



General Assembly

Distr.: General
14 December 2007

Original: English

United Nations Commission on International Trade Law Resumed fortieth session

Summary record of the 860th meeting

Held at the Vienna International Centre, Vienna, on Wednesday, 12 December 2007, at 2 p.m

Chairperson: Ms. Sabo (Vice-Chairperson) (Canada)

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Adoption of a draft UNCITRAL Legislative Guide on Secured Transactions and possible future work (*continued*)

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V.07-88277 (E)



The meeting was called to order at 2.05 p.m.

Adoption of a draft UNCITRAL Legislative Guide on Secured Transactions and possible future work (A/CN.9/617, 620, 631 and Add. 1-11, and 637 and Add.1-8; A/CN.9/XL/CRP.10 and 11 and Add.1) *(continued)*

Recommendations (A/CN.9/637 and A/CN.9/XL/CRP.10) (continued)

Proposed amendment to recommendation 5 (continued)

1. **The Chairperson** invited the Commission to resume its consideration of the amendment to recommendations proposed by the delegation of the United States in document A/CN.9/XL/CRP.10.

2. **Mr. Bazinas** (Secretariat) asked whether it might be sufficient for the commentary to state that in cases where tangible assets that became attached to immovable property were treated as immovable property, recommendation 5 should be understood as excluding such assets. The clarification would be unnecessary in a legal system where a tangible asset remained movable property to the extent that it could be easily separated from the immovable property.

3. **Mr. Sigman** (United States of America) said that while he would welcome such an addition to the commentary, it failed to address all the points that arose. For instance, some recommendations discussed the remedies after default available to a person with a security right in an asset that became an attachment to immovable property. Such provisions clearly affected persons with an interest in immovable property.

4. **Mr. Macdonald** (Canada) expressed support for the proposed amendment because some recommendations could have a collateral effect on rights in immovable property. He proposed searching the draft Guide for all occurrences of the word “immovable” and listing those recommendations.

5. **The Chairperson** said she took it that the Commission wished to amend the recommendation so that the first sentence merely stated that the law should not apply to immovable property, and the second sentence listed all recommendations that might affect rights in immovable property.

6. *It was so decided.*

Proposed amendments to recommendation 40

7. **Mr. Sigman** (United States of America) said that the purpose of the proposed amendments was to bring the structure of recommendation 40 into line with that of recommendation 45 which dealt with similar circumstances. In both cases a security right was effective against third parties for a fixed period of time and continued to be effective thereafter if a certain condition was met. In addition, the proposed new version of the recommendation was prefaced by the phrase “The law should provide that” and the word “or” before “do not consist of” was replaced by “and”, which was more logical.

8. **Mr. Deschamps** (Canada) expressed support for the proposed amendments.

9. *The proposed amendments to recommendation 40 were adopted.*

Proposed amendments to recommendation 54 (h)

10. **Mr. Sigman** (United States of America) noted that the provision stating the required content of a notice in the registry (recommendation 57 (a)) referred to the “identifier” rather than to the “name” of the grantor. He therefore proposed replacing the word “name” with “identifier” in recommendation 54 (h). Secondly, he proposed amending “or according to some other reliable identifier of the grantor” to read “and according to any other reliable identifying information specified in the law”. There were many countries where millions of people had the same given name and family name. It would be reasonable in such cases to use the name as a basic identifier but to add, for instance, an identity or health insurance number.

11. **Ms. McCreath** (United Kingdom) proposed replacing “reliable identifying information specified in the law” with something along the lines of “reliable and legally enforceable identifying information”.

12. **Mr. Deschamps** (Canada) expressed support for the proposal by the representative of the United States. However, he proposed inserting the words “that may be” after the word “information” to make it clear that the provision of such information was not mandatory.

13. **Mr. Sigman** (United States of America) said that the phrase “specified in the law” had been included because it could not be left to registrants to decide what kind of additional identifier was acceptable. The

registry should establish a rule governing second identifiers in cases where, for instance, given and family names were deemed to be insufficient. It was not mandatory for a jurisdiction to do so, but where the registry established such a rule, both identifiers should be indexed and retrievable. He understood the intention of the proposal by the representative of Canada, which he thought had been covered by the word “any” before “other reliable identifying information”.

14. **Mr. Umarji** (India) said that the use of the word “and” rather than “or” with respect to the other identifying information was misleading because it gave the impression that both the identifier and the other identifying information had to be checked in all circumstances.

15. **Mr. Sigman** (United States of America) said that in that case the use of the word “or” was acceptable.

16. **Mr. Bazinas** (Secretariat) drew attention to recommendation 57 (a), which stated that the identifier of the grantor satisfying the standards laid down in recommendations 58 to 60 was required in the notice; recommendation 58, which referred to the grantor’s correct identifier; and recommendation 59, which stated that where the grantor was a natural person, the identifier of the grantor for the purposes of effective registration was the grantor’s name and that, where necessary, additional information, such as the birth date or identity card number, should be required to uniquely identify the grantor. The term “identifier” thus already included the name and additional information. He also asked the representative of the United States whether the law referred to in the phrase “specified in the law” was secured transactions law or some other branch of law.

17. **Mr. Sigman** (United States of America) proposed ensuring that the wording of recommendation 54 (h) and recommendations 57 to 59 was consistent.

18. **The Chairperson** suggested requesting the Secretariat to review the wording of the recommendations mentioned by the representative of the United States to ensure that the use of the word “identifier” was consistent.

19. *It was so decided.*

Proposed amendments to recommendation 61

20. **Mr. Sigman** (United States of America) said that the first sentence of recommendation 61 referred to a change in “the identifier of the grantor used in the notice”, whereas what had changed was the grantor’s identifier as such. His delegation therefore proposed amending the first part of the sentence to read:

“The law should provide that, if, after a notice is registered, the identifier of the grantor changes and as a result the grantor’s identifier provided in the notice does not meet the standard ...”.

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

22. *The first proposed amendment to recommendation 61 was adopted.*

23. **Mr. Sigman** (United States of America) proposed inserting the phrase “after the change in the grantor’s identifier but” before the words “before registration of the amendment” in subparagraphs (a) and (b) of recommendation 61. He believed that the additional wording was consistent with the previous day’s policy discussion regarding the need to protect innocent parties that relied on the record. If it were omitted, a person that bought an encumbered asset from a grantor, taking it subject to a security right at the time when the grantor’s original identifier was valid, would suddenly, if the grantor changed its identifier, take the asset free of the security right even though it had not been misled by the identifier on the public record. However, if the Commission considered that the proposal amounted to a substantive amendment, his delegation was willing to withdraw it.

24. **Ms. Walsh** (Canada) said that her delegation did not view the amendment as a substantive change but as a clarification. It therefore supported the proposal.

25. **Ms. Stanivuković** (Serbia) also expressed support for the proposal.

26. *The second proposed amendment to recommendation 61 was adopted.*

Proposed amendment to recommendation 64

27. **Mr. Sigman** (United States of America) said that his delegation proposed repeating the words “before and after” before “conclusion of the security agreement” in order to make the meaning crystal clear. The amended version would read: “The law should provide that a notice with respect to a security right may be registered before or after creation of the security right, or before or after conclusion of the security agreement.”

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

29. **Mr. Ginting** (Observer for Indonesia) asked how a security right could be registered before conclusion of the security agreement, since the agreement constituted the basis for the creation of the security right. He therefore proposed deleting the word “before

or” in the phrase “before or after conclusion of the security agreement”.

30. **Mr. Bazinas** (Secretariat) said that the Commission had considered cases in which the lender, following negotiations with the borrower, registered a notice prior to the conclusion of the security agreement. The notice did not create a security right but once the security agreement was concluded, it was backdated to the time of registration of the notice. If no security agreement was concluded, the registration was without effect and the grantor could take steps to ensure its immediate deletion from the record.

31. **The Chairperson** said that, if she heard no objection, she would take it that the Commission wished to adopt the proposed amendment to recommendation 64.

32. *The proposed amendment to recommendation 64 was adopted.*

Proposed amendment to recommendation 66

33. **Mr. Sigman** (United States of America) proposing replacing the word “time” with “duration” in the following phrase in the third sentence: “If the law specifies the time of effectiveness of the registration”.

