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Report of Working Group VI (Security Interests) on the work of its nineteenth session (New York, 11-15 April 2011)

Contents

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I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a text on the registration of security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session, in 2010.[1] The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of a security rights registry.[2]

2. At its forty-second session in 2009, the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.[3] In accordance with that decision,[4] the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of notices with respect to security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector.[5]

3. At its forty-third session in 2010, the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.[6]

4. The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the UNCITRAL Legislative Guide on Secured Transactions ("Guide"), texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the Guide.[7]

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 268.

[2] Ibid., para. 265.

[3] Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

[4] Ibid.

[5] The papers presented at the colloquium are available at www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

[6] Ibid., *Sixty-fifth session, Supplement No. 17* (A/65/17), paras. 264 and 273.

[7] Ibid., paras. 266-267.

5. The Working Group began its work at its eighteenth session (Vienna, 8-12 November 2010) by considering a note by the Secretariat entitled "Registration of security rights in movable assets". The Working Group also considered the issue of coordination of the text on registration with UNCITRAL texts on electronic communications.[8] At that session, the Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of that session.[9]

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its nineteenth session in New York from 11 to 15 April 2011. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Cameroon, Canada, Chile, China, Colombia, France, Germany, India, Israel, Italy, Japan, Kenya, Mauritius, Mexico, Nigeria, Norway, Paraguay, Philippines, Republic of Korea, Russian Federation, Spain, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Croatia, Ecuador, Guatemala, Guinea, Iraq, Kuwait, Myanmar, Qatar, Switzerland and Syrian Arab Republic. The session was also attended by observers from the following non-member State: Holy See.

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

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

(b) *Intergovernmental organizations*: Organization of American States (OAS);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Association of the Bar of the City of New York, Commercial Finance Association (CFA), European Law Students' Association, Inter-Pacific Bar Association (IPBA), International Insolvency Institute (III), Moot Alumni Association (MAA) and National Law Center for Inter-American Free Trade (NLCIFT).

9. The Working Group elected the following officers:

Chairperson: Mr. Rodrigo LABARDINI FLORES (Mexico)

Rapporteur: Mr. Young-joon KWON (Republic of Korea)

10. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.45 (Provisional Agenda), A/CN.9/WG.VI/WP.46 and Addenda 1 to 2 (Draft Security Rights Registry Guide) and A/CN.9/WG.VI/WP.46/Add.3 (Draft Model Regulations).

11. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.

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[8] A/CN.9/714, paras. 34-47.

[9] Ibid., para. 11.

2. Election of officers.

3. Adoption of the agenda.

4. Registration of security rights in movable assets.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered notes by the Secretariat entitled "Draft Security Rights Registry Guide" (A/CN.9/WG.VI/WP.46 and Addenda 1 to 2) and "Draft Model Regulations" (A/CN.9/WG.VI/WP.46/Add.3). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. The Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

IV. Registration of security rights in movable assets: draft security rights registry guide

A. General (A/CN.9/WG.VI/WP.46, paras. 1-61)

13. The Working Group first considered the form and content of the text to be prepared. Differing views were expressed. One view was that a stand-alone guide should be prepared that would include an educational part along the lines of chapters I and II aimed at introducing the secured transactions law recommended in the Guide and a practical part that would consist of model registration regulations and commentary thereon. It was stated that both parts were equally important as the work on the Supplement on Security Rights in Intellectual Property (the "Supplement") had indicated.

14. Another view was that emphasis should be placed on model registration regulations and a commentary thereon. It was stated that, while a short introduction could be included in the text, it should not be as long as chapters I and II. It was also observed that a text consisting of model regulations and commentary thereon would provide States that had enacted the secured transactions law recommended in the Guide with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry. It was also observed that the Supplement was different in that, unlike the text on registration that sought to provide practical advice on matters addressed in the secured transactions law recommended in the Guide, the Supplement sought to coordinate the law recommended in the Guide with intellectual property law.

15. After discussion, the Working Group decided to begin its considerations with chapter III that dealt with the key characteristics of an effective security rights registry and could thus be considered as fulfilling the function of commentary on model regulations. It was agreed that, once the Working Group had the opportunity to consider the part of the text dealing with practical issues, it could better

determine which part of the introduction contained in chapters I and II should be retained.

