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Treatment of security interests in the draft Legislative Guide on Insolvency Law

Note by the Secretariat

1. At its thirty-fifth session (2002), the Commission noted with particular satisfaction the efforts undertaken by Working Group VI (Security Interests) and Working Group V (Insolvency Law) towards coordinating their work on a subject of common interest, the treatment of security interests in insolvency proceedings. Strong support was expressed for such coordination, which was generally thought to be of crucial importance for providing States with comprehensive and consistent guidance regarding the treatment of security interests in insolvency proceedings. The Commission endorsed a suggestion made to revise chapter X, Insolvency, of the draft legislative guide on secured transactions in light of the core principles agreed by Working Groups V and VI (see A/CN.9/511, paras. 126-127 and A/CN.9/512, para. 88). The Commission also endorsed a suggestion for closer coordination of the work of the two Working Groups, including by holding a one-day joint meeting of the two Working Groups at their upcoming sessions.[1]

2. At their first joint session (Vienna, 16-17 December 2002), Working Groups V and VI considered the treatment of security rights in insolvency proceedings on the basis of chapter IX, Insolvency, of the draft legislative guide on secured transactions (A/CN.9/WG.VI/WP.6/Add.5). At that session, the Secretariat was requested to prepare a revised version of chapter IX, Insolvency (see A/CN.9/535, para. 8).

3. At its thirty-sixth session (2003), the Commission expressed its appreciation to Working Groups V and VI for the progress made during their first joint session on

[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/57/17), para. 203.

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matters of common interest and noted with satisfaction the plans for further joint meetings of experts.[2]

4. At its fourth session (Vienna, 8-12 September 2003), Working Group VI considered the revised version of chapter IX (A/CN.9/WG.VI/WP.9/Add.6) and requested the Secretariat to prepare a further revision (see A/CN.9/543, para. 15).

5. Working Groups V (Insolvency) and VI (Security Interests) will hold their second joint session on 26 March 2004. The purpose of the joint session is to confirm the treatment in the draft legislative guide on insolvency law (document A/CN.9/WG.V/WP.70 (Parts I and II)) of secured creditors in insolvency proceedings with respect to a number of issues raised at the fourth session of Working Group VI in September 2003.[3] The Commission has requested Working Group V to complete its work on the draft legislative guide and refer it to the thirty-seventh session of the Commission in 2004 for finalization and adoption.

6. The issues relating to the treatment of security interests are set forth in the table attached to this note. The treatment of those issues in the draft legislative guide on insolvency law is set forth, in summary, in the fourth column, with the second and third columns referring to the relevant chapters of the draft legislative guide.

7. Amongst the issues noted in the attached table, the Working Groups may wish to consider whether the following issues, in particular, should be dealt with more fully in the insolvency guide:

(a) Application of the stay and avoidance provisions to the perfection of a security interest (see issues 3 and 18);

(b) Determination of economic value of security interests (especially timing of valuation) (see issues 7 and 9);

(c) Treatment of secured creditors in reorganization where they disagree with, or abstain from voting on, the reorganization plan (see issues 23-28);

(d) Derogations from the first priority of secured creditors (see issues 32-33);

(e) Treatment of subordination agreements (see issue 34); and

(f) Treatment of title arrangements (see issues 36-43).

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[2] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 217.

[3] Report of Working Group V (Security Interests) on the work of its fourth session (September 2003) A/CN.9/543, paras 81-83.

