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Summary record of the 842nd meeting
Held at the Vienna International Centre, Vienna, on Thursday, 28 June 2007, at 9.30 a.m.

Chairperson: Ms. Sabo (Chairperson of the Committee of the Whole)..... (Canada)

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V.07-85532 (E)

The meeting was called to order at 9.45 a.m.

Adoption of a draft UNCITRAL Legislative Guide on Secured Transactions and possible future work (*continued*) (A/CN.9/617, 620, 631 and Add.1-11, 632 and 633)

XIII: Private international law (A/CN.9/631 and Add.10)

Recommendations 207 to 213

1. *Recommendations 207 to 213 were adopted.*

Recommendation 214

2. **Mr. Bazinas** (Secretariat) said that recommendation 214 was the result of a last-minute compromise reached by Working Group VI. It stated that the enforcement of a security right in tangible property should be governed by the law of the State where enforcement took place, while the enforcement of a security right in intangible property should be governed by the law of the State whose law governed the priority of a security right.

3. As the term enforcement might refer to acts such as notification, repossession, sale or redistribution of proceeds occurring in different countries, and as collateral might be tangible property before a sale but intangible property afterwards, the Secretariat had suggested in a note following the recommendation that the Commission might wish to consider whether one law – the law governing priority – should be made applicable to the enforcement of security rights in both tangible and intangible property. In the case of tangible property, the place of enforcement of security rights would in most cases be the place where the asset was located and the law of that State would govern priority. In the case of intangible property, enforcement would take place in the State of the location of the grantor and the law of that State would govern priority.

4. **Mr. Deschamps** (Canada) expressed support for the Secretariat's suggestion.

5. **Ms. Kaller** (Austria) expressed a preference for the wording as it stood because there could be cases in which tangible property was located in a different State from the State whose law governed enforcement.

6. **Mr. Riffard** (France), referring to the statement in the Secretariat note to the effect that the place of enforcement of security rights in tangible property in most instances would be the place of location of the asset, asked whether the words "in most instances" referred to the exceptions mentioned in recommendation 202, on the one hand with respect to security rights in tangible property of a type ordinarily used in more than one State, which were governed by the law of the State in which the grantor was located, and on the other hand with respect to security rights in the same kind of tangible property that were subject to a specialized registration system, which were governed by the law of the State under the authority of which the registry was maintained. If so, he could foresee a potential inconsistency between the suggestion in the note to the Commission and recommendation 202.

7. **Mr. Deschamps** (Canada) said that the law governing priority and the law applicable to enforcement should ideally be the same because difficulties would arise where a State's enforcement rules prevented it from giving full effect to another State's priority rules. In the case of property subject to a specialized registration system, the property would in all likelihood be located in the State under whose authority the register was maintained, so that there would be few cases in which the law applicable to enforcement was different from that of the location of the property.

8. **Mr. Smith** (United States of America) said that, while he was unable to support either the wording as it stood or the Secretariat's suggestion, he had been persuaded by the representative of Canada that there was some virtue in aligning the conflict-of-law rules on enforcement with those on priority.

9. **Mr. Ghia** (Italy) expressed a preference for the existing text, which ensured greater balance and effectiveness of enforcement.

10. **Ms. Okino Nakashima** (Japan), supported by **Mr. Kemper** (Germany), said that she agreed with the representative of Italy. Matters affecting the enforcement of a security right included both substantive and procedural matters, and enforcement might involve either judicial or extrajudicial remedies. She therefore believed, as stated in recommendation 214 (a), that the enforcement of a security right in tangible property should be governed by the law of the forum.

11. **Mr. Bazinas** (Secretariat) said that the words "in most instances" referred to the fact that the place of enforcement of security rights in tangible property was usually – but not always – the place of location of the asset, since it could, for instance, be the place where the registry was maintained. That was also true of certain intangibles, as stipulated in recommendation 107.

12. **Mr. Riffard** (France) said that the Secretariat's suggestion, according to which the place of

enforcement of security rights in tangible property would – in most instances – be the place of location of the asset, was a clearer and more objective option.

13. **Mr. Deschamps** (Canada) said that the term "place of enforcement" was vague since it was not always clear where enforcement took place. For example, a secure creditor in State A might apply to a court in that State to enforce a security right in property located in State B. State A might thus be regarded as the "place of enforcement" although the property was located elsewhere. He proposed including both the existing text and the Secretariat's suggestion as alternative options.

14. **Ms. Kaller** (Austria) expressed support for the existing text. Difficulties would arise if the judgement of a court in one State had to be recognized by courts in other States. Moreover, there were procedural and not just conflict-of-law issues involved. States that did not recognize extrajudicial enforcement would not tolerate a foreign creditor entering a debtor's home to seize property in settlement of a debt.

15. **Mr. Sigman** (United States of America) expressed support for the proposal by the representative of Canada that alternative options should be presented. He also agreed with the point made by the representative of Austria regarding judicial and extrajudicial enforcement. As there was no forum in the context of non-judicial enforcement, a rule was needed that worked equally well for both types of enforcement. While he would not normally support alternative options in a conflict situation, he was willing to make an exception in the current case because the existing recommendation failed to provide the certainty required of a conflicts rule.

16. **Mr. Bazinas** (Secretariat) asked the Committee how a rule referring to the law governing priority would be applied in jurisdictions where there was no concept of priority or, more generally, where priority was not distinguished from creation and third-party effectiveness. He also asked how such a rule would be applied to acquisition financing rights, given that even part of the draft Guide did not use the term "priority" for the non-unitary approach.

17. **Mr. Pereznieto Castro** (Mexico) expressed support for the existing text and noted that the procedural aspects of enforcement dealt with by the courts should not be confused with the law applicable to enforcement. The draft Guide provided sufficient clarity in that regard and expanding it further could lead to confusion.

18. **Mr. Riffard** (France) said that the note to the Commission provided an answer to the question raised by the Secretariat regarding the concept of priority. He proposed deleting the phrase "and the law of that State would govern priority" in the second and third sentences of the note referring to tangible and intangible property respectively.

19. **Mr. Bazinas** (Secretariat) asked whether in that case the reference to the location of the asset for tangible property and to the location of the grantor for intangible property should become a clear-cut rule, or whether provision should be made for exceptions, for instance the law of the State maintaining a registry.

20. **Mr. Deschamps** (Canada) said that amending the text in the manner proposed by the representative of France would create problems because, as the Secretariat had just pointed out, exceptions would need to be made. However, the Committee should not be unduly concerned about the fact that the non-unitary approach in the acquisition financing chapter did not use the term "priority", since the conflict rules would be construed as being applicable to the non-unitary system and the terms used would be adapted accordingly. Thus, the term "priority", interpreted broadly, would cover any situation in which there was a conflict between competing rights.

21. **Mr. Sigman** (United States of America), supported by **Mr. Ghia** (Italy), proposed explaining the broad interpretation of the term "priority" in the commentary.

22. **Ms. Stanivuković** (Serbia) said that it was important to make a distinction between substantive and procedural issues. The term "priority" related to substantive issues, which would be governed by the priority rules already established. Procedural issues, on the other hand, could be governed only by the law of the place of enforcement – the lex fori. She therefore suggested inserting the word "procedural" before "matters" in the chapeau of the existing text of recommendation 214. She also wondered whether subparagraph (b) of the recommendation might be superfluous.

23. **Mr. Bazinas** (Secretariat) drew attention to the commentary on the law applicable to the enforcement of a security right, contained in paragraphs 56 to 58 of document A/CN.9/631/Add.10, which provided clarifications on substantive and procedural matters.

24. **Mr. Sigman** (United States of America) asked whether extrajudicial enforcement was in any way procedural. If not, he proposed that the commentary should state clearly that the distinction between

substance and procedure was relevant only in the case of judicial action and that it was irrelevant in the case of extrajudicial enforcement.

25. **Mr. Bazinas** (Secretariat) said that procedural issues might arise at some point in extrajudicial enforcement and that those issues could be discussed in the commentary.

26. **Mr. Ghia** (Italy) expressed support for the original wording of recommendation 214. Any additional relevant points could be included in the commentary.

27. **The Chairperson** said she took it that the Committee wished to adopt the original version of recommendation 214 and to discuss other approaches, including that contained in the note to the Commission, in the commentary.

28. *It was so decided*.

29. *Recommendation 214 was adopted*.

Recommendation 215

30. **Mr. Voulgaris** (Greece) noted that recommendation 215 reflected the approach adopted in the United Nations Convention on the Assignment of Receivables in International Trade (the United Nations Assignment Convention), namely that the location of the grantor meant the place where the grantor's central administration was exercised. He would have preferred a reference to the location of the branch of the grantor that was most closely connected to the security agreement.

31. *Recommendation 215 was adopted*.

Recommendation 216

32. **Mr. Voulgaris** (Greece) said that the reference to the "time of the creation" of a security right in recommendation 216 (a) was unduly vague and might cause confusion.

33. **Mr. Bazinas** (Secretariat) said that "the time of creation" was dealt with in recommendation 12.

34. **Mr. Cohen** (United States of America) said that the representative of Greece had been right to draw attention to the problems arising from the phrase "time of the creation". A conflict-of-law issue would arise if the States involved had different rules as to what constituted creation. Simply to refer to the time of creation failed to resolve that issue, since in some States a security right could be created orally, while in other States it had to be created in writing. It might be preferable to use a form of words along the following lines: "the time at which it is asserted that the right was created".

35. **Ms. Walsh** (Canada) said that the appropriate term might be "putative creation" of the security right.

36. **Ms. Stanivuković** (Serbia) suggested the phrase "purported creation".

37. **The Chairperson** said she took it that the Committee wished to amend the recommendation along those lines and that it would leave the final wording to the Secretariat.

38. *It was so decided*.

39. *Recommendation 216 was adopted on that understanding*.

Recommendation 217

40. *Recommendation 217 was adopted*.

The meeting was suspended at 11.05 a.m. and resumed at 11.35 a.m.

Recommendation 218

41. **Mr. Deschamps** (Canada) proposed amending recommendation 218 (c) to read: "The rules in subparagraph (a) and (b) of this recommendation do not permit the application of the provisions of the substantive law of the forum on third-party effectiveness or priority of a security right as against the rights of competing claimants." That wording was based on the corresponding provision of the Assignment Convention. The purpose of subparagraph (c) was to make it clear that if the conflict rules of the draft Guide called for the application of a foreign law to third-party effectiveness or priority, the forum court could not invoke public-policy principles to disregard those rules. However, public-policy principles could be invoked to prevent the application of a foreign law to other matters such as creation. If, for instance, the foreign law permitted the creation of a security right in wages and the public-policy rules of the forum did not, those rules could be invoked to disregard the foreign law.

42. **Mr. Bazinas** (Secretariat) asked whether the addition of the word "substantive" was necessary in the light of the rule in recommendation 217. He assumed that the reason for deleting the final phrase of the original version, which read "unless the law of the forum is the applicable law under the provisions of this law on private international law", was that it could be tacitly understood.

43. **Ms. Walsh** (Canada) said that the exclusion of the renvoi rule in recommendation 217 dealt with a different point. The proposed insertion of the word "substantive" in recommendation 218 (c) was intended to clarify that the substantive provisions of the law of the forum on third-party effectiveness or priority of a security right could not be applied. She drew attention to an analogous use of the word "substantive" in recommendation 220.

44. **The Chairperson** pointed out that that the word "law" had been taken to mean "substantive law" throughout the draft Guide. She said she took it that the Committee agreed to adopt the amended version of the recommendation with the deletion of the word "substantive".

45. *It was so decided*.

46. *Recommendation 218, as amended, was adopted*.

Recommendations 219 and 220

47. **The Chairperson** drew attention to the suggestion in a note following recommendation 220 that recommendation 219 (b) should be deleted since it was covered, in substance, by recommendation 220.

48. **Mr. Deschamps** (Canada) expressed support for the proposal.

49. **The Chairperson** said she took it that the Committee wished to delete recommendation 219 (b) and leave it to the Secretariat to make any consequential changes to the wording of recommendations 219 and 220.

50. *It was so decided*.

51. *Recommendations 219 and 220 were adopted on that understanding*.

Recommendations 221 and 222

52. *Recommendations 221 and 222 were adopted*.

Commentary to chapter XIII: Private international law (A/CN.9/631/Add.10)

Paragraph 1

53. *The substance of paragraph 1 was approved*.

Paragraph 2

54. **Mr. Deschamps** (Canada) said that paragraph 2 of the commentary was inconsistent with the principles underlying the pertinent recommendations in the draft Guide. It stated that courts must determine whether a case was domestic or international as a prerequisite for the application of conflict-of-law rules. The criteria on which the court would base that decision were not specified in the commentary, which merely referred to the general rules of private international law of the forum. It followed that a court might decide that a case was not international even if the conflict rule set out in the draft Guide indicated that a foreign law was applicable. Such an approach would be inconsistent with recommendation 218 and the relevant sentences should be deleted from paragraph 2.

55. **Mr. Sigman** (United States of America) expressed strong support for the proposal by the representative of Canada.

56. **Mr. Voulgaris** (Greece) also expressed support for the proposal. He further proposed deleting the terms "forum", "tribunal" and "court", since they gave the impression that contentious issues were invariably involved. He therefore suggested amending the phrase "only if the forum is in a State" in the first sentence to read "only if the transaction is examined in a State".

57. **The Chairperson** said that, while the terms to which the representative of Greece objected were not ideal, she doubted whether there were any generally acceptable alternative terms. However, she took it that the Committee wished to leave it to the Secretariat to redraft the paragraph in the light of the proposals made by the representatives of Canada and Greece.

58. *It was so decided*.

59. *The substance of paragraph 2 was approved subject to the agreed amendments*.

Paragraphs 3 to 13

60. *The substance of paragraphs 3 to 13 was approved*.

Paragraph 14

61. **Mr. Voulgaris** (Greece) proposed that paragraph 14 should be reviewed to avoid any implication that all legal systems adopted an identical position on the application of the law of the location of the asset to the creation of a security right as between the parties.

62. *The substance of paragraph 14 was approved subject to the agreed amendment*.

Paragraphs 15 to 34

63. *The substance of paragraphs 15 to 34 was approved*.

Paragraphs 35 to 47

64. **Ms. McCreath** (United Kingdom), drawing attention to the links between paragraphs 35 to 40 and recommendation 204, proposed including cross-references in those paragraphs along the lines of those agreed in respect of the recommendation. Moreover, as overlapping issues pertaining to financial contracts remained pending, she proposed that approval of paragraphs 35 to 40 should be deferred.

65. **Mr. Wezenbeek** (Observer for the European Union) expressed support for the points made by the representative of the United Kingdom. The issue addressed in recommendation 204 was the subject of intense debate in the European Union in the context of the European Commission proposal for a regulation on the law applicable to contractual obligations (Rome I). Given the highly complex nature of the issue, the discussions were likely to continue for some time.

66. **Mr. Bazinas** (Secretariat) said that UNCITRAL had taken six years to negotiate the United Nations Assignment Convention, which had been adopted by the General Assembly. The Commission had therefore resolved the issue of the law governing receivables versus the law of the assignor. The adoption of a consistent rule in the draft Guide was the product of yet another six years of negotiations.

67. No reference had been made in the recommendations or the commentary to the proposed regulation on the law applicable to contractual obligations (Rome I) because it had not been finalized. The only draft available adopted the assignor's law with certain differences in the definition of the location rule. Moreover, the only official statement in that regard at the Commission's thirty-ninth session had been to the effect that the European Commission shared UNCITRAL's concerns regarding the potential impact of the adoption of a different law on receivables financing as a whole and was prepared to develop a consistent approach so that a uniform conflict-of-law rule could be adopted. Although UNCITRAL appreciated that the finalization of the Rome I document was a complex and time-consuming process, it could not be expected to amend rules adopted after lengthy negotiations to achieve consistency with a draft instrument. While it had always been open to regional harmonization efforts, it could not be bound by such efforts inasmuch as the United Nations and UNCITRAL were required to represent the international community as a whole.

68. **Ms. McCreath** (United Kingdom) said that the aim of the current discussion was to reach consensus on the best possible draft Guide. To that end, efforts must be made to adapt to the needs of a changing global environment. The receivables financing industry in the United Kingdom was arguably the largest in Europe and operated on the basis of a very different conflicts law from that proposed in the draft Guide at present.

The meeting rose at 12.30 p.m.