely felt that, with that change, for article 81 to apply, it would not be necessary to determine that: (a) the law governing the immovable property registry permitted registration with respect to security rights for third-party effectiveness and priority purposes; and (b) a competing claimant did in fact register in the immovable property registry. Subject to those changes, the Working Group adopted article 81.

**Article 82. Law applicable to the enforcement of a security right**

90. Diverging views were expressed as to the law applicable to the enforcement of a security right in a tangible asset under subparagraph (a). One view was that the words "the relevant act" of enforcement should be retained outside square brackets, as enforcement involved various acts that could take place in different States. As a result, repossession of an asset could take place in, and be subject to the law of, one State, while the sale of the asset could take place in, and be subject to the law of, another State. Another view was that those words should not be added to subparagraph (a), as enforcement could not commence in one State and continue in another State. In that connection, it was suggested that subparagraph (a) should state more clearly the applicable law and thus refer to the law of the State in which a tangible asset was located. There was support for that suggestion. However, to have time to consider the matter carefully and avoid unnecessarily changing the rule in recommendation 218, subparagraph (a), on which article 82, subparagraph (a), was based, the Working Group agreed that article 82 should be revised to include two options that would read along the following lines: "The law applicable to issues relating to the enforcement of a security right: (a) In a tangible asset is the law of the State where [enforcement takes place] [the encumbered asset is located at the time of commencement of enforcement], except as provided in article 93". Subject to those changes, the Working Group adopted article 82.

**Article 83. Law applicable to security rights in proceeds of an encumbered asset**

91. Diverging views were expressed as to whether the rule in article 83 should be retained in its present formulation. One view was that the bifurcated rule of article 83 might lead to difficulties in cases where the law governing creation provided that a security right in proceeds was automatically effective against

third parties (e.g. art. 17, para. 1), while the law governing third-party effectiveness and priority provided that, for a security right in proceeds to be effective against third parties, a new registration was necessary (e.g. art. 17, para. 2). Another view was that the rule in article 83 was appropriate, as paragraph 2 would only come into play only if a security right had been effectively created in accordance with the law applicable under paragraph 1. As a result, it was stated, if the proceeds were in the form of receivables, under paragraph 2, the law applicable would be the law governing the third-party effectiveness and priority of a security right in receivables as originally encumbered assets (i.e. art. 80). After discussion, the Working Group agreed that the matter should be discussed in the draft Guide to Enactment and adopted article 83 unchanged. The Working Group also agreed that the draft Guide to Enactment should explain that article 83 addressed the issue of the law applicable to proceeds derived from a disposition of an encumbered asset outside the context of the enforcement, while article 82 dealt with the law applicable to proceeds derived from a disposition of an encumbered asset pursuant to enforcement proceedings.

**Article 85. Relevant time for determining location**

92. It was agreed that paragraph 2 should be revised to refer to rights of competing secured creditors being "created and made effective against third parties", and to the rights of all other competing claimants being "established". Diverging views were expressed as to whether the rule in article 85 would be appropriate where there was a change in the location of an encumbered asset or the grantor after the creation of a security right or even after the commencement of enforcement proceedings. In that regard, it was observed that, while a change in the location of an encumbered asset or the grantor was envisaged in various articles, article 85 should not give the impression that enforcement proceedings that were commenced in one State could continue in another State. In response, it was pointed out that the new rule proposed for article 82, subparagraph (a), might be sufficient to address the issue arising as a result of a change of location of an encumbered asset or the grantor. After discussion, subject to the above-mentioned change to paragraph 2, the Working Group adopted article 85, on the understanding that it would consider further the matter of the application of article 85 in the case of a change in the location of an encumbered asset or the grantor.