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

35. *The proposed amendment to recommendation 66 was adopted.*

Insertion of a new recommendation after recommendation 76

36. **Mr. Smith** (United States of America) said that his delegation had decided, in the light of informal consultations, to withdraw the proposal contained in document A/CN.9/XL/CRP.10 to insert a new recommendation after recommendation 76. However, it now proposed addressing the problem in the commentary.

37. The Commission had discussed the situation in which a grantor gave a security right to a secured creditor that was effective against third parties, but then sold the encumbered asset to a buyer that obtained the encumbered asset subject to the security right. Where that buyer also had a secured creditor which had made its security right effective against third parties with respect to the buyer, a priority conflict with respect to the encumbered asset would arise between the grantor’s secured creditor and the buyer’s secured creditor. The draft Guide’s priority rule in recommendation 73 was designed to resolve such

conflicts, but if both secured creditors had filed a notice, the priority dispute would be resolved under recommendation 73 in favour of the secured creditor that had filed the notice first. That outcome made no sense in a situation where either the buyer’s or the grantor’s secured creditor might have filed first. The proposed new recommendation that his delegation had withdrawn had sought to resolve the conflict in favour of the grantor’s secured creditor provided that the security right concerned remained effective against third parties. However, given the complexity of the issue, his delegation was now requesting that the commentary should make clear that recommendation 73 was intended to apply to priority disputes where the competing security rights were granted by the same grantor.

38. **Mr. Bazinas** (Secretariat) said that the issue had been discussed on a number of occasions. The commentary already explained that a priority conflict arose only where competing claimants had taken a security right from the same person. As the conflict just described by the representative of the United States was not a priority conflict under the draft Guide, it was unclear to him what should be inserted in the commentary. A reference might perhaps be made to general property law principles.

39. **Mr. Deschamps** (Canada) noted that “priority” was defined in the draft Guide as “the right of a person to derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant”. It was also clear that the definition of a competing claimant referred to competition between two or more persons that derived their interest from the same grantor. Moreover, the chapter on creation of a security right made it clear that a security right could not provide a secured creditor with more rights than the grantor enjoyed (*nemo dat quod non habet*). If those principles were to be made abundantly clear, the words “claimants holding” could be inserted in the first line of recommendation 73, which would then read: “The law should provide that priority between competing claimants holding security rights ...”.

40. **Mr. Marca Paco** (Bolivia) said that his delegation was opposed to any amendment to recommendation 73.

41. **The Chairperson** suggested that the commentary should explain that recommendation 73 did not apply to priority conflicts between secured creditors that took a security right in an asset from different grantors. Accordingly, where a secured creditor took a security right in an encumbered asset from a buyer of the asset, it took the asset subject to the security right granted in

it by the seller, in accordance with the *nemo dat quod non habet* principle.

42. *It was so decided.*

Insertion of a new recommendation after recommendation 79

43. **Mr. Smith** (United States of America) said that his delegation was withdrawing its proposal contained in document A/CN.9/XL/CRP.10 to insert a new recommendation after recommendation 79 because it would amount to a substantive change. However, it now proposed that the issue should be addressed in the commentary.

44. If a grantor that had created a security right in an encumbered asset subsequently sold the asset, the sale was subject to the secured creditor's security right. However, if the secured creditor knew of the sale and took all steps necessary to ensure that the security right would continue, but nevertheless continued to lend money so that the total amount of secured obligations continued to increase even though all credit was now going to the grantor, some jurisdictions considered that there should be a cut-off point at which the transferee would take the asset free of the security right. Under the draft Guide, all future credit extended to the grantor under such circumstances continued to be secured by the encumbered asset.

45. **Mr. Deschamps** (Canada) proposed explaining in the commentary that States had two options. They could either apply the rule as it stood, so that the buyer would take the asset subject to a security right that would continue to guarantee all obligations, or they could opt for the alternative proposed by the representative of the United States.

46. **Mr. Smith** (United States of America) said he agreed that both options should be explained. However, the commentary should support the rule contained in the draft Guide.

47. **The Chairperson** said she took it that the Commission supported that approach.

48. *It was so decided.*

Proposed amendment to recommendation 108

49. **Mr. Smith** (United States of America) said that recommendation 108, as currently worded, required the secured creditor to preserve not only the encumbered asset itself but also its value. The secured creditor could easily preserve an asset such as a gold bar by making sure that it was not stolen, but it was unclear what action could be taken to preserve its value if the

price of gold fell. As his delegation doubted whether it was the intention of the Commission to impose that kind of burden on the secured creditor, it proposed deleting the words "and its value" at the end of the recommendation. However, it was prepared to withdraw the proposed amendment if it had misinterpreted the rule.

50. **The Chairperson** said she feared that the amendment would amount to a substantive change.

51. **Mr. Kohn** (Observer for the Commercial Finance Association) said that there were many situations in which it was impossible for a secured creditor to preserve the value of an asset. His Association therefore considered that the amendment proposed by the United States was sensible in practical terms.

52. **Mr. Voulgaris** (Greece) said that he was opposed to the amendment because the party in possession of an encumbered asset was required only to take "reasonable steps" to preserve the value of the asset.

53. **Mr. Marca Paco** (Bolivia) also expressed a preference for retaining the text as it stood.

54. **Mr. Deschamps** (Canada) referred by way of example to the case of a promissory note pledged to a secured creditor. Under the laws of many jurisdictions, the note would have to be presented for payment on its maturity date in order to preserve the holder's recourse against an endorser. Recommendation 108, as currently worded, seemed to require the pledgee of the promissory note to present it for payment on maturity. However, the secured creditor would have the option in many jurisdictions of protecting itself by negotiating a waiver in the security agreement. If the parties had not negotiated such a waiver, the default rule should perhaps be that set out in recommendation 108.

55. **Mr. Pendón Meléndez** (Spain) pointed out that the term "value" had many different shades of meaning, not just in economic terms or in terms of profitability, but also in legal and social terms. Those shades of meaning also had a bearing on the idea of "preservation". He was therefore in favour of maintaining the recommendation as it stood.

56. **Mr. Porreca** (Italy) expressed the view that deletion of the reference to the asset's value would defeat the purpose of recommendation 108.

57. **Mr. Schneider** (Germany) said that his delegation was strongly opposed to any amendment. If the encumbered asset was a car, for instance, and the grantor retained possession, it was clearly liable for payment of insurance, repairs and other similar costs.

58. **Mr. Sigman** (United States of America) said that his delegation withdrew its proposed amendment but proposed that the commentary should reflect the discussion, explaining that the rule applied only to security rights in tangible assets subject to possession.

59. **The Chairperson** said she took it that the Commission agreed that the commentary should include that explanation.

60. *It was so decided.*

The meeting was suspended at 3.45 p.m. and resumed at 4.05 p.m.

Proposed amendment to recommendation 109

61. **Mr. Sigman** (United States of America) noted that the question of what happened when a secured obligation was extinguished was addressed in recommendations 69, 109 and 137. Recommendation 69 dealt with cases in which the secured creditor was obliged to terminate its notice and spelt out the grantor's correlative right in that regard. Recommendation 109 dealt with the physical return of an encumbered asset if it was in the possession of the secured creditor at the time of extinction of the obligation, and recommendation 137 dealt with enforcement provisions, indicating how to achieve extinction of the security right. Recommendations 69 and 109 both simply contained the phrase "extinguished by full payment or otherwise". The third sentence of recommendation 137, on the other hand, contained in addition the phrase "[i]f all commitments to extend credit have terminated". His delegation was proposing a slight different amendment to that contained in document A/CN.9/XL/CRP.10, namely to insert the phrase "as provided in the last sentence of recommendation 137" after the word "extinguished" in recommendations 69 and 109.

62. **Mr. Umarji** (India) expressed support for the proposed amendment, which would be applicable, in particular, to banks' practice of extending revolving credit.