Issue	Subject heading	Ref.	Basic Treatment in draft UNCITRAL Legislative Guide on Insolvency Law
1. Are encumbered assets part of the estate?	Assets constituting the insolvency estate	II.A	Rec. 24(a) provides "The law should identify the assets that will constitute the estate, including … the debtor's interest in assets subject to a security interest and in third-party-owned assets as at [the time of application for commencement] [commencement] of insolvency proceedings" (see also paras. 156, 159-161). Paras. 159-160 discuss reasons for including encumbered assets and note that while commencement of proceedings may limit or suspend the exercise of security rights, the insolvency law should make it clear that creditors are not deprived of their rights altogether. *Note to the Working Groups: Is the reference to the "debtor's interest in assets" sufficient to cover all intended circumstances? Will it, for example, capture the debtor's interest in a transfer of title arrangement where the law does not provide for the debtor to retain an equitable property right or a right of redemption in the assets? If the debtor must rely in such situations on contractual or legislative rights, should the current formulation include a specific reference to such rights?*
2. What is the scope and time of the application of the stay?	Protection and preservation of the insolvency estate	II.B	The guide provides that provisional measures (including a stay) may be granted by a court to apply between application for and commencement of insolvency proceedings (rec. 27) and that on commencement a stay or suspension should apply to certain actions (rec. 34), specifically: "(a) commencement or continuation of individual actions or proceedings concerning the assets of the debtor, and the rights, obligations or liabilities of the debtor; (b) [perfection] [actions to make security interests effective against third parties] or enforcement of security interests; (c) execution or other enforcement against assets of the estate; (d) the right of a counterparty to terminate any contract with the debtor; and (e) the right to transfer, encumber or otherwise dispose of any assets of the estate." The stay would apply to actions taken by the debtor and by creditors or third parties, and would include creation of an encumbrance by the debtor after commencement. Secured creditors may request relief from the stay (see 5 below).
3. Should the stay extend to acts of perfection of security interests?			Rec. 27(a) provides that provisional measures may include, inter alia "(a) staying execution against the assets of the debtor, including [perfection] [actions to make security interests effective against third parties] or enforcement of security interests"; see also rec. 34. See generally para.181. Footnote 35 to para.189 notes that "Where a secured transactions regime provides a grace period for perfection of a security interest, whether the insolvency law should recognize that grace period and include an exception to application of the stay to secured creditors to permit perfection in the applicable circumstances also will need to be considered."

Issue	Subject heading	Ref.	Basic Treatment in draft UNCITRAL Legislative Guide on Insolvency Law
4. What is the duration of application of the stay?			Rec. 37(c) provides "The law should specify that the measures applicable on commencement of insolvency proceedings remain effective throughout the proceedings until (a) relief is granted; (b) a reorganization plan becomes effective; or (c) in the case of secured creditors in liquidation proceedings, a fixed time period specified in the law expires, unless it is extended by the court for further period on showing that: (i) an extension is necessary to maximize the value of assets for the benefit of creditors; and (ii) the secured creditor will be protected against the erosion of the value of the encumbered asset." Footnote 52 to rec. 37(c) notes that it is intended the stay should apply to secured creditors in liquidation proceedings only for a short period of time, such as between 30 and 60 days, and that the law should clearly state the period of application.
5. On what grounds can the secured creditor be granted relief from the stay?			Rec. 38 provides "… a secured creditor may request the court to grant relief from the type of measures applicable on commencement on grounds that may include that: (a) the encumbered asset is not necessary to a prospective reorganization or sale of debtor's business; (b) [where the value of the secured claim exceeds the value of the encumbered asset] the value of the encumbered asset is eroding and the secured creditor is not protected against the erosion of that value; and (c) in reorganization, a plan is not approved within any applicable time limits." Other relevant circumstances for relief from the stay discussed (see paras 200, 207) include where provision of protection of value is not feasible or is overly burdensome to the estate or where relief is required to protect or preserve value of assets, such as perishable goods.
6. Aside from relief from the stay, what are the conditions for, and types of, protection that might be granted to secured creditors?			Rec. 39 provides "… a secured creditor may request the court to grant protection. Where the value of the encumbered asset does not exceed the secured claim or will be insufficient to meet the secured claim if the value of the encumbered asset erodes during the imposition of the measures applicable on commencement, protection may include: (a) cash payments by the estate; (b) provision of additional security; or (c) such other means as the court determines." Other measures discussed (see paras. 160, 189, 206) include maintaining the value of encumbered assets or the secured portion of a creditors claim; payment of interest; and consulting secured creditors on use and sale of encumbered assets. Para. 206 notes that approaches to protection need to be weighed against potential complexity and cost. Third-party-owned assets: para. 237 notes that the law should consider protection against diminution in value as for secured creditors.