B. Key characteristics of an effective security rights registry (A/CN.9/WG.VI/WP.46, paras. 62-72)

16. With respect to paragraphs 62-72, several suggestions were made, including the following:

(a) The text should be restructured so as to present first the approach recommended in the Guide with any necessary explanation and should not be written so as to suggest that approaches not recommended in the Guide might be preferable to those recommended in the Guide;

(b) The headings of the chapter should be revised to be more consistent with the approaches recommended in the Guide;

(c) In paragraph 63, for consistency with the terminology used in the Guide, the reference to "registration" should be replaced by a reference to "notice";

(d) In paragraph 64, the reference to true leases and commercial consignments as falling within the scope of the registry should be presented as an approach that was followed in some States or moved to another place in the text;

(e) In paragraph 68, the first sentence did not relate to the issue of the effectiveness of a registration made without the grantor's authorization and should be deleted or placed elsewhere in the text;

(f) Paragraphs 68 and 69 dealt with the amendment of a registration and should be moved to the place of the text where that issue was discussed with appropriate explanation of the third-party effectiveness and priority of security rights, notice of which was registered without prior authorization by the grantor;

(g) In paragraph 69, the issue of correction of typographical errors should be discussed in more detail (mainly by referring to the Guide, under which a notice could be corrected by a second notice and both notices would be preserved in the registry record but also by reference to other methods of correction of typographical errors);

(h) Paragraph 70 should refer to asset indexing at least with respect to those assets that could be identified by reference to a serial number; and

(i) References to grantor indexing and to serial number indexing should be preserved in paragraphs 71 and 72, while consideration might be given to moving that paragraph to chapter IV.

C. Rules applicable to the registration and search process (A/CN.9/WG.VI/WP.46/Add.1, paras. 1-61 and A/CN.9/WG.VI/WP.46/Add.2, paras. 1-40)

1. A/CN.9/WG.VI/WP.46/Add.1, paras. 1-61

17. With respect to paragraph 3, the view was expressed that authorization of a registration by the grantor after registration was meaningless and could expose the grantor to risks associated with unauthorized registrations. In response, it was noted that the Guide permitted registration without prior authorization to facilitate situations in which registration took place before the conclusion of a security agreement or the creation of a security right (see recommendation 67).

18. However, it was generally agreed that, while the policy decisions reflected in the Guide should not be revisited, they could be further explained. In addition, the Working Group agreed that it was necessary to clarify the third-party effectiveness and priority consequences of a registration made without prior authorization by the grantor. In that context, the following clarifications were suggested:

(a) In instances where a security right was registered without prior authorization by the grantor and a subsequent security right was registered with prior authorization by the grantor, the former security right would prevail only if authorization was later obtained (otherwise, as the former security right would be ineffective, no priority conflict could arise);

(b) If a security agreement was concluded, it would constitute authorization rendering the registration effective as of the date of the registration and not as of the date of the security agreement or other authorization; and

(c) If no security agreement was concluded (or registration was otherwise not authorized) after the registration, or if the registration was made in bad faith, the registration would be ineffective and the grantor would be able to seek cancellation of the registration through a summary procedure (see recommendation 72).

19. With respect to paragraph 9, it was suggested that:

(a) The reference to authorization for advance registration should be deleted as it gave the impression that, contrary to recommendation 67, prior authorization was necessary for advance registration; and

(b) Advance registration without prior authorization ensured the priority of a security right as against another security right but not against the rights of a buyer of the asset.

20. With respect to paragraphs 11 and 12, a number of suggestions were made, including the following:

(a) The heading should be aligned with the heading of recommendation 68 and reference should be made in the text to multiple agreements between the same parties and relating to the same assets;

(b) The order of paragraphs 11 and 12 should be inverted so that the focus would be on the approach recommended in the Guide;

(c) The second sentence in paragraph 12 should be revised to read along the following lines: “the registration continues to be effective, however, only to the extent that the description of the asset in the notice corresponds to the terms of any new or amended security agreement”; and

(d) In the third sentence of paragraph 12, reference should be made to “new categories of assets” instead of to “new assets.”

21. With respect to paragraphs 13-33, a number of suggestions were made, including the following:

(a) To emphasize the importance of the grantor’s name, the order of the paragraphs should be changed so that paragraph 18 should follow paragraph 13;

(b) References to other approaches not recommended in the Guide should be limited;

(c) In paragraphs 19 and 20, it should be explained that, while the Guide referred to a single registry record, the registry system could be designed to permit separate searches for grantors that were natural persons and grantors that were legal persons;

(d) Privacy and identity theft issues should be discussed in line with the way they were discussed in the Guide, highlighting that the law recommended in the Guide would apply together with the law on privacy and identity theft;

(e) Any rules on grantor name should be set out as examples not precluding the application of naming conventions prevailing in any given enacting State;

(f) Emphasis should be placed on the reason why a State might require certain documents (namely, to have a unique grantor identifier) rather than on what documents exactly were required;

(g) In paragraph 23, it should be clarified that not all official documents specified the components of the grantor’s name (first, middle and last name);

(h) In paragraph 24, it should be clarified that, once the three conditions set out therein were satisfied, the use of a government-issued personal identification number would be an ideal way to uniquely identify grantors;

(i) In paragraph 27, it should be clarified that “public records” were those that involved documents constituting the legal person;

(j) In the chart after paragraph 28, reference might be made to the insolvency estate as, in some legal systems, an insolvency representative could not create a security right in assets of the estate;

(k) The second sentence of paragraph 29 should become a separate paragraph as it applied generally and not only in the case of sole proprietorships; and

(l) The last sentence of paragraph 31 should be aligned with the “seriously misleading” standard provided in recommendation 64.

22. With respect to paragraphs 31-36, a number of suggestions were made, including the following:

(a) In paragraph 31, it should be clarified that the address of the grantor and additional information about the grantor such as the birth date or identity card number were examples of grantor information that did not constitute a search criterion;

(b) In paragraphs 31 and 36, the "seriously misleading" standard in recommendation 64 should be further developed possibly with relevant examples;

(c) In the first sentence of paragraph 32, reference should be made to "search logic" instead of "software"; and

(d) Paragraph 33 should be revised as the indexing and search logic to ignore all punctuations, special characters and case differences applied not only to grantors that were legal persons but also to grantors that were natural persons.

23. With respect to paragraphs 37-52, a number of suggestions were made, including the following:

(a) In addition to the examples already provided with respect to generic description of encumbered assets, paragraph 38 should be further developed to include examples on how specific assets or specific types of asset could be described in a notice that would meet the asset-description requirements of recommendation 14, subparagraph (d);

(b) As paragraphs 42 and 43 provided an accurate illustration of the justifications for serial number indexing (for certain tangible assets with significant resale market and sufficiently high value and to preserve the secured creditor's rights to follow the asset into the hands of a buyer or lessee from the original grantor), paragraph 45 should be revised to refer to paragraphs 42 and 43;

(c) It should be clarified that the use of a serial number as a means of describing certain types of high-value asset with a resale value (recommendations 14, subpara. (d), and 63) and the use of a serial number as a search criterion were separate issues;

(d) Issues related to the description in a notice of encumbered attachments to immovable property should be discussed (along the lines of paras. 60 and 61 of A/CN.9/WG.VI/WP.46);

(e) The second sentence of paragraph 49 should be clarified as recommendation 65 related only to sufficient (or insufficient) description of assets and not to instances where the registrant had simply omitted to describe certain assets;

(f) With respect to paragraph 50, it should be clarified that: (i) the policy decision reflected in the Guide permitted over-inclusive descriptions of encumbered assets to facilitate the ability of the parties to enter into new security agreements encumbering additional assets as the grantor's financing needs evolved (similar to advance registration); and (ii) where the grantor had not authorized such an over-inclusive registration, the grantor would be able to seek amendment or cancellation through a summary procedure (recommendation 72) and in some cases, demand compensation for damages;

(g) The last two sentences of paragraph 52 should be revised to reflect the approach referred to in paragraphs 42 and 43; and

(h) Paragraph 52 should make it clear that in systems where a serial number constituted an indexing and search criterion, both the grantor identifier and the serial number would need to be entered correctly in the registration for that registration to be effective and that the optional use of serial numbers as an indexing and search criterion without consequences if the wrong number was entered would not add anything and could even weaken the certainty achieved through the registry.

24. With respect to paragraph 53, it was suggested that it should be clarified that the first approach (whereby laws specified a standard statutory term) could limit or be contrary to the freedom of the parties to agree upon a longer duration of the registration. It was also suggested that other alternative approaches should be set out: (a) where there was no duration period for the registration and the registration would remain effective until performance of the secured obligation; and (b) where parties would self-select the duration, yet with a fall-back rule on a standard term when the duration was not selected by the parties.

25. With respect to paragraphs 56-61, a number of suggestions were made, including the following:

(a) It should be clarified that the Guide was neutral on the issue of the maximum amount for which the security right could be enforced (recommendations 14, subpara. (e), and 57, subpara. (d));

(b) The presentation of paragraphs 56 to 59 might be revised to first state the approach of the Guide;

(c) Even in cases where the maximum amount specified in the notice was less than the amount actually owed, the enforcement by the secured creditor would not be limited to the stated maximum amount if there were no other competing claimants, unless the maximum amount was included in the security agreement (and not just in the notice);

(d) In the situation referred to under subparagraph (c) above, the secured creditor would be entitled to recover the excess amount only as an unsecured creditor; and

(e) Paragraph 57 should be revised to reflect the actual lending practice, as lenders usually kept a certain margin over the market value of the asset.

2. A/CN.9/WG.VI/WP.46/Add.2, paras. 1-40

26. With respect to paragraphs 1-4, a number of suggestions were made, including the following:

(a) Reference should be made to the fact that even in electronic registries where notices were submitted online, there could be a lag between the time the information contained in the notice was entered into the registry record and the time such information became available to searchers;

(b) Reference to the words “before it can be confident that its security right is effective against third parties” should be deleted as advance registration (without the authorization of the grantor) might not yet be effective against third parties; and

(c) When notices are submitted in paper form, the registry staff (in manual registration) should adhere to the order of the submission.

27. With respect to paragraphs 5-6, a number of suggestions were made, including the following:

(a) In paragraph 6, it should be clarified that it was the assignor (the original secured creditor) that was permitted to amend the secured creditor information or the assignee with the consent of the assignor;

(b) It should be clarified that the assignee's omission to ensure the registration of the amendment would result in the original secured creditor retaining the legal power to alter the state of the record (chap. IV of the Guide, para. 111);

(c) It should be clarified that notification to the grantor was a separate issue from the amendment of the registration; and

(d) The fourth sentence in paragraph 6 should state that the registry system "must be" designed so that a search result would show both the original secured creditor and the new secured creditor.

28. In paragraph 7, it should be clarified that it was possible for a competing claimant to register an amendment notice with the consent of the subordinating secured creditor, provided that the security right of the subordinating secured creditor or of a competing claimant had been made effective against third parties by registration.

29. In paragraph 8:

(a) At the end of the first sentence, language along the following lines should be added "in such a way that a search of the registry under the new name will not reveal the initial registration";

(b) The last sentence should be deleted; and

(c) It should be clarified that, in systems where a unique identity number was used to identify the grantor, a change of the grantor name had no impact on the identification of the grantor.

30. In paragraph 9:

(a) At the end of the first sentence, reference should be made to the fact that failure to enter an amendment should not make the security right "generally" or "retroactively" ineffective against third parties; and

(b) At the end of the third sentence, it should be clarified that reference to "these classes of competing claimants" referred to a secured creditor, buyer, lessee or licensee of the encumbered asset.

31. In paragraphs 10 and 11, it should be clarified that:

(a) The main issue was whether a secured creditor would have the right to register an amendment with the name of the transferee of the encumbered asset to protect third parties;

(b) The Guide recommended that the issue should be addressed in the law and listed the possible ways to address it with their comparative advantages and disadvantages;

(c) The secured creditor could make a new registration against the name of the transferee (and not an amendment of the initial registration); and

(d) Reference was made to an unauthorized transfer outside the ordinary course of business because, if the transfer was authorized or took place in the ordinary course of the grantor's business with respect to certain assets in certain transactions, the transferee would acquire the asset free of the security right (recommendation 80, subpara. (a), and 81, subpara. (a));

32. In paragraph 12, it should be clarified that:

(a) New encumbered assets could be added by way of an amendment or a new registration;

(b) The new registration or amendment of the newly encumbered asset would be effective as of the time it was made (not retroactively);

(c) The only difference between a new registration and an amendment was that the amendment would expire with the initial registration.

33. In paragraph 15:

(a) The third sentence should be deleted as, if a secured creditor failed to renew a registration in a timely fashion or inadvertently registered a cancellation, the secured creditor would suffer a loss of priority as against all competing claimants; and

(b) The last sentence should be modified to reflect the result mentioned in subparagraph (a).

34. In paragraph 20, reference should be made to the right of the grantor to seek cancellation of a registration not only if a security agreement had not been concluded but also if such an agreement was not contemplated.

35. In paragraph 21, it should be clarified that:

(a) The secured creditor should comply with the request within a number of days "after receipt of the request" (recommendation 72, subpara. (a)); and

(b) The grantor or the court should register a cancellation or amendment in accordance with a specified procedure.

36. In paragraph 22, it should be clarified that:

(a) The consent of the grantor was not required for certain types of amendment (such as assignment of the secured obligation, subordination or change of the address of the secured creditor);

(b) The registry should be able to determine whether a cancellation or amendment was registered by the secured creditor or a person other than the secured creditor;

(c) The issue of the availability of archived cancellations to searchers was a separate issue that arose both in the case of voluntary and mandatory cancellation; and

(d) In some legal systems, archived cancellations were available to searchers, while under the law recommended in the Guide information on

archived cancellations could be obtained further to a request to the registry (recommendation 74).

37. In paragraphs 23-26:

(a) The text should be recast so that paragraph 25 would follow paragraph 23;

(b) The issue of privacy concerns should be discussed separately from the issue of whether a searcher should give reasons for searching and privacy concerns should be discussed by reference to other law (privacy and identity theft law); and

(c) There was no need for a record of searchers other than that indicating payment of any search fees.

38. With respect to paragraphs 27-31, a number of suggestions were made, including the following:

(a) In the last sentence of paragraph 27, reference should be made to the fact that a careful and prudent searcher would search under the correct grantor identifier;

(b) In paragraph 28, it should be clarified that, for the purpose of a search, a searcher needed to use the correct grantor identifier and not the status of a grantor, for example, as insolvent or deceased;

(c) In paragraph 29, it should be emphasized that a search by reference to registration numbers was especially useful in circumstances where notices could not be searched by using the grantor identifier due to indexing errors or changes in the search logic; and

(d) In paragraph 30, examples should be provided of situations where a single global amendment would be useful (for example, bank mergers or acquisitions).