**Article 87. Overriding mandatory rules and public policy (*ordre public*)**

93. It was agreed that article 11, paragraph 5, of the Hague Principles on Choice of Law in International Commercial Contracts (the "Hague Principles"), which dealt with the public policy and mandatory law exception in the case of arbitral proceedings should also be added to article 87, in view of the importance of arbitration proceedings, the need to include all paragraphs of article 11 and the fact that UNCITRAL had endorsed the Hague Principles. It was also agreed that paragraph 5 should be revised to read along the following lines: "This article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a security right". Subject to those changes, the Working Group adopted article 87.

**Article 88. Impact of commencement of insolvency proceedings on the law applicable to a security right**

94. It was agreed that paragraph 1 should be revised to read along the following lines: "The commencement of insolvency proceedings relating to the grantor does not displace the law applicable to a security right under the provisions of this chapter". It was also agreed that paragraph 2 should be deleted, as it addressed matters referred to the *lex fori concursus* under insolvency law, and the matters addressed therein should be discussed in the draft Guide to Enactment. Subject to those changes, the Working Group adopted article 88.

**Article 90. Law applicable to a security right in a right to payment of funds credited to a bank account**

95. It was agreed that the draft Guide to Enactment should explain that, where a bank offered its services only through an online connection, for the purpose of option A of article 90, its branch or office should be considered as being located in the jurisdiction specified by law for regulatory and other purposes (e.g. court jurisdiction and anti-money-laundering laws).

**Article 91. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration**

96. It was agreed that article 91 should be simplified so that it would apply to the third-party effectiveness of a security right by registration under the law of the grantor's location, whether or not such registration had in fact taken place. It was also agreed that article 91 should be revised to be made applicable also to negotiable documents and certificated non-intermediated securities. Subject to those changes, the Working Group adopted article 91.

**Articles 92 and 94**

97. The Working Group adopted articles 92 and 94 unchanged.

**Article 93. Law applicable to a security right in non-intermediated securities**

98. Diverging views were expressed as to the option or options of article 93 that were preferable and should be retained. After discussion, it was agreed that all options should be retained for further consideration. It was also agreed that a variant should be prepared for paragraph 2 of option A, to refer effectiveness of a security right in debt securities against the issuer to the law governing the securities.

## F. Chapter IX. Transition (A/CN.9/WG.VI/WP.65/Add.4)

**Articles 95 and 97**

99. The Working Group adopted articles 95 and 97 unchanged.

**Article 96. Transitional application of this Law**

100. It was agreed that, in the definition of the term "prior law" and where else necessary (e.g. art. 99), alternatives should be prepared to address situations in

which the prior law was not the law of the enacting State but the law of another State applicable by virtue of the conflict-of-laws rules of the enacting State. It was also agreed that the definition of the term "prior security right" should be revised to refer to security rights covered by a security agreement entered into before the entry into force of the new law, to provide the benefits of the transition rules even to security rights in assets produced or acquired by the grantor after the entry into force of the new law. Subject to those changes, the Working Group adopted article 96.

**Article 98. Creation of a prior security right**

101. It was agreed that paragraph 2 should be revised to avoid the repetition of elements already addressed in the definition of the term "prior security right". Subject to that change, the Working Group adopted article 98.

**Articles 99 and 100**

102. Subject to any changes necessary to ensure that security rights created and made effective against third parties under a prior law other than a prior law of the enacting State would benefit from the transition rules, the Working Group adopted articles 99 and 100.

**Article 101. Entry into force of this Law**

103. It was agreed that options A to C should be replaced by wording within square brackets leaving the matter addressed in article 101 to each enacting State. It was also agreed that all options should be discussed in the draft Guide to Enactment, with particular emphasis on the essence of option C, namely the need to link the entry into force of the new law with the time the Registry would become operational.

# V. Future work

104. The Working Group noted that its next session was scheduled to take place in New York from 8 to 12 February 2016. The Working Group also noted that, while completing the draft Model Law at its next session was difficult, it was possible and every effort should be made for the Working Group to achieve that result. The Working Group also noted that, in order to complete the draft Guide to Enactment, it might need to request the Commission for an additional 1 session or 2 sessions.