63. **Mr. Riffard** (France) said that he had no objection to the substance of the proposed amendment. However, his delegation would prefer to amend recommendation 109 to read:

"The secured creditor must return an encumbered asset in its possession if, all commitments to extend credit having been terminated, the security right has been extinguished by full payment or otherwise."

64. **Mr. Deschamps** (Canada) said that his delegation would be prepared to support either amendment.

65. **Mr. Sigman** (United States of America) indicated that the amendment proposed by the representative of France would be acceptable to his delegation, provided that recommendation 69 was also brought into conformity with recommendation 137.

66. **The Chairperson** said that, if she heard no objection, she would take it that the Commission agreed to adopt the amendment proposed by the representative of France and to leave it to the Secretariat to ensure that the three recommendations were consistent.

67. *It was so decided.*

Proposed amendment to recommendation 124 (b)

68. **Mr. Sigman** (United States of America) said that the purpose of the proposed amendment to recommendation 124 (b) was to make it clear that the phrase "acquired from or created by the transferor" referred to the security right and not to the rights of the transferee. His delegation therefore proposed deleting the words "acquired from".

69. **Mr. Ginting** (Indonesia) expressed support for the proposed amendment. However, to prevent misunderstanding, he proposed restructuring the second half of the sentence to read: "... right to receive the proceeds created by the transferor or any prior transferor under the independent undertaking".

70. **The Chairperson** pointed out that the draft Guide had defined "proceeds under an independent undertaking", the phrase contained in the original version of the subparagraph, in its "Terminology" section. She took it that the Commission wished to adopt the amendment proposed by the delegation of the United States.

71. *The proposed amendment to recommendation 124 (b) was adopted.*

Proposed amendment to recommendation 156

72. **Mr. Sigman** (United States of America) said that his delegation was withdrawing its proposal in document A/CN.9/XL/CRP.10 to delete recommendation 156 but remained concerned about its implications. Recommendations 153 to 155 described the process whereby a secured creditor proposed to acquire encumbered assets in satisfaction of a secured obligation. Moreover, under recommendation 156, the grantor was given the option of proposing to the secured creditor that it exercise that remedy. If the

secured creditor agreed, it was required to proceed in accordance with recommendations 154 and 155. It was unclear whether the grantor was also under an obligation not to object to the terms involved. He proposed that the commentary should spell out the consequences of the provision contained in recommendation 156.

73. **Mr. Bazinas** (Secretariat) said that the commentary had been prepared on the understanding that once the grantor had asked the secured creditor to make the proposal, the secured creditor would be required under recommendation 154 to give notice to all the parties listed in that recommendation, and that any addressee of the proposal would be entitled under recommendation 155 to object.

74. **Mr. Umarji** (India) said that the Secretariat's understanding was, in his view, correct. The only outstanding question was whether the grantor, having formally made the proposal, could subsequently withdraw it.

75. **Mr. Bazinas** (Secretariat) expressed the view that the grantor would be entitled to object to the terms of the secured creditor's proposal if they were unreasonable.

76. **Mr. Macdonald** (Canada) said that the question had been raised when recommendation 156 was adopted during the first part of the session. It was his understanding that the sole purpose of the provision was to allow the grantor to take the initiative. He expressed support for the proposal by the delegation of the United States to spell out its implications in the commentary.

77. **The Chairperson** said she took it that the Commission agreed to entrust the Secretariat with the task of clarifying the situation in the commentary.

78. *It was so decided.*

Proposed amendment to recommendation 165

79. **Mr. Sigman** (United States of America) said that the purpose of his delegation's proposed amendment to recommendation 165 was to ensure that the wording was consistent with the definition of "assignment" in the "Terminology" section, which first referred to the creation of a security right in a receivable by way of assignment and then stated that the term also included an outright transfer of a receivable for convenience of reference. Recommendation 165, as currently worded, mentioned in the first sentence "a receivable assigned by an outright transfer" and in the second sentence "a receivable assigned by way of security" without referring to a security right. His delegation proposed

replacing the phrase in the second sentence with "a receivable assigned otherwise than by an outright transfer", although it might have been more appropriate, in light of the definition, to introduce a reference to a security right.

80. **The Chairperson** said that, if she heard no objection, she would take it that the Commission approved the amendment proposed by the delegation of the United States.

