



General Assembly

Distr.: Limited
16 November 2006

Original: English

**United Nations Commission
on International Trade Law**
Working Group VI (Security Interests)
Twelfth session
New York, 12-16 February 2007

Draft legislative guide on secured transactions

Note by the Secretariat

Background remarks

1. At its thirty-third session, in 2000, the United Nations Commission on International Trade Law considered a report of the Secretary-General on possible future work in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck in that regard, however, to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable. Furthermore, in order to ensure the optimal benefits from law reform, including financial-crisis prevention, poverty reduction and facilitation of debt financing as an engine for economic growth, any effort on security interests would need to be coordinated with efforts on insolvency law.¹

2. At its thirty-fourth session, in 2001, the Commission considered a note by the Secretariat on security interests (A/CN.9/496). At that session, the Commission agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic



and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.² As to the form of work, the Commission considered that a model law might be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include, where feasible, model legislative provisions.³

3. After discussion, the Commission decided to entrust a working group with the task of developing “an efficient legal regime for security rights in goods involved in a commercial activity, including inventory, to identify the issues to be addressed, such as the form of the instrument, the exact scope of the assets that can serve as collateral, ...”.⁴ Emphasizing the importance of the matter and the need to consult with representatives of the relevant industry and practice, the Commission recommended that a two- to three-day colloquium be held.⁵

4. At its first session (New York, 20-24 May 2002), Working Group VI (Security Interests) had before it a first, preliminary draft legislative guide on secured transactions, prepared by the Secretariat (A/CN.9/WG.VI/WP.2 and Add.1-12), a report on an UNCITRAL-Commercial Finance Association international colloquium, held in Vienna from 20 to 22 March 2002 (A/CN.9/WG.VI/WP.3), and comments by the European Bank for Reconstruction and Development (A/CN.9/WG.VI/WP.4). At that session, the Working Group considered chapters I to V and X of the draft legislative guide (A/CN.9/WG.VI/WP.2 and Add.1-5 and 10), and requested the Secretariat to revise those chapters (A/CN.9/512, para. 12). At the same session, the Working Group considered suggestions for the presentation of modern registration systems in order to provide the Working Group with information necessary to address concerns expressed with respect to registration of security rights in movable property (see A/CN.9/512, para. 65). In addition, the Working Group agreed on the need to ensure, in cooperation with Working Group V (Insolvency Law), that issues relating to the treatment of security rights in insolvency proceedings would be addressed consistently with the conclusions of Working Group V on the intersection of the work of Working Group V and Working Group VI (see A/CN.9/512, para. 88; see also A/CN.9/511, paras. 126 and 127).

5. At its thirty-fifth session, in 2002, the Commission had before it the report of Working Group VI (Security Interests) on the work of its first session (A/CN.9/512). The Commission expressed its appreciation to the Working Group for the progress made in its work. It was widely felt that, with the legislative guide, the Commission had a great opportunity to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately

friendly relations among States.⁶ In that connection, the Commission noted with satisfaction that the project had attracted the attention of international, governmental and non-governmental organizations and that some of those took an active part in the deliberations of the Working Group. The comments submitted to Working Group VI, in particular by the European Bank for Reconstruction and Development (A/CN.9/WG.VI/WP.4), were mentioned as an indication of that interest.

6. At that session, the feeling was widely shared that the timing of the Commission's initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission's own initiative in the field of insolvency law. In that connection, the Commission noted with particular satisfaction the efforts undertaken by Working Group V (Insolvency Law) and Working Group VI towards coordinating their work on a subject of common interest, such as the treatment of security rights in the case of insolvency proceedings. Strong support was expressed for such coordination, which was generally thought to be of crucial importance for providing States with comprehensive and consistent guidance with respect to the treatment of security rights in insolvency proceedings. The Commission endorsed a suggestion made to revise the insolvency chapter of the draft legislative guide on secured transactions in light of the core principles agreed by Working Groups V and VI (see A/CN.9/511, paras. 126 and 127 and A/CN.9/512, para. 88). The Commission stressed the need for continued coordination and requested the Secretariat to consider organizing a joint session of the two Working Groups in December 2002.⁷

7. After discussion, the Commission confirmed the mandate given at its thirty-fourth session to Working Group VI to develop an efficient legal regime for security rights in goods, including inventory. The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.⁸