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7. What "value" will be protected?			Paras. 210-215 discuss various approaches to protection of value. The first approach discussed is reflected in rec. 39 (see 6 above). A second approach discussed (but not currently reflected in recommendations) is to protect the value of the secured portion of the claim—the asset is valued upon commencement, and the amount of the secured portion of claim is determined. This remains fixed through the proceedings and is distributed at conclusion. It is noted that under some laws there may be payment of interest.
8. If necessary, how might the security be "replaced"?			Para. 214 notes that where it is necessary for the insolvency representative to sell encumbered assets, it is "desirable for an insolvency law to allow the insolvency representative the choice of providing the creditor with substitute equivalent security, such as a replacement lien over another asset or the proceeds of the sale of the encumbered asset, or paying out the full amount of the value of the assets that secure the secured claim either immediately or through an agreed payment plan". The law may restrict use of proceeds of sale of encumbered assets (see 13 below).
9. When and how will the economic value of a security right be determined?			Paras. 213-214 address the various purposes for which valuation of encumbered assets is required and note the need for the insolvency law to identify the date for determining value—the example given is the value at commencement, with provision for ongoing review. Methods of valuation discussed include by agreement of the parties; others are court-based including the use of experts, market comparisons and/or the application of principles stated in the insolvency law. There are no specific recommendations as to the method or time of valuation.
10. Post-commencement restraints on enforcement of security rights, including whether security agreement is a contract that has not yet been fully performed.			See II.B Application of the stay and II.E Treatment of contracts. The guide talks generally about contracts where both parties have not fully performed their obligations (para. 257), noting that exceptions to the general rules on contracts may be needed for certain contracts, for example, labour contracts, contracts for the provision of personal services, financial contracts, contracts for loans and contracts for insurance (para. 259). Security agreements are not specifically discussed.
11. What power does the insolvency representative have to use or sell encumbered assets?	Use and disposal of assets	II.C	Recs. 40, 43 and 44 provide that the law should permit the use and disposal by the insolvency representative of assets of the estate, including assets subject to security interests, both in and outside the ordinary course of business, provided that: there is notice of the proposed sale or other disposal to secured creditors; secured creditors are given an opportunity to object to any proposed sale; relief from the stay has not been granted; and priority of interests in the proceeds of sale is preserved.

Issue	Subject heading	Ref.	Basic Treatment in draft UNCITRAL Legislative Guide on Insolvency Law
			Paras. 229-230 discuss various approaches to use or disposal of encumbered assets (other than by further encumbrance). Para. 231 discusses different approaches to the sale of encumbered assets free and clear of encumbrances and notes the different conditions that are imposed in insolvency laws including that the sale price must exceed the value of the security interest, or that the secured creditor could be compelled (in other legal proceedings) to accept cash or substitute equivalent security in settlement; and that the court may authorize the sale if the secured creditor does not consent. It notes further that where an inadequate offer is made, the secured creditor may be permitted to offset bid. Urgent sales: rec. 46 provides that the law should permit urgent sales "where the assets by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy. The law may provide that prior approval of the court or of creditors is not in such circumstances". Power of secured creditor to sell: para. 229 notes that if encumbered assets are not part of the estate, secured creditor can sell; otherwise it will normally be the insolvency representative that has the power but there may be limitations on exercise of that power, especially in liquidation, and in certain situations the insolvency representative may relinquish encumbered assets.
12. When can encumbered assets be surrendered to secured creditor?			Rec. 48: "… where a secured claim exceeds the value of the encumbered asset, and the asset is not required for a reorganization or sale of the business as a going concern, the law may permit the insolvency representative to relinquish the asset to the secured creditor without notice to other creditors". Assets may also be relinquished where it is in the interests of estate, or the secured creditor obtains relief from stay. Other situations discussed (para. 234) include: where assets have no, or an insignificant, value to the estate; where the asset is burdened in such a way that retention would require excessive expenditure that would exceed the proceeds of realization of the asset or give rise to an onerous obligation or a liability to pay money; or where the asset is unsaleable or not readily saleable by the insolvency representative, such as where the asset is unique or does not have a readily apparent market or market value.
13. Who is entitled to the proceeds of encumbered assets received from post-commencement dealings and events? Can proceeds for this purpose include both replacement assets and closely associated revenue? (see 8 above)			Paras. 238-239 note that most laws provide that the secured creditor holds the equivalent interest in cash proceeds from the disposal of the encumbered asset. Proceeds may be used with the consent of the secured creditor or the court. Under some laws, certain issues may need to be resolved before a court will authorize such use: both the relevant security interest and the value of the underlying property will need to be determined; the risk to the secured creditor will need to be identified; and the court will need to determine whether sufficient measures are in place to protect the economic value of the secured claim.