39. With respect to paragraphs 32 and 33, a number of suggestions were made, including the following:

(a) Rather than limiting the permissible language to official language(s) of the State under whose authority the registry was maintained, States should be able to freely determine the language in which the information should be entered, whether it was the official language or not;

(b) As it would sometimes be impossible for a searcher to know in which language the information was entered, the searcher should be allowed to search in one of the official languages, with the search result being displayed in the language the information was originally entered;

(c) Reference to “accents” in paragraph 32 should be replaced with “symbols”;

(d) In paragraph 33, if rules applicable to registration required that all linguistic versions of the grantor’s name were to be entered, those rules would also need to set out the legal consequences with respect to errors made to one or more versions of the name; and

(e) The use of identification numbers could assist in mitigating language problems.

40. With respect to paragraphs 34-36, a number of suggestions were made, including the following:

(a) The first sentence of paragraph 34 should be revised as verification, although essential for the secured creditor, was not an element required for the third-party effectiveness of a security right (recommendations 32 and 70);

(b) The second sentence of paragraph 34 should be revised to clarify that, while a registrant could obtain a record of the registration as soon as the registration information was entered into the registry record (recommendation 55, subpara. (e)), the registry had the obligation to send to the secured creditor only a copy of any "changes" to a registered notice (recommendation 55, subpara. (d));

(c) In paragraph 34, where the registrant was not the secured creditor, the copy of the registration should be sent to either the registrant or the secured creditor;

(d) The concept of "registrant" needed to be further clarified in paragraph 34; and

(e) Paragraph 35, in particular the last sentence, should be revised to refer to electronic means of communications in general rather than to any technology in particular.

41. With respect to paragraphs 37-40, it was suggested that they should be deleted or significantly reduced since whether the grantor was entitled to request additional information and whether the secured creditor was obliged to provide such information were matters for the substantive secured transactions law rather than for the regulations. It was also stated that, in any case, the grantor had access to most of the relevant information through the security agreement with the secured creditor.

42. Nonetheless, it was pointed out that, although those issues needed to be addressed in the substantive secured transactions law, it would be worthwhile to inform the readers of the text on registration that notices did not always provide all the information that might be needed by a grantor or by a third party. It was thus suggested that paragraphs 37 to 40 should be shortened to simply set out the issues that might be relevant in the operation of the registry.

43. With respect to paragraphs 45-46, a number of suggestions were made, including the following:

(a) Emphasis should be placed more on the centralized and consolidated registry record allowing registrants and searchers to access the registry through multiple modes and access points rather than on the fact that the information was stored in a single consolidated database, in particular, taking into account the development of new technologies; and

(b) Taking into account issues relevant to multi-unit States (with reference to recommendations 224-227), multi-unit States could consider establishing a centralized registry for all units of a multi-unit State.

44. With respect to paragraph 50, it was suggested that, in some instances, it would be necessary for the registry to provide a user such as a bank with a special access code allowing the bank to issue access codes for its branches.

D. Registry design, administration and operation (A/CN.9/WG.VI/WP.46/Add.2, paras. 51-73)

45. With respect to paragraphs 51 to 60, a number of suggestions were made, including the following:

(a) In paragraph 52, it should be clarified that States should retain ownership of the registry record for the purposes of establishing public trust in the registry and preventing commercialization and fraudulent use of information in the registry record;

(b) In line with the Guide, in paragraphs 57 and 58, reference should be made to one type of a search and no distinction should be drawn between official and unofficial searches;

(c) Reference in paragraph 59 should be simply to "errors" as errors were by nature inadvertent;

(d) Paragraph 60 should: (i) clarify that the registry should take all the necessary steps to avoid unauthorized access to and duplication of electronic records; (ii) refer to the objectives of avoiding loss or corruption of data and of ensuring uninterrupted service rather than to ways to address those issues by way of methods that might soon become outdated; and (iii) refer to disaster recovery centres;

(e) In paragraphs 66-68, reference should be made to the possibility of the registry being part of a government department and thus not charging any registration or search fees; and

(f) In paragraph 72, emphasis should be placed on the transition to a new secured transactions rather than on how data might migrate to a new registry without a change in the secured transactions law.

V. Registration of security rights in movable assets: draft model regulations (A/CN.9/WG.VI/WP.46/Add.3)

A. General (A/CN.9/WG.VI/WP.46/Add.3, article 1)

46. The Working Group next turned to a discussion of the draft model regulations. At the outset, differing views were expressed as to the form of the text. One view was that the text should be cast in the form of recommendations. It was stated that recommendations would be more consistent with the Guide, flexible and thus acceptable. Another view was that the text should take the form of model regulations. It was observed that, while model regulations were not more binding than recommendations, model regulations would be more concrete and better attract the attention of governments. After discussion, the Working Group decided to first consider the substance of the text and revert to the issue of its form at a later stage.

47. With respect to article 1, definitions, a number of suggestions were made, including the following:

(a) In the definition of the term "address": (i) it might be better to require a physical address for the grantor and a post office box or e-mail for the secured creditor; (ii) reference should be made to "postal" rather than "zip" code; and (iii) the fact should be taken into account that, in some States, address might be reflected in more general terms (for example, town or island rather than street address);

(b) In the definition of the term "amendment": (i) it should be clarified by listing examples of amendments; (ii) the definition should be aligned with articles 27 and 28; and (iii) it should be clarified whether the term meant a notification, the information changed or the result of the change of the information;

(c) With respect to the meaning of the terms "security right" and "movable asset" in the definition of the term "law", it was noted that those terms did not need to be defined as they were explained either in the terminology or in the recommendations of the Guide;

(d) In the definition of the term "notice", reference should be made to recommendations 72-75;

(e) In the definition of the term "password", the word "confidential" should be deleted since, even if there was a breach of confidentiality, the password would still be a password (the matter could be dealt by way of a provision that that the password should be kept confidential);

(f) Consideration might be given to combining the definitions of the terms "registration" and "registry record";

(g) The definitions of the terms "official search logic", "registry", "registry services" and "registry system" should be deleted as the meaning of those terms was self-evident;

(h) The terms "serial number" and "serial number assets", which were said to be overly restrictive, should be considered only if the Working Group decided that the articles in which those terms appeared should be retained; and

(i) The definition of the term "user identification", which was not clear as to whether it meant only a registrant or also a searcher, should be considered in the context of the articles in which that term was used.

B. Establishment and operation of a registry (A/CN.9/WG.VI/WP.46/Add.3, articles 2-7)

48. With respect to article 2, establishment of a registry, it was suggested that:

(a) Reference might be made to a "central" registry;

(b) The reference to the purpose of the registry might need to be recast and streamlined; and

(c) It might be supplemented by a provision dealing with the scope of the registry.

49. With respect to article 3, appointment of a registrar and a deputy registrar, differing views were expressed. One view was that it should be deleted as it was too detailed and the matter should be left to each State. Another view was that, if the text took the form of regulations that were inherently more prescriptive than recommendations, it was unavoidable to interfere with the flexibility that was necessary for States to deal with such a matter. Yet another view was that whether the text took the form of model regulations or recommendations it should deal at least with the appointment of a registrar, but not necessarily with the way of appointment or the duties of the registrar, or the appointment of a deputy registrar or other staff.

50. With respect to article 3, it was also suggested that it should emphasize that an entity authorized by law could appoint a person or entity (public or private, see recommendation 55, subpara. (a)) to supervise and administer the registry, whereas the internal structure or hierarchy of the registry mechanism should be left to each State.

51. In addition, it was suggested that, whatever form the text might take (recommendations or model regulations), there would be certain key provisions that would need to include some detail and other provisions, such as articles 3 and 4, that would need to be cast in general terms and function as a reminder of issues that States should address in law or regulations.

52. With respect to article 4, it was suggested that a distinction should be made between the power and the duties of the registry, the nature of which was administrative, and the services to be provided by the registry (receiving, indexing and storing notices, issuing certificates and allowing searches). It was also suggested that the allocation of power and duties among the staff of the registry should be left to each State.

53. With respect to article 7, it was widely felt that the liability of a registry was a matter for relevant law (contract, tort, secured transactions or even administrative law) and should be left to that law in line with recommendation 56. A note of caution was struck, however, to the effect that the regulations or the commentary should address that matter, which, inter alia, could affect the cost of registration, which under recommendation 54, subparagraph (i), should be set a level no higher than necessary for cost recovery.

C. Registry services (A/CN.9/WG.VI/WP.46/Add.3, articles 8-10)

54. With respect to article 8, a number of suggestions were made, including the following:

(a) The criteria for accessing the registry for registration purposes and for search purposes should be clearly distinguished and set out separately;

(b) Article 8 should be recast taking into account that the identification of the grantor in a manner that was sufficient to allow indexing or the provision of other necessary information was a condition for the registry to accept a notice but not to allow access to the registry (recommendation 54, subpara. (c));

(c) A distinction between occasional users and frequent users was only applicable to registrants and accordingly, paragraph 2 should be recast to clarify that it applied to frequent registrants only;

(d) A user identification and password could be assigned to registrants that needed such arrangements but were not necessary for searchers; and

(e) Assigning a user identification and password should not be presented as the only method for granting access to registry services as other methods were presently available or might become available in the future.

55. With respect to article 9, it was stated that the registry should be able to rely on the fact that the user identification and password were properly used and the registrant was their rightful owner. However, it was added that, in the case of wrongful use by a person and of registration of an adverse amendment, the rights of the secured creditor should not be negatively affected by a conclusive presumption that the user identification and password were properly used.

56. With respect to article 10, a number of suggestions were made, including the following:

(a) Reference should be made to the rejection of a "notice" instead of "registration";

(b) Subparagraph (b) of paragraph 1 should be recast along the following lines "the information in the notice or the search request does not comply with the requirements of these regulations"; and

(c) In the context of electronic registration, reference should be made to "incomplete" instead of "incomprehensible or illegible" information.