8. At its second session (Vienna, 17-20 December 2002), the Working Group considered chapters VI (Filing system), VII (Priority) and IX (Default and enforcement) (A/CN.9/WG.VI/WP.2/Add.6, 7 and 9) of the first preliminary draft guide on secured transactions, prepared by the Secretariat. At that session, the Working Group requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/531, para. 15). In conjunction with that session and in accordance with suggestions made at the first session of the Working Group (see A/CN.9/512, para. 65), an informal presentation of the registration systems of security rights in movable property of New Zealand and Norway was held. Immediately before the second session of Working Group VI, Working Groups V (Insolvency Law) and VI (Security Interests) held their first joint session (Vienna, 16 and 17 December 2002), during which the revised version of former chapter X (new chapter IX; A/CN.9/WG.VI/WP.6/Add.5) on insolvency was considered. At the joint session, the Secretariat was requested to prepare a revised version of that chapter (see A/CN.9/535, para. 8).

9. At its third session (New York, 3-7 March 2003), Working Group VI considered chapters VIII (Pre-default rights and obligations of the parties), XI (Conflict of laws and territorial application) and XII (Transition) of the first preliminary draft guide on secured transactions (A/CN.9/WG.VI/WP.2/Add.8, 11

and 12) and chapters II (Basic approaches to security) and III (Creation) of the second version of the draft guide (A/CN.9/WG.VI/WP.6/Add.2 and 3) and requested the Secretariat to prepare revised versions of those chapters (A/CN.9/532, para. 13). In conjunction with that session, an informal presentation was made of the recently completed secured transactions law in Slovakia, which was supported by the World Bank and by the European Bank for Reconstruction and Development.

10. At its thirty-sixth session, in 2003, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its second and third sessions (A/CN.9/531 and A/CN.9/532), as well as the report of the first joint session of Working Groups V and VI (A/CN.9/535). The Commission commended Working Group VI for the progress in its work and expressed its appreciation to Working Group V and Working Group VI for the coordination of their work in relation to the treatment of security rights in insolvency proceedings. The Commission also noted with appreciation the presentation of modern registration systems of security rights in movable property.⁹

11. In addition, the Commission emphasized the importance of coordination with organizations with interest and expertise in the field of secured transactions law, such as the International Institute for the Unification of Private law (Unidroit), the Hague Conference on Private International Law, the World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development and the Asian Development Bank. Reference was made to the current work of Unidroit on security rights in securities, to the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* to the extent they concerned secured transactions, to the Model Law on Secured Transactions and the "Core principles for a secured transactions law" of the European Bank for Reconstruction and Development, to the Asian Development Bank's *Guide to Movable Registries* and to the Model Inter-American Law on Secured Transactions of 2002 prepared by the Organization of American States. Reference was also made to the need to coordinate with the Hague Conference with respect to the conflict-of-laws chapter of the draft legislative guide on secured transactions, in particular with respect to the law applicable to the enforcement of security rights in the case of insolvency.¹⁰

12. With respect to the scope of work, the Commission noted suggestions that the Working Group should consider covering, in addition to goods (including inventory), trade receivables, letters of credit, deposit accounts and intellectual property rights in view of their economic importance as security for credit. As to the substance of the draft legislative guide, the Commission noted statements that, while the draft guide should discuss various workable approaches, it should also include recommendations and that, if alternative recommendations had to be prepared, their relative merits, in particular for developing countries and for countries with economies in transition, should also be discussed.¹¹

13. After discussion, the Commission confirmed the mandate given at its thirty-fourth session to Working Group VI to develop an efficient legal regime for security rights in goods, including inventory, and its decision at its thirty-fifth session that the mandate should be interpreted widely to ensure an appropriate work product, which should take the form of a legislative guide. The Commission also confirmed that it was up to the Working Group to consider the exact scope of its work and, in particular, whether trade receivables, letters of credit, deposit accounts and

intellectual and industrial property rights should be covered in the draft legislative guide.¹²

14. At its fourth session (Vienna, 8-12 September 2003), the Working Group considered chapters I (Introduction), II (Key objectives), IV (Creation) and IX (Insolvency) and paragraphs 1 to 41 of chapter VII (Priority) (A/CN.9/WG.VI/WP.6/ Add.1 and 3 and A/CN.9/WG.VI/WP.9/Add.3 and 6) and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/543, para. 15).

15. At its fifth session (New York, 22-25 March 2004), the Working Group considered the summary and recommendations of chapters V (Publicity), VII (Priority) and X (Conflict of laws) (A/CN.9/WG.VI/WP.9/Add.2, 3 and 7), and requested the Secretariat to prepare revised versions of those chapters (see A/CN.9/549, para. 16).