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14. What types of post-commencement secured finance can be obtained? How is the priority of the provider of new secured finance reconciled with pre-commencement secured creditors?	Post-commencement finance	II.D	Rec. 50: "The law should enable a security interest to be granted for repayment of post-commencement finance, including a security interest on unencumbered assets, including after-acquired assets, or a junior or lower priority security interest on already encumbered assets of the estate." (See also 15 below.) Paras. 247-250 discuss the provision of security and priority.
15. Must an existing secured creditor agree to new secured finance? (see "Priming lien")			Rec. 51: "The law should specify that a security interest over the assets of the estate to secure post-commencement finance does not have priority ahead of any existing security interest over the same assets unless the insolvency representative obtains the agreement of the existing secured creditor(s) or follows the procedure in recommendation (52)." Rec. 52: "… where the existing secured creditor does not agree, the court may authorize the creation of a security interest having priority over pre-existing security interest provided specified conditions are satisfied, including: (a) the existing secured creditor was given the opportunity to be heard by the court; (b) the debtor can prove that it cannot obtain the finance in any other way; (c) the interests of the existing secured creditor will be protected, including by a sufficient excess in the value of the encumbered asset so that the existing secured creditor will not be exposed to an unreasonable risk of harm." Other conditions discussed (para. 250) might include providing protection for any diminution of the economic value of encumbered assets.
16. Is super-priority restricted to secured creditors who finance acquisition of new assets by way of title retention or secured loan?			Not specifically addressed.
	Treatment of contracts	II.E	The guide provides generally that automatic termination clauses should be unenforceable as against the insolvency representative and the debtor (rec. 56); and that the insolvency representative may decide to continue to perform or reject a contract under which both the debtor and its counterparty have not yet fully performed their obligations (recs. 58-71).

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17. Should secured transactions be included within the general rules governing avoidance of transactions in insolvency?	Avoidance actions	II.F	Rec. 74: "(a) where a security interest is effective and enforceable under other law, that effectiveness and enforceability will be recognized in insolvency proceedings" and (b) notwithstanding that a security interest is effective and enforceable under other law, it may be subject to the avoidance provisions of the insolvency law on the same grounds as other transactions" (see also paras. 322-324).
18. Should security rights created or perfected within a prescribed period before commencement be subject to avoidance?			Para. 325 notes the approach, under some insolvency laws, of avoidance provisions applying to a security interest that was not perfected under the relevant secured transactions law or to a security interest perfected within a short period before the commencement of proceedings. This issue is not addressed in the recommendations.
19. What will be the length of the suspect period for avoiding a secured transaction?			Rec. 75: "The law should specify that the transactions described in recommendation 73(a)-(c) may be avoided if they occurred within a specified period (the suspect period) calculated retroactively from a specified date, being either the application for or commencement of the insolvency proceedings. The law may specify different suspect periods for different types of transactions". There are no specific recommendations as to length of the suspect period for any of these types of transactions, although different approaches are discussed (see paras. 332-335) and it is noted that where the transactions involve creditors who are not related persons, the suspect period may be brief (examples range from three to six months).
	Rights of set-off	II.G	No specific reference to secured transactions. See paras. 349-352 and rec. 85.
	Financial contracts and netting	II.H	Rec. 88: "Once the financial contracts of the debtor have been terminated, the law should permit counterparties to enforce and apply their security interest to obligations arising out of financial contracts. Financial contracts should be exempt from any stay under the insolvency law that applies to the enforcement of a security interest".
20. Can secured creditors participate in insolvency proceedings?	Creditors—participation in insolvency proceedings	III.C	Rec. 110 establishes that all creditors, both secured and unsecured, are entitled to participate in insolvency proceedings and that the law should identify what that participation may involve in terms of the functions that may be performed.
21. How might secured creditors participate in insolvency proceedings?			Recommendations 110-120 on participation of creditors do not distinguish between secured and unsecured creditors. Paras. 444; 458-459 note that some insolvency laws require secured creditors to surrender their security before they can participate in the proceedings and vote as a member of the creditor body. Where they are under-secured, however, their participation in the committee or in voting by the creditor body may be appropriate to the extent that they are under-secured. In reorganization proceedings, secured creditors will have an interest in negotiating with the debtor