D. Registration (A/CN.9/WG.VI/WP.46/Add.3, articles 11-16)

57. With respect to article 11, a number of suggestions were made, including the following:

(a) Paragraph 1 should state that the registry should record a date and time of registration according to the standard provided in paragraph 2 and assign a registration number;

(b) As paragraph 2 stated a fundamental rule, the order of paragraphs 1 and 2 might be reconsidered;

(c) Issues related to simultaneous registrations might also be dealt with by providing that the registry should record the exact date and time of receipt, and index notices according to the exact order in which they were received; and

(d) Special rules might be required for the date and time of registration of a notice with respect to an acquisition security right.

58. With respect to article 12, a number of suggestions were made, including the following:

(a) It should be clarified that article 12 set out options in line with recommendation 69;

(b) In option B, the maximum time limit should be deleted and set out in an option C, while the second sentence should be deleted, since in an electronic registry of a self-select system, a notice would be rejected if the duration of registration had not been selected; and

(c) Paragraph 3 in article 12 should be deleted with some explanation in the commentary that the matter was left to relevant law.

59. Differing views were expressed as to whether article 13 should be retained. One view was that article 13 should be deleted because the time when a registration might be made was a matter for secured transactions law addressed in recommendation 67. Another view was that article 13 should be retained as a reminder of an important matter that should be addressed in the law or the regulations. Similar views were expressed with respect to article 14. In addition, with respect to article 14, the view was expressed that the question whether one notice could cover multiple security rights was a matter for the regulations.

60. Noting that serial number indexing was not addressed in the recommendations of the Guide but was discussed in the commentary, the Working Group decided that the reference to serial number indexing in paragraph 2 of article 15 should be retained within square brackets until it had an opportunity to consider article 24. With respect to paragraph 3, it was suggested that amendments and cancellations should be indexed not only by the initial notice (rather than registration) number but also by the grantor's identifier and asset serial number. It was also suggested that notices might also be indexed by secured creditor identifier but only for internal purposes of the registry and, therefore, the matter could be addressed in the commentary rather than in the regulations.

61. With respect to paragraph 1 of article 16, it was suggested that: (a) reference should be made also to the deletion of certain information (as opposed to the removal of all the information); and (b) it should be clarified that the reference to the registry record was both to the record available to the public and the archive record. With respect to paragraph 2, it was suggested that reference should also be made to: (a) the fact that registry record in that context referred to the record available to the public (otherwise, article 16, para. 2, would be inconsistent with article 29, para. 2); (b) a judicial or administrative order of the type referred to in article 31; and (c) to the possibility that cancelled notices might be retained in the registry record available to the public at least for a certain period of time (such as two years).

62. In addition, the view was expressed that allowing the registry to remove from the record information that was frivolous, vexatious, offensive or contrary to the public interest would amount to allowing the registry to scrutinize the content of the notices registered and thus be contrary to recommendation 54, subparagraph (d). Moreover, the view was expressed that where the registry had made an error in the entry into the record of information submitted by way of a paper notice, the registry should be able to correct the error. It was stated that such a correction would be in the interest of all involved and would not have a negative impact on the rights of the registrant.

E. Registration information (A/CN.9/WG.VI/WP.46/Add.3, articles 17-30)

63. With respect to paragraph 2 of article 17, it was suggested that its wording should be aligned with the wording of recommendation 54, subparagraph (d).

64. With respect to subparagraph 1 (b) of article 18, it was suggested that it should be revised to ensure that, in the case of more than one secured creditor, the identifier and address of each secured creditor or its representative should be included in the notice. With respect to subparagraph 1 (c), it was noted that it was sufficient to cover one or more assets.

65. With respect to paragraph 2, it was suggested that reference should be made to any language specified in the law, which could include the official State and any other language.

66. With respect to paragraph 3, it was suggested that, to the extent it provided that the name of each grantor should be mentioned in the notice, it was appropriate to cover mainly multiple joint owners of the same encumbered assets. It was stated that, if the owners and the encumbered assets were different, the secured creditor should register multiple notices.

67. In addition, it was suggested that the commentary should refer to the need for the registry to have a set of rules for the transliteration of names with foreign characters in the alphabet of the language(s) used by the registry. Moreover, it was suggested that the commentary should include wording preserving the naming conventions of the enacting State.

68. With respect to option A of article 19, it was suggested that it should: (a) refer also to the name of the grantor (to be more in line with recommendation 59, which referred to identification number as additional information for the identification of the grantor); (b) separate the issue of the identification of the grantor in a notice from the issue of indexing of registered notices (which could be based on the name or the identification number of the grantor); and (c) address also the identification of foreign citizens. With respect to option B, it was suggested that it should: (a) address also the identification of foreign citizens; and (b) take into account that one State might issue a passport and another State a document such as a licence.

69. With respect to paragraph 4, it was suggested that none of the possibilities mentioned therein worked well because: (a) reference to the address entered in the notice was tautological; (b) reference to the security agreement failed to cover registration made prior to the conclusion of a security agreement; and (c) reference to official documents could inadvertently result in an address that was not up to date.