81. *The proposed amendment to recommendation 165 was adopted.*

Proposed amendment to recommendation 187

82. **Mr. Sigman** (United States of America) said that the purpose of his delegation's proposed amendment to recommendation 187 was to make it clear that a security right did not "encumber" an asset only to the extent of the asset's value. The beginning of the second sentence should be amended to read: "The maximum amount realizable from the security right is the asset's value...".

83. **The Chairperson** said that, if she heard no objection, she would take it that the Commission approved the amendment proposed by the delegation of the United States. She asked the Secretariat to search the draft Guide for any other references to a security right "encumbering" an asset and to make the requisite amendments in order to ensure consistency.

84. *The proposed amendment to recommendation 187 was adopted.*

Proposed amendment to recommendation 188

85. **Mr. Sigman** (United States of America) drew attention to a difference between the wording of recommendation 186, which used the phrase "is concluded in or evidenced by a writing", and that of recommendation 188, which merely stated "is evidenced in accordance with recommendation 186". His delegation proposed to reproduce the wording of recommendation 186 in recommendation 188.

86. **Mr. Macdonald** (Canada) noted that the wording of recommendation 15 was the same as that used in recommendation 186.

87. **The Chairperson** pointed out that both recommendation 15 and recommendation 186 were referring to an agreement, whereas recommendation 188 was referring to a right.

88. **Mr. Sigman** (United States of America) withdrew his delegation's proposal.

Proposed amendment to recommendation 204

89. **Mr. Sigman** (United States of America) said that the purpose of his delegation's proposed restructuring of recommendation 204 was simply to make it clear, by bringing forward the phrase "provided that the asset reaches the State of its ultimate destination within [...] days after the time of creation of the security right", that that proviso referred only to the alternative place of registration.

90. **Mr. Deschamps** (Canada) expressed support for the proposed amendment.

91. **The Chairperson** said that, if she heard no objection, she would take it that the Commission approved the amendment proposed by the delegation of the United States.

92. *The proposed amendment to recommendation 204 was adopted.*

93. **The Chairperson** noted that the Commission had thus concluded its consideration of document A/CN.9/XL/CRP.10 containing proposed amendments by the delegation of the United States.

94. **Mr. Riffard** (France) proposed giving a mandate to the Secretariat to review the entire draft Guide with a view to removing any redundant material and making it as concise and reader-friendly as possible.

95. **Mr. Macdonald** (Canada) expressed support for the proposal, noting that repetition occurred mostly in introductory paragraphs and did not affect substantive points.

96. **Mr. Schöfisch** (Germany) expressed the view that it might be difficult for the Secretariat to be sure that its changes were strictly editorial and not substantive.

97. **The Chairperson** suggested that the Secretariat should err on the side of caution.

98. **Mr. Sekolec** (Secretary of the Commission) reassured the Commission that the guidance it had received was sufficient to enable it to carry out its review assignment with full confidence.

Recommendation 205: Proposal by the observer for the European Commission

99. **The Chairperson** invited the observer for the European Commission to introduce his proposal regarding recommendation 205. She urged him to bear in mind, however, that most of the participants were not members of the European Union.

100. **Mr. Wezenbeek** (Observer for the European Commission) said that the European Union had a problem with chapter XII of the draft Guide concerning conflict of laws, particularly in the context of its proposed regulation on the law applicable to contractual arrangements (Rome I). In his view, it was not a purely European issue but had potential implications for global industry. The European Commission was not proposing to amend recommendation 205, since it had already been adopted. However, it would circulate text referring to different options that were available and used by industry. For instance, the law of the underlying claim was not mentioned in the commentary to chapter XII, although it was already being successfully applied, particularly by the securitization industry. It would be unfortunate, also for developing countries, if the draft Guide remained silent on such developments.

101. **Mr. Burman** (United States of America) said that informal consultations had begun on the text mentioned by the observer for the European Commission. While his delegation would be very reluctant to add text to recommendation 205, it would not be averse to including appropriate references to the issues raised in the commentary to chapter XII.

The meeting rose at 5 p.m.