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			and other parties, particularly where their rights may be modified by a reorganization plan, or where the encumbered asset will be key to the successful implementation of the plan. Creditor committees generally represent only unsecured creditors. While some laws allow a separate committee of secured creditors, other laws provide for both types of creditors to be represented on the same committee. A further approach is for an insolvency law not to specify which creditors should be represented in a given case, but to allow creditors to collectively choose their own representatives on the basis of willingness to serve.
22. When can secured creditors vote?			Rec. 111 provides that the law should specify the matters on which the vote of creditors is required and establish the relevant eligibility and voting requirements. In particular, creditors should vote to approve a reorganization plan. Para. 474 notes that some laws distinguish matters requiring the support of both secured and unsecured creditors; secured creditors will only participate in the vote on specified matters such as selection of the insolvency representative and matters affecting their security. See also Reorganization.
	Party in interest's right to be heard	III.D	Rec. 121 provides that all parties in interest should have a right to be heard (no specific reference to secured creditors).
	Reorganization plan	IV.A	Rec. 128 provides that the law should specify the minimum contents of a plan, which may include … means for the implementation of the plan which may include … (v) [modification of terms of security interests, including] extension of a maturity date or a change in an interest rate or other term; [(vi) continued use of encumbered assets;] …" (see also paras. 498-499).
23. How are secured creditors bound to a reorganization plan if they disagree with it or abstain from voting?			Paras. 512-517 discuss approaches to approval by secured and priority creditors. Para. 516 discusses the various approaches to binding dissenting members of a class of secured creditors which otherwise votes in support of a reorganization plan, and the protections that may apply or the conditions that must be satisfied before such creditors can be bound.
24. Should there be a minimum standard for the level of recovery by a secured creditor in reorganization proceedings?			Para. 529 addresses the question of whether or not all classes of creditors must support the plan in order for it to be approved. Paras. 532-540 discuss mechanisms for binding dissenting creditors, in particular court confirmation of a plan approved by the requisite majority of creditors and the conditions that may apply to such confirmation.
25. Must secured creditor consent to alteration of rights?			With regard to abstentions, para. 510 notes in passing that the insolvency law will need to address the manner in which non-participating or abstaining creditors will be treated. It notes, in particular, that some laws treat such creditors as voting to reject a plan, while other laws, for purposes of determining whether the majority required for approval has been met, only take into account those creditors actually voting.

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			The recommendations do not specifically refer to approval by secured creditors, but note the need for the insolvency law to specify (rec. 133) where voting takes place in classes, how the vote achieved in each class would be treated for purposes of approval of the plan and, where the approval of all classes is not required (rec. 134), that the law should address the treatment of those classes that do not vote in support of a plan that is otherwise approved by the requisite majority or the requisite classes. Rec. 136 provides that the plan should bind debtor, creditors and other interested parties either through approval by the requisite majority or though a combination of that approval and confirmation by the court. Rec. 137: "[The law may provide that if secured creditors do not support a plan and the encumbered assets are required for the reorganization, the court may order that the assets may continue to be used in the reorganization, subject to protection of the interests of the secured creditor.]" Where the law requires court confirmation of a plan approved by the requisite classes or majority of classes, rec. 138 sets out the conditions that should be met including: "(c) that the creditor will receive as least as much under the plan as they would have received in liquidation, unless they have agreed to lesser treatment; and (f) that the treatment of claims in the plan conforms to the ranking of claims under the law, except to the extent that affected creditors agree otherwise."
26. Can secured creditors vote on a reorganization plan?			Paras. 510, 512-514 note that the voting of secured creditors depends upon the manner in which the insolvency regime treats secured creditors, the extent to which a reorganization plan can affect the security interest of the secured creditor, and the extent to which the value of encumbered assets will satisfy the secured creditor's claim. It is noted that where the insolvency law does not affect secured creditors, secured creditors do not need a right to vote or protections but that a successful reorganization is unlikely. A secured creditor may vote to the extent its claim is unsecured. Para. 515 notes that different approaches to voting include voting as separate class on a plan that would impair secured claims, or each secured creditor forming a class of its own, since their interests very often differ from each other. Paras. 515, 529 note that requirements for voting of secured creditors are generally the same as for approval by unsecured creditors, although some laws require different majorities depending upon the manner in which secