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# Possible future work on security interests

## Note by the Secretariat

**Addendum**

Contents



* This document is submitted three weeks later than the required ten weeks prior to the start of the meeting because of the need to complete consultations and to finalize consequent amendments.

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# II. Possible future work topics (*continued*)

## C. Security rights in movable assets: a model law

### 1. Introduction

1. The *UNCITRAL Legislative Guide on Secured Transactions* (the "*Guide*") is a substantial document with commentary, discussing various workable approaches to all policy issues to be addressed in a secured transactions law, and 242 detailed legislative recommendations. It will be accompanied by a substantial supplement on security rights in intellectual property (the "draft Supplement"). However, while the *Guide* combines the flexibility of the commentary with the certainty of the recommendations, the *Guide* is not a model law or a convention. Thus, the *Guide* leaves to each State the task of drafting a secured transactions law based on its recommendations. The language of the recommendations of the *Guide* is so specific, however, that they may take the shape of a model law if the words "the law should provide that", introducing each recommendation, were omitted. Such a model law could complement the work of the Commission on security rights in movable assets. Like the *Guide*, a model law would combine flexibility with certainty, but to a different extent, as, generally, a model law would provide less flexibility, but more certainty.

2. The Commission may wish to note that there are already several regional model laws on secured transactions, including the following: (a) the Model Law on Secured Transactions adopted by the European Bank for Reconstruction and Development (EBRD) in 1993;[1] (b) the Model Inter-American Law on Secured Transactions adopted by the Organization of American States (OAS) in 2002;[2] (c) the OHADA Uniform Securities Act;[3] and (d) Book IX of the Draft European Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of European Private Law.[4] So far, there has not been an effort to prepare a model law on secured transactions that could apply to all States of the world, irrespective of legal tradition or stage of economic development.

### 2. Desirability

3. The *Guide* covers all relevant issues to be addressed in a secured transactions law. However, the *Guide* is a lengthy and complex document and its transformation into law may require a substantial amount of time and effort. In addition, a *Guide* may not attract the attention of States in the way that a model law could do. Moreover, to the extent that the recommendations of the *Guide* may be implemented (or interpreted) differently from State to State, the modernization effect of their implementation may vary and thus the harmonization effect may be reduced. Furthermore, States with developing economies or economies in transition may lack the resources or the expertise necessary to efficiently implement law reform in an area as complex as secured transactions law.

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[1] http://www.ebrd.com/pubs/legal/secured.pdf.

[2] http://www.oas.org/DIL/CIDIP-VI-securedtransactions_Eng.htm.

[3] OHADA, Traité et actes uniformes commentés et annotés (2002) 619.

[4] C. v. Bar and E. Clive (ed.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Vol. 6 (2009), pp. 5389-5667.

4. It should also be noted that a model law based on the recommendations of the *Guide* may not only assist States in the actual implementation of the recommendations of the *Guide*, but would also maximize the potential modernization and harmonization effect of such a model law. While being more flexible than a convention but less flexible than a guide, a model law may provide the ideal level of flexibility, allowing States to address their specific needs. The process of transforming the recommendations of the *Guide* into a model law is also likely to result in improving and completing the recommendations of the *Guide*. Thus, a model law may increase the likelihood that States will enact legislation adopting the principles of the *Guide*.

5. Furthermore, as already noted, at present, there is no model law on secured transactions on a global scale. In addition, most of the currently existing regional model laws are out-dated and have been prepared prior to adoption of the *Guide*. Thus, circumstances may be ripe for the preparation of an up-to-date model law for worldwide adoption, reflecting the policy approaches recommended in the *Guide*. Overall, a model law on secured transactions to be prepared by the Commission would complement the *Guide* and thus benefit States in reforming their secured transactions laws.

6. However, it is not certain that the benefits deriving from a model law outweigh the potential disadvantages of such a project. The preparation of a model law may be a relatively simple exercise if it involves the transformation of the recommendations of the *Guide* into model legislative provisions. However, this will not be the case if the merits of each recommendation were to be reconsidered. Indeed, if the substance of each recommendation were to be discussed anew, such a project may take a substantial time and may result in a text that could be inconsistent with the recommendations of the *Guide*.