70. In view of the above, it was suggested that the issue of which grantor address should be mentioned in the notice should be left to the registrant. It was stated that, in any case, it was in the interest of the registrant to ensure that an accurate grantor address was mentioned in the notice even though an incorrect statement would not render the registration ineffective unless it would seriously mislead a reasonable searcher (recommendation 64). It was also observed that, while the time for determining the accuracy of the grantor address should be the time of registration,

the secured creditor could always register an amendment notice in the case of a change of the grantor's address after registration.

71. The example was given of a national registry in which, in addition to the name of a third-party grantor, the name of the debtor of the secured obligation was mentioned in a notice. It was stated that such information was useful for several reasons, including, because it allowed third parties to obtain information from the debtor and to assess the possibility of the security right being realized. In response, it was noted that the Guide did not require that debtor information be included in the notice, since such an approach would complicate the registration process and third parties could always obtain information with respect to the debtor from the security agreement, which they would typically request in the context of due diligence.

72. In that connection, it was observed that the grantor might not be the owner but a person who had the power to encumber the encumbered asset (recommendation 13). In response, it was noted that, even in that exceptional case, there was no problem as upon creation the security right would be effective between the parties and upon registration it would become effective against third parties. It was also pointed out that information about the owner (and any security rights created by the owner) could always be obtained through the typical due diligence process, which would reveal also the identity of the owner. It was also said that the priority rules would apply in any case to priority conflicts among security rights created by the grantor or the actual owner.

73. With respect to option A of article 20, it was suggested that it should refer to both the name and the number of the grantor in the relevant (company or other) registry pursuant to the relevant law. With respect to all options of article 20, it was suggested that they should also cover: (a) legal persons that were not corporations; and (b) foreign legal persons. With respect to paragraph 2 of article 20, it was suggested that the issue of the address of the secured person that was a legal person should be addressed in the same way as the address of the secured creditor that was a natural person.

74. With respect to articles 19-21, it was suggested that they might be recast to: (a) explain more clearly that the issue of who was the grantor was a matter for substantive law, while the draft model regulations could deal with information to be included in a notice and with search criteria; and (b) focus on the search criteria rather than on how registrants should fill out notices.

75. With respect to article 21, it was suggested that it should be revised to: (a) separate more clearly trusts that had a name from those that did not; (b) refer to the name of the owner of the asset where the grantor was not the owner; and (c) consider the issue of trade names of sole proprietorships.

76. With respect to article 23, it was suggested that additional information in the form of attachments to notices referred to in paragraph 3 could be discussed in the commentary but should be deleted from article 23 and, in any case, should not refer to location of assets.

77. With respect to article 24, it was suggested that it should be deleted and explained in the commentary or revised to clarify that it had limited application to the indexing and searching of certain serial number assets. With respect to all other references in the draft model regulations to serial number assets (the relevant

definitions, articles 15, paragraph 2, 26, paragraph 2 and 33,subparagraph (b)), it was suggested that they should be retained in square brackets.

78. With respect to article 25, it was suggested that:

(a) Additional description of the relevant immovable property might not be necessary;

(b) A definition of the attachments might be included in the definitions of the model regulations; and

(c) Registration of a security right in attachments to immovable property in the immovable property registry might be left to immovable property law.

79. With respect to article 26, it was suggested that:

(a) The heading should be revised to refer to "incorrect or incomplete information"; and

(b) Paragraph 2 should be simplified and aligned with recommendation 65.

80. With respect to article 27, it was suggested that:

(a) The terminology used in the article should be aligned with the terminology used in the Guide;

(b) As the impact of transfer of an encumbered asset on the effectiveness of registration was an issue to be addressed in secured transactions law (and the Guide did not make a specific recommendation in that regard), provisions related to transfers should be placed in square brackets in the draft model regulations or in the commentary;

(c) Subparagraph 1 (a) should be deleted;

(d) Subparagraph 1 (f) should also deal with situations in which there were multiple secured creditors; and

(e) Even when the transferee was identified as the new grantor replacing the original grantor, a search should still reveal the notice showing the original grantor.

81. With respect to article 29, it was suggested that in subparagraph 1 (a) reference should be made to a "registrant's identification information" as user identification and password would only be available to users accessing the registry via electronic means, unless another technology was used.

82. With respect to article 30, it was suggested that:

(a) In paragraphs 1 and 2, reference should be made to "notice" instead of "registration"; and

(b) The information to be included in the copy of the notice did not need to be specified.

83. With respect to article 31, it was suggested that compulsory amendment or cancellation should also be applicable in situations where the notice included description of assets that were not encumbered or no longer encumbered by the security agreement.

84. With respect to article 32, it was widely felt that it should be deleted and placed in the commentary as it dealt with substantive law issues that did not belong in the draft model regulations.

VI. Future work

85. The Working Group noted that its twentieth session was scheduled to be take place in Vienna from 12 to 16 December 2011, those dates being subject to confirmation by the Commission at its forty-fourth session, which was scheduled to take place in Vienna from 27 June to 8 July 2011.