16. At their second joint session (New York, 26 and 29 March 2004), Working Groups V (Insolvency Law) and VI (Security Interests) considered the treatment of security rights in the draft legislative guide on insolvency law on the basis of document A/CN.9/WG.V/WP.71 (see A/CN.9/550, para. 11).

17. At its thirty-seventh session, in 2004, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its fourth and fifth sessions (A/CN.9/543 and A/CN.9/549), as well as the report of the second joint session of Working Groups V and VI (A/CN.9/550). The Commission commended Working Group VI for the progress achieved thus far and expressed its appreciation to Working Groups V and VI for the progress made during their second joint session, at which they had considered pending issues of common interest.¹³

18. In addition, the Commission noted with appreciation the progress made by the Working Group in the coordination of its work on conflict of laws with the Hague Conference on Private International Law and in particular the plans for a joint meeting of experts. The Commission also commended the efforts to coordinate with Unidroit, which was preparing a text on security rights in securities. The Commission also expressed its appreciation for the coordination with the World Bank, which was preparing principles and guidelines for effective insolvency and creditor rights systems, and in particular for the agreement that the World Bank text would form with the draft legislative guide on secured transactions a single international standard.¹⁴

19. The Commission noted with interest that a preliminary consolidated set of recommendations might be ready by early 2005. The Commission also welcomed the preparation of additional chapters on various types of asset, such as negotiable instruments and documents, bank accounts, letters of credit and intellectual property rights. In that connection, while the importance of those types of asset was generally recognized, it was stated that including them in the draft guide should not be at the expense of slowing down work with respect to the core assets within the scope of the draft guide (i.e. goods, including inventory, and receivables).¹⁵

20. After discussion, the Commission confirmed the mandate given to Working Group VI at the thirty-fourth session of the Commission and subsequently confirmed at its thirty-fifth and thirty-sixth sessions. The Commission also

requested the Working Group to expedite its work so as to submit the draft guide to the Commission for final adoption as soon as possible and, hopefully, in 2006.¹⁶

21. At its sixth session (Vienna, 27 September – 1 October 2004), the Working Group considered chapters I (Introduction), II (Key objectives), III (Basic approaches to security), IV (Creation), V (Effectiveness against third parties), VII (Pre-default rights and obligations of the parties), VIII (Default and enforcement), X (Conflict of laws) and XI (Transition) (A/CN.9/WG.VI/WP.9/Add.1, 4 and 8, A/CN.9/WG.VI/WP.11/Add.1 and 2, A/CN.9/WG.VI/WP.13 and A/CN.9/WG.VI/WP.14 and Add.2 and 4) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/570, para. 8). At that session, the Working Group noted with appreciation that the conflict-of-laws chapter of the guide was being prepared in close cooperation with the Hague Conference on Private International Law (see A/CN.9/570, para. 75).

22. At its seventh session (New York, 24-28 January 2005), the Working Group considered chapters X (Conflict of laws), XII (Acquisition financing devices) and XVI (Security rights in bank accounts) (A/CN.9/WG.VI/WP.16/Add.1, A/CN.9/WG.VI/WP.17 and Add.1 and A/CN.9/WG.VI/WP.18 and Add.1) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see A/CN.9/574, para. 8).

23. At its thirty-eighth session, in 2005, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its sixth and seventh sessions (A/CN.9/570 and A/CN.9/574). The Commission commended the Working Group for the progress achieved thus far, noted with interest the progress made by the Working Group in the coordination of its work with the Hague Conference on Private International Law, Unidroit, the World Bank and the World Intellectual Property Organization (WIPO) and requested the Working Group to expedite its work so as to submit the draft legislative guide to the Commission, at least for approval in principle, in 2006, and for final adoption in 2007.¹⁷

24. At its eighth session (Vienna, 5-9 September 2005), the Working Group considered recommendations in chapters VII (Pre-default rights and obligations of the parties), VIII (Default and enforcement), IX (Insolvency), X (Acquisition financing devices) and XI (Conflict of laws) (A/CN.9/WG.VI/WP.21/Add.2-5). It also considered terminology and recommendations related to (a) negotiable instruments and negotiable documents (definitions (w) and (x), as well as recommendations 3 (d) and 24 (see A/CN.9/WG.VI/WP.21 and A/CN.9/WG.VI/WP.22/Add.1); (b) proceeds from a drawing under an independent undertaking (definitions (y), (z), (aa) and (bb), as well as recommendations 25, 49, 62, 106 and 138) (see A/CN.9/WG.VI/WP.21/Add.1 and 5 and A/CN.9/WG.VI/WP.22/Add.1); and (c) intellectual property rights (definition (dd), and recommendation 3 (h)) (see A/CN.9/WG.VI/WP.21 and A/CN.9/WG.VI/WP.22/Add.1) (see A/CN.9/588, para. 8).