7. Moreover, the preparation of a model law at this stage may inadvertently result in States postponing implementation of the *Guide's* recommendations until the model law is completed. In this sense, embarking on the preparation of a model law at this stage may not be an efficient use of the Commission's resources. There is another reason why a model law may not be needed. In secured transactions laws, as in many other fields of law, the "one-size-fits-all" approach may not be appropriate. By contrast, the flexibility provided by the *Guide's* commentary, coupled with the level of certainty provided by its recommendations, may prove to be the most appropriate vehicle of modernization and harmonization of secured transactions laws. The fact that, as already noted, the various regional model laws that have been prepared so far have had varying degrees of success may also indicate that a model law may not be needed on a world level. In any case, as long as national legislation is consistent with the recommendations of the *Guide*, States may not need a model law to achieve their goals of modernizing their secured transactions laws.

### 3. Feasibility

8. In determining the feasibility of preparing a model law on secured transactions, the Commission may wish to take into account the following considerations. The Commission's experience with the *UNCITRAL Legislative*

*Guide on Privately Financed Infrastructure Projects*,[5] adopted in 2000, and the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects*,[6] adopted in 2003, may be indicative of the possibility that such a project may be completed successfully within a reasonable period of time.

9. As already noted, if the preparation of a model law involved the transformation of the recommendations of the *Guide* into model legislative provisions, such a project could be completed successfully within a reasonable period of time. If, however, this process were to require the reconsideration of every issue and policy approach, on which consensus was reached after long and difficult discussions, then the preparation of a model law may entail a very complex project, calling for a significant amount of time and resources. As a result, the preparation of a model law may or may not be feasible, depending on the terms of reference that the Commission would set for Working Group VI.

10. Even if such a project were feasible, it may still result in difficult situations such as, for example, coming up with a model law that would be inconsistent with the recommendations of the *Guide*. The existence of several regional model laws on secured transactions and the absence of an international model law may suggest the lack of international consensus for the preparation of such an international model law. This perception may be reinforced by the fact that all international normative texts in the field of secured transactions have been asset specific so far, abstaining from regulating security rights in all types of asset (as is the case with the *United Nations Convention on the Assignment of Receivables in International Trade* (the "*Receivables Convention*"),[7] the Cape Town Convention[8] and its protocols,[9] as well as Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009)[10] and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary).[11] This status suggests that the preparation of an international model law applicable to security rights in all types of asset may still be unattainable in the near future.

11. Some examples are given below in order to assist the Commission in determining the feasibility of the preparation of a model law on secured transactions.

### (a) Definitions

12. A model law would have to include definitions (the *Guide* has only a terminology section which is indicative and non-binding). Reaching consensus on a set of definitions that could work in all legal systems in the field of property and

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[5] United Nations publication, Sales No. E.01.V.4. http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFIP.html.

[6] United Nations publication, Sales No. E.04.V.11. http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2003Model_PFIP.html.

[7] United Nations publication, Sales No. E.04.V.14. http://www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html.

[8] http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[9] For example, http://www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR2.

[10] http://www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

[11] http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72.

secured transactions law may be quite challenging. For example, the *Guide* uses the generic term "security right" to denote all types of security rights, possessory and non-possessory. As long as it follows a functional approach to secured transactions, a State implementing the recommendations of the *Guide* may remain faithful to the principles of the *Guide* even if it uses different terms (for example, pledge, hypothec, fiduciary transfer of a movable or assignment of a receivable, retention of title right or financial lease right). Thus, a model law may contain different definitions.

**(b) Scope**

13. A model law would need to define its scope. Assuming that the model law follows the recommendations of the *Guide*, it would apply to consensual security rights in movable assets. However, a model law may take a different approach and have a broader scope of application. For example, it may conceive security rights as embracing all legal devices that provide for a right in property carving out exceptions to the principles of the debtor's universal patrimonial liability and equality of creditors. Thus, a model law may embrace: (a) both consensual and non-consensual security rights; (b) security rights in both movable and immovable property; (c) possessory security rights and mere enforcement preferences; and (d) the use of title to secure performance of an obligation.

14. In addition, if a model law follows the approach of the *Guide*, it would have to address matters left to other law in many jurisdictions (although this is a matter of legislative approach rather than scope, as the *Guide* makes no claim that all matters covered in the *Guide* should be included in a single statute dealing with security rights). These matters may include, for example: (a) outright assignments; (b) leases; (c) procedural mechanisms of enforcement; (d) conflicts of laws; and (e) insolvency. These matters may be more easily included in a *Guide* than in a model law. In any case, whether it implements the recommendations of the *Guide* or a model law, a State may exclude from its national law matters included in the *Guide* (leaving those matters to be governed by other law) and include matters that the *Guide* excludes (thereby expanding the coverage of the national law).

**(c) Proceeds**

15. A model law would have to address the question whether a security right in an asset extends automatically to the proceeds of the asset (including proceeds of proceeds). If a model law follows the approach of the *Guide*, it would have a very broad notion of "proceeds", embracing what are known in many jurisdictions as products and fruits, as well as what is received upon disposition of an encumbered asset, even if the security right follows the asset in the hands of the transferee (see the term "proceeds" in the Introduction to the *Guide*, sect. B).

16. While this approach was adopted in the recommendations of the *Guide*, a different approach may have to be followed in a model law. The reason for this is that, in many jurisdictions, there may not be a concept equivalent to "proceeds" or of a security right extending to "proceeds". If there is such a notion of proceeds, it may be limited to situations of real subrogation, that is, to cases where, for example, a hypothec in an encumbered asset is extinguished because the asset was sold and acquired by another person in good faith. In such a case, it may be necessary to draft two distinct rules, one for proceeds and another for products and fruits. Whether the

two rules would lead to the same result would depend on whether agreement is reached to follow the approach recommended in the *Guide*.

### (d) Acquisition financing

17. A model law would also have to deal with acquisition financing devices (loans granted for the acquisition of assets, retention-of-title sales and financial leases). If a model law follows the approach of the *Guide*, it would have to adopt a generic and functional approach to acquisition financing. Such an approach focuses on the nature of the secured transaction rather than on the parties to it (either sellers or lenders) or who holds title to the relevant asset. Under such an approach, whether a purchase or a loan, any secured transaction by which ownership is acquired with funds provided by a lender is an acquisition financing transaction. Likewise, any transaction that produces results which are functionally equivalent (retention-of-title sale or a financial lease) is considered as an acquisition financing transaction. Moreover, functionalism extends beyond the characterization of the transaction. All providers of credit, whether the contracting party (seller, financial lessor or lender) or a third party (lender or trustee), and all forms of acquisition financing, whether in cash, credit or in kind, fall under the notion of acquisition financing. The significance of characterizing a security right as an acquisition security right lies in the priority position that accrues to the acquisition financier. The underlying policy sought to be achieved in the recommendations of the *Guide* is to provide that the acquisition security right has priority over even previously-registered holders of non-acquisition security rights. In the case where there is a grace period for registration of an acquisition security right, such security right will outrank even previously perfected security rights.

18. A model law may follow a different approach as many jurisdictions continue to distinguish between rights available to: (a) sellers and lessors who deploy title as an acquisition financing device; (b) sellers and others whose acquisition financing agreements take a vendor's hypothec which is equivalent to ownership; and (c) lenders who take a security right. In each of these cases of title security, a model law may elaborate a regime that would be slightly different from the regime recommended in the *Guide*. For example, only the retention-of-title sale may be subject to a regulatory regime for enforcement tracking the regime applicable to security rights. In addition, the priority ranking of the acquisition financier may have to be determined according to basic principles of property law (*nemo dat quod non habet*). Moreover, except in the case of financial leasing, a lender may have to take an assignment of the seller's or the lessor's rights to obtain an acquisition security right.

19. As in the two cases previously noted (scope and proceeds), there are obvious differences in legislative technique. It is true that there are significant differences between the policy approaches of the *Guide* and those currently adopted in many law jurisdictions, especially regarding lender acquisition financing. Those differences may be overcome, but this task may be easier in a guide rather than in a model law.

## 4. Conclusions

20. The Commission may wish to consider that, at least for the time being, the *Guide* is sufficient as a rich, elaborate and pedagogically sophisticated normative

instrument to assist States in modernizing their secured transactions laws. The Commission may also wish to consider that it should allow time for the *Guide* to be considered and enacted into national law before it makes a decision to prepare a model law. In addition, the Commission may wish to consider that, while a model law on secured transactions would present obvious benefits, in light of the existence of the *Guide*, those benefits may be marginal. Moreover, the Commission may wish to consider that, achieving those benefits would come only after the investment of great time and effort on the part of the Commission, while the resources of the Commission might be more productively spent on other secured transactions law topics.

21. In view of the above, the Commission may wish to decide to retain the topic of a model law on secured transactions on its future work agenda, postponing further consideration of the matter to a later stage. At that time, the Commission may wish to determine the desirability and feasibility of a model law taking into account the experience gained from the implementation of the recommendations of the *Guide*, the draft Supplement and any other text to be prepared by the Commission in the field of secured transactions.

## D. Rights and obligations of the parties to a security agreement

### 1. Introduction

22. One of the fundamental principles of the law recommended in the *Guide* is the principle of party autonomy. According to that principle, unless otherwise provided by secured transactions or other law, the parties to a security agreement may agree as to how to address their particular needs in the security agreement (see recommendation 10). In addition, the *Guide* includes a chapter (chapter VI) on the rights and obligations of the parties. This chapter discusses, in an indicative rather than exhausting way, issues that the parties may wish to address in their agreement, and includes a few recommendations (see recommendations 110-116).

23. However, parties negotiating complex security agreements may require detailed guidance as to the issues that they should address in their security agreements and as to how to best address those issues. Thus, a text that discusses in a comprehensive way the rights and obligations of the parties to a security agreement would be very useful. Such guidance would be particularly useful to those parties that may not have easy access to an experienced legal counsel or to parties in those parts of the world in which expertise may not be readily available, at least, at an affordable cost. The *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*,[12] which was adopted by the Commission in 1987, is a good example of such a text.

### 2. Desirability

24. As noted above, the *Guide* contains a chapter on the rights and obligations of the parties (see chapter VI). In addition, the *Guide* provides that, unless otherwise provided in the secured transactions or other law, parties may agree on how to

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[12] United Nations publication, Sales No. E.87. V10. http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1988Guide.html.

address a matter in their security agreement (see recommendation 10). However, parties to complex security agreements may require detailed and comprehensive guidance as to the issues they should address in the security agreement and as to the ways in which those issues could be best addressed. Individual small-and medium-size businesses and consumers may not have an as easy and affordable access to adequate legal counsel as large businesses. This may also be the case with parties to security agreements in States with developing economies or economies in transition.

25. Such a text could usefully complement the *Guide*, providing information also to legislators implementing the law recommended in the *Guide*, as well as to judges, arbitrators, business people and lawyers. For example, with regard to the creation of security right, the law recommended in the *Guide* simply requires an agreement concluded between the grantor and the secured creditor and sets out the minimum contents and the form of that security agreement (see recommendation 13-15). A detailed text on the rights and obligations of the parties could highlight the various issues to be addressed in a security agreement and illustrate, in more detail, how to formulate a security agreement. This would include ways in which parties could describe the secured obligation and the encumbered asset. In addition to creation issues, such a text could address other issues left by secured transactions law to party autonomy (for example, subordination agreements, definition of default and waiver of rights in the context of enforcement; see recommendations 94 and 133).

### 3. Feasibility

26. In determining the feasibility of the preparation of a text on the rights and obligations of the parties to a security agreement, the Commission may wish to take into account the following considerations.

#### (a) Minimum content of a security agreement

27. A text on the rights and obligations of the parties to a security agreement could usefully explain that a security agreement must have a minimum content and provide examples of how to express that content. For example, such a text could provide examples of how to: (a) state the intention of creating a security right; (b) identify the grantor and the secured creditor; and (c) describe the secured obligation and the encumbered asset.

#### (b) Third-party effectiveness and priority

28. A text on the rights and obligations of the parties to a security agreement could address issues relating to the third-party effectiveness and priority of a security right that are exceptionally referred to party autonomy (such as, for example, issues relating to subordination of priority).

#### (c) Default and enforcement

29. A text on the rights and obligations of the parties to a security agreement could usefully discuss how parties could address in their security agreement matters relating to default and enforcement, including the following matters: (a) what constitutes default; (b) the ability of the secured creditor to enforce its security right upon default; and (c) to the extent allowed by secured transactions and other law,

the rights and remedies of the grantor and the secured creditor in the case of default and enforcement.

### (d) Applicable law

30. Under the law recommended in the *Guide*, the parties to a security agreement may choose the law applicable to their mutual rights and obligations (see recommendation 216). A text on the rights and obligations of the parties to a security agreement could usefully discuss ways in which the parties could effectively agree on the law applicable to such matters.

### (e) Relationship with other law

31. A text on the rights and obligations of the parties to a security agreement would not replace contract law. It would simply supplement it with regard to rights and obligations of the parties. It would also supplement secured transactions law to the extent that law permits party autonomy. In addition, in the same way that the law recommended in the *Guide* defers to consumer-protection law, such a text would also have to defer to consumer-protection law.

### (f) Other matters

32. There is a variety of other matters that a text on the rights and obligations of the parties to a security agreement should address perhaps with sample language for the consideration of the secured creditor and the grantor. These matters include the questions whether: (a) the grantor has to be the same person as the borrower; (b) the security agreement secures all the relevant obligations; (c) the security right is subject to any legal restrictions; (d) there must be a clear payment schedule in the credit; (e) there are any special rights or obligations (such as rights of way or rights of access to a site); (f) there are any special obligations for the preservation of encumbered assets; (g) there are any obligations not to transfer the encumbered asset or create another security right in it; (h) ways in which the grantor and other interested parties could be notified in the case of default and enforcement; (i) there should be a reference to extrajudicial enforcement; and (j) there should be a dispute resolution clause.

### (g) Form and structure of work

33. While the Commission may wish to leave the exact form and structure of work to Working Group VI, it may wish to note that a text on the rights and obligations of the parties to a security agreement could take the form of a guide. Such a guide would mainly be addressed to parties to security agreements. Its main purpose would be to assist parties in negotiating and drafting security agreements by identifying the legal issues involved in those agreements, discussing possible approaches to the solution of those issues and, where appropriate, suggesting solutions that the parties may wish to incorporate in their agreements. Such a guide would also be a useful tool for legislators, judges, arbitrators, business people and practitioners.

### 4. Conclusions

34. To the extent it would elaborate on the concrete ways to implement the principle of party autonomy and on the rights and obligations of the parties to a security agreement, a text on the rights and obligations of the parties to a security agreement could usefully complement the *Guide*. In addition, to the extent such a text would promote better understanding of secured transactions, it would promote implementation of the recommendations of the *Guide*. However, the Commission may wish to consider that preparation of such a text may not be as urgent as the preparation of a text on the registration of security rights in general security rights registries or a text on security rights in securities. Therefore, the Commission may wish to retain the topic on its future work agenda for further consideration at a future session.

## E. Intellectual property licensing

### 1. Introduction

35. Economic development depends to a large extent on innovation protected by intellectual property rights. The development of such rights requires substantial investment of time, effort and money. The funds necessary may come mainly from two sources. One is the use of intellectual property rights as security for credit, which is the subject of the draft Supplement. The other possible source of funding is the commercial exploitation of the intellectual property by the owner or other right holder through licensing or other contracts, which presupposes that the intellectual property has commercial value.

36. There are several texts on various aspects of intellectual property licensing developed by various organizations. The World Intellectual Property Organization (WIPO) in particular has prepared a number of texts on various aspects of intellectual property licensing, including: (a) copyright licensing; (b) intellectual property asset management; (c) licensing guides for small- and medium-size enterprises; and (d) training in particular in the area of technology transfer and licensing. However, all these texts address the economic, technical or other practical aspects of intellectual property licensing rather than all the legal issues arising in that regard.

37. Generally, intellectual property licensing is at the intersection of intellectual property and contract law. Yet, intellectual property law focuses more on the recognition and enforcement of exclusive intellectual property rights rather than on the contractual aspects of intellectual property licensing; and general contract law focuses on contract formation and enforcement rather than on the specific issues arising in the context of intellectual property licensing. Thus, it seems that there is a need for a text that would address in a systematic and comprehensive way the legal issues arising with respect to intellectual property licensing. Guidance on all those issues would be helpful to intellectual property owners, licensors, licensees, financiers and professionals, but also to governments considering law reform. Such a text could draw on work undertaken by various organizations, such as WIPO,

Unidroit (Unidroit Model Law on Leasing)[13] and the Commission (United Nations Convention on Contracts for the International Sale of Goods; the "CISG").[14]

### 2. Desirability

38. As already noted, intellectual property is becoming increasingly important in commercial transactions, whether domestic or international. In addition, the various texts prepared by international organizations, such as WIPO, provide guidance with respect to economic, technical or other practical aspects of intellectual property licensing, they do not address all the relevant legal issues. Moreover, intellectual property law deals mainly with the recognition and enforcement of intellectual property rights. While it is important to protect intellectual property rights, for parties to earn true value from their intellectual property, it is often necessary for them to engage in commercial contracting in order to develop the intellectual property and make it available to third parties. Such commercial practices are the province of traditional commercial law.

39. However, many States do not have specific legal regimes for intellectual property licensing or intellectual property contracting in general. They instead often rely on general principles of contract law. Intellectual property commerce, especially in States with developing economies and economies in transition, could be enhanced if the law provided guidance in the form of commercial contracting rules especially suited for intellectual property. In addition, in some States, commercial contracting laws tailored for other types of asset, such as sales of tangible assets, are sometimes applied to intellectual property due to a lack of other available guidance. This practice can lead to distortions. It also places a premium on specialized knowledge needed to "contract out" of inappropriate laws that can disadvantage small- and medium-size businesses. Moreover, there is increased interest in several international forums to deal with intellectual property contracting practices, albeit in specific situations that do not involve the totality of the relevant legal issues. Furthermore, in commercial practices, many intellectual property contracts involve a multiplicity of intellectual property rights, such as software that could include patent, copyright, trademark and trade secret rights. Thus, a more coordinated approach would lead to better results and avoid conflicts in approaches.

40. In view of the above, it would appear that a text on intellectual property licensing that would address in a comprehensive and systematic way all the legal issues arising in the context of intellectual property licensing would be useful to parties negotiating and drafting such contracts, as well as to governments interested in preparing legislation to address those issues.

### 3. Feasibility

41. In determining the feasibility of a text on intellectual property licensing, the Commission may wish to take into account the various texts prepared by other organizations and the following considerations.

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[13] http://www.unidroit.org/english/modellaws/2008leasing/main.htm.

[14] United Nations publication, Sales No. E.95.V.12. http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

**(a) Scope**

42. The key to the feasibility of a text on intellectual property licensing is to identify carefully the scope of the text. The text could deal not only with intellectual property licensing but also with intellectual property contracting in general (and thus deal also with transfers). The text could also deal with all the issues to be addressed in an intellectual property contract. More specifically, the text could apply to all types of intellectual property, rather than looking to different rules for specific types of intellectual property (for example, for patents, copyrights, trademarks or trade secrets) or industry sectors (for example, for movies, software, fashion designs and pharmaceuticals). The text could also focus on common contracting rules that would apply across all types of intellectual property and industry sector, rather than try to devise asset- or sector-specific rules, which may add to complexity.

**(b) Contents**

43. A text on intellectual property licensing could deal with several issues. For example, such a text may have to include a definition of the term "licence" and distinguish between exclusive and non-exclusive licences. In addition, the text could include a provision on party autonomy, tracking article 6 of the CISG, and a provision on interpretation, tracking article 7 of the CISG. Moreover, with respect to the formation of a licence agreement, the text could refer to the general requirements for contract formation and any additional requirements under intellectual property law. Furthermore, with respect to warranties, the text could refer to best practices in the field of intellectual property licensing. The text could also include a section on performance, dealing with the respective rights and obligations of the parties (for example, the obligation of the licensor to "enable use" of the licence by the licensee and the obligation of the licensee to "pay or perform for performance accepted"). The text could also deal with transfers and incorporate generally applicable rules (such as, for example, that a transfer should be authorized and permitted under intellectual property law or the *nemo dat* rule). Finally the text could deal with remedies of the parties in the case of breach of contract under the text on intellectual property licensing (such as, for example, cancellation, specific performance and damages), without interfering with any remedies under intellectual property law.

**(c) Relationship with other law**

44. The text could build on the usual approach in commercial law of recognizing party autonomy by presenting approaches to intellectual property licensing that are descriptive rather than prescriptive, enabling rather than regulatory. The purpose of the text would be to provide "residual" contracting rules that would apply when not displaced by specific rules of the kind described above. At the same time, such a text should defer to various laws, including intellectual property law that regulates specific licence agreement terms and practices, secured transactions law, competition law and consumer protection law.

**(d) Form of and structure of work**

45. While the Commission may leave the matter of the exact form and structure of work to the Working Group, it may wish to note that a text on intellectual property

licensing could take the form of a contractual guide, a legislative guide or even a model law. The structure of such a text could follow the structure of the CISG and the Unidroit Model Law on Leasing and, for example include the following sections: (a) general provisions (definitions, scope of application, party autonomy, and interpretation); (b) intellectual property contract formation; (c) warranties; (d) performance; (e) transfers; and (f) remedies.

### 4. Conclusions

46. Intellectual property licensing (or contracting in general) is an extremely important practice at the intersection of intellectual property and contract law. Various aspects of intellectual property licensing are addressed by a number of organizations, in particular, WIPO. Yet, despite the importance of intellectual property licensing, neither the currently existing texts nor intellectual property law in general nor contract law address in a comprehensive and systematic way all the legal issues arising in the context of intellectual property licensing.

47. Thus, the Commission may wish to consider referring to a working group (other than Working Group VI as intellectual property licensing is not a secured transactions topic) the task of preparing a text on intellectual property licensing or contracting in general. As this topic is at the intersection of commercial and intellectual property law, the Commission may wish to undertake this project in close cooperation with organizations active in the field of intellectual property law and in particular WIPO. Alternatively, the Commission may wish to retain this topic on its future work agenda, postponing further consideration to a later stage. At that time, the Commission may wish to consider appropriate ways of coordinating efficiently and effectively with intellectual property organizations, such as WIPO.

## F. Implementation of UNCITRAL texts on secured transactions

48. The Commission may wish to consider its future work programme on the implementation of its texts on secured transactions. These texts include: (a) the *Receivables Convention*; (b) the *Guide*; and (c) the draft Supplement, which the Commission is expected to consider and adopt at its current session.

49. With respect to the *Receivables Convention*, the Commission may wish to note that it has been signed by Luxembourg, Madagascar and the United States of America, and ratified by Liberia. The Commission may also wish to note that the United States of America is taking steps to ratify the *Receivables Convention* and reiterate its recommendation to all States to consider becoming party to the *Receivables Convention*. The Commission may wish to consider requesting the Secretariat to intensify its efforts of disseminating information and providing assistance to States interested in becoming party to the *Receivables Convention*.

50. The Commission may also wish to note that, while Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) did not address the issue of the law applicable to the third-party effects of assignments of receivables, the European Commission is considering the preparation of a study on the matter. The Commission may wish to request the Secretariat to continue coordinating with the European Commission with a view to avoiding any conflict between the *Receivables*

*Convention* and any text to be prepared by the European Commission on the law applicable to the third-party effects of assignments of receivables (see also A/CN.9/707, para. 34).

51. With respect to the *Guide*, the Commission may wish to note that the *Guide* already influenced the recent secured transactions law reform in Australia and the Republic of Korea, as well as Book IX of the Draft European Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of European Private Law. The Commission may also wish to note that the *Guide* is a valuable resource tool because it discusses all issues to be addressed in a secured transactions law, explains all the workable approaches presenting their advantages and disadvantages and makes recommendations to the legislator.

52. The Commission may also wish to note that the *Guide* is a useful resource tool not only for States but also for international organizations that provide assistance for law reform in the area of secured transactions, such as the International Bank for Reconstruction and Development (the "World Bank"). In this connection, the Commission may wish to note that the Secretariat provided comments to the Investment Climate Advisory Service ("FIAS") of the World Bank on a revised version of the OHADA Uniform Securities Act, with a view to ensuring consistency with the *Guide*. With the same goal in mind, the UNCITRAL Secretariat also provided comments to FIAS on the World Bank Toolkit on Secured Transactions (see A/CN.9/707, para. 39).

53. Finally, with regard to the draft Supplement to the *Guide*, the Commission may wish to note that it should be very helpful to States because it fills the gaps left by the *Guide* with regard to security rights in intellectual property.

54. In view of the above, the Commission may wish to recommend that States give favourable consideration to the *Guide* and the draft Supplement when revising or adopting legislation relevant to secured transactions. The Commission may also wish to consider requesting the Secretariat to intensify its efforts of disseminating information and providing legislative assistance to States interested in implementing the *Guide* and the draft Supplement (see A/CN.9/695, para. 24).