

I. Introduction

1. – The set of draft rules which we will discuss today and tomorrow are not a Model Law and even less draft provisions of an international Convention. They are merely “recommendations” of a “Legal Guide” to secured transactions. Each of these recommendations will be supplemented by somewhat longer “Comments” which will explain major or difficult points.

This rather modest approach was chosen in order to dissipate any suspicion that UNCITRAL was attempting to “legislate” in the area of property law, a highly sensitive area. On hindsight, one may perhaps regard this attitude as overcautious.

2. – The Legal Guide pursues 11 key objectives which are set out in the first section of the Recommendations (Doc. 29 p. 12). In my view, the three most important ones are

- (1) to promote secured credit (lit. a);
- (2) to obtain security rights in a simple and efficient manner (lit. c); and
- (3) to harmonize secured transaction laws, including [I add: relevant] conflict-of-laws rules (lit. k).

3. – The central aim of the Legal Guide is to recommend to national legislators rules for a uniform “security right”. Such a security right ought to replace the existing national regimes with their confusing and often arbitrary multitude of basic types of security. The summa divisio, the basic differentiation usually is between possessory and non-possessory security. While there is mostly only

one type of possessory security, i.e. the classical pledge (the Roman law pignus), the situation differs completely when it comes to non-possessory security. One may say that there is everything between zero and two-hundred: There are still numerous countries where this modern type of commercial security is not recognised at all or only exceptionally. One of the key objectives of the Guide therefore is “to validate non-possessory security rights” (key objective (e), Doc. 29 p. 12).

On the other hand, there are countries with a plethora of non-possessory security rights such as the charge which may be equitable or legal, fixed or floating, and the mortgage in England; or the non-possessory pledge, the chattel mortgage, the security transfer of ownership or the security assignment of rights, etc., etc. in the so-called Civil Law countries.

All these and innumerable other varieties of national security rights, whether possessory or non-possessory, are to be replaced by one single and general “security right”. Such unification is possible and is enormously helpful for the promotion of security for credits. This has been proven during almost 50 years on the national level by Art. 9 of the American UCC. And this model has later been adopted by several other Anglophone countries, but also by the two Civil Law jurisdictions of Louisiana and Quebec.

4. – The “security right” is defined in the Legal Guide as a consensual property right created in movable property that secures payment or other performance of one or more obligations (Terminology s. 3 lit. (a), WP. 29 p. 3).

The primary object of a security right are corporeal movables. These, however, are less relevant for our present discussion.

However, a security right can also be created in rights. And these are of increasing importance.

The primary type of right envisaged by the Guide are claims for the payment of money, i.e. receivables. The security right also covers an outright transfer of a receivable (Defin. 3 (a)); cf. also Rec. 3 – WP. 29 p. 3 and 14).

Other types of property rights that may be used as security are, of course, intellectual property rights. That brings us to the topic of this Colloquium. Definition 3 (ii) of the Guide (Doc. 29 p. 9) specifies “Intellectual property rights” as including “patents, trademarks, service marks, trade secrets, copyright and related rights and designs. It also includes rights under licences of such rights.” (WP. 29 p. 9) There is also a definition of the “Licencee in the ordinary course of business” (Definitions 3 (ww), Doc. 29 p. 11). But, if I am not mistaken, intellectual property rights are not mentioned anywhere else.

The starting point of the Legal Guide therefore is: it applies to intellectual property rights, without establishing specific rules that would take into account the special features of this kind of asset.

However, there is another kind of brake and that is effected by limiting the application of the Guide. According to Rec. 4 (a) (WP. 29 p. 15) the Guide does not claim to apply if there is an inconsistency of its rules with – I quote –

“existing laws or international obligations of the state relating to these assets.”

[unquote] The term “laws” very probably covers also case law – at least if it is firm. And “international obligations” will in the European context cover Community law, especially Directives. But I will not further venture into an interpretation of Rec. 4 (a).

More specific are the indications in the Note to the Working Group which will probably be reflected in the Comment to that Recommendation. It encourages States to consider two kinds of adjustments of their security regime when transforming the Guide into national law:

First, the recommendations may, if appropriate, have to be adapted as they apply to a security right in intellectual property.

Second, if there is a direct inconsistency of the Guide’s recommendations with provisions of existing national law or a State’s international obligations, then the exclusive application of these instruments should expressly be spelt out within the confines of that inconsistency.

In short, the Legal Guide is flexible and follows the general principle that special rules prevail over general rules. Perhaps the Colloquium and any subsequent work of UNCITRAL in this area will achieve more specific rules integrating the two fields.

II. Acquisition Financing

I have stated in the beginning that the Legal Guide provides for one security right. This is the general rule; but as for all general rules, at least one major exception must be made, and that relates to security rights covering credits for the acquisition of assets.

Probably it would not be necessary to deal with this point – were it not for the fact that on this aspect no full uniformity could be achieved in the Guide.

Therefore, we have two slightly differing approaches – the so-called unitary approach and the so-called non-unitary approach (cf. WP 29, pp. 91 ss. and 95 ss.).

First, very briefly on the unitary approach: Generally speaking, as Rec. 182 says, an acquisition security is also a security right. This means that the rules of the guide apply to it, except where otherwise provided. Indeed, there are a few special rules:

a) Acquisition security rights in consumer goods are effective against third parties without registration (Rec. 185); in other words, the seller or another creditor financing the sale of such goods need not register its security right.

b) Under certain, although differing conditions, an acquisition security right may have a super-priority over earlier non-acquisition security rights in goods or inventory or proceeds of such goods. For details, I must refer you to Rec.s 186 – 192.

Second, equally briefly on the non-unitary approach. Essentially this relies upon the retention by the seller of its ownership in the sold goods as security for payment of the outstanding purchase price. The so-called retention-of-title devices comprise, apart from retention (or reservation) of title by the seller, hire-purchase sellers and financial lessors as well as purchase-money lenders. These four classes should be treated equally among each other and the results should functionally be equivalent to the regime of security rights under the unitary approach (Purpose section at WP 29 p. 95).

In particular, this equivalence means:

a) To be effective against third parties, ownership rights have to be registered under the same conditions and with the same limitations as under the unitary approach (Rec. 184 – 185, p. 97 s.).

b) Rec.s 186 – 192 (p. 98 – 100) confirm the super-priority of retention-of-title devices over limited rights of other creditors. This super-priority results already from their quality as retention of ownership. However, this “natural” super-priority is made subject to the same conditions as are required under the unitary approach.

This is in very brief outline a summary of the special aspects of security rights for acquisition financing. Further discussions may show how relevant this aspect of the Legal Guide is for dealing with security rights in intellectual property, if at all.