25. At its ninth session (New York, 30 January – 3 February 2006), the Working Group considered recommendations in chapters V (Effectiveness against third parties), VI (Priority) and X (Acquisition financing devices) (see A/CN.9/WG.VI/WP.24/Add.3-5) and requested the Secretariat to revise those chapters to reflect the deliberations and decisions of the Working Group (see

A/CN.9/593, para. 8). At that session, in view of the expectation of the Commission to approve in principle the substance of the recommendations of the draft guide at its thirty-ninth session, which was scheduled to take place in New York from 19 June to 7 July 2006, the Working Group agreed to hold an extra session, its tenth session, in New York from 1 to 5 May 2006 (see A/CN.9/593, para. 97).

26. At its tenth session (New York, 1-5 May 2006), the Working Group considered recommendations on security rights in receivables, negotiable instruments, negotiable documents, rights to payment of funds credited to bank accounts, rights to proceeds under independent undertakings, as well as recommendations on pre-default rights and obligations of the parties and recommendations 88 to 111 on default and enforcement (see A/CN.9/WG.VI/WP.24 and Add.1 and 2 and A/CN.9/WG.VI/WP.26 and Add.1-3 and Add.3/Corr.1). The Secretariat was requested to revise those recommendations to reflect the deliberations and decisions of the Working Group (see A/CN.9/603, para. 8). At that session, the Working Group noted that the Commission was expected to approve in principle the substance (i.e. the policy, not the formulation) of the recommendations of the draft guide at its thirty-ninth session (New York, 19 June – 7 July 2006).

27. At its thirty-ninth session, in 2006, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its eighth, ninth and tenth sessions (A/CN.9/588, A/CN.9/593 and A/CN.9/603 respectively). The Commission expressed its satisfaction with the progress achieved thus far by Working Group VI (Security Interests) in developing a legislative guide on secured transactions and approved, in substance, the recommendations contained in documents A/CN.9/WG.VI/WP.21/Add.3, A/CN.9/WG.VI/WP.24 and Add.5, A/CN.9/WG.VI/WP.26/Add.4-8 and A/CN.9/611 and Add.1 and 2. After conclusion of its discussion of the recommendations of the draft guide, the Commission expressed its appreciation to the Working Group for the results achieved thus far in the development of the draft guide and noted that the views expressed and the suggestions made by the Commission would be taken into account in the subsequent version of the draft guide.¹⁸

28. At that session, the Commission noted that, as the draft guide dealt with security rights in intellectual property rights (such as patents, trademarks and copyrights) in general terms, more work might be required to provide guidance to States in that regard.¹⁹ After discussion, the Commission requested the Secretariat to prepare, in cooperation with relevant organizations and in particular WIPO, a note discussing the scope of future work of the Commission on security rights in intellectual property rights. In order to obtain the input of experts in Government and the private sector, the Commission requested the Secretariat to organize a colloquium.²⁰

Notes

¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

² *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 351.

³ *Ibid.*, para. 357.

⁴ *Ibid.*, para. 358.

- ⁵ Ibid., para. 359.
 - ⁶ Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 202.
 - ⁷ Ibid., para. 203.
 - ⁸ Ibid., para. 204.
 - ⁹ Ibid., *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 217.
 - ¹⁰ Ibid., para. 218.
 - ¹¹ Ibid., paras. 220 and 221.
 - ¹² Ibid., para. 222.
 - ¹³ Ibid., *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 75.
 - ¹⁴ Ibid., para. 76.
 - ¹⁵ Ibid., para. 77.
 - ¹⁶ Ibid., para. 78.
 - ¹⁷ Ibid., *Sixtieth Session, Supplement No. 17 (A/60/17)*, paras. 186 and 187.
 - ¹⁸ Ibid., *Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 13 and 78.
 - ¹⁹ Ibid., paras. 79-85.
 - ²⁰ Ibid., para. 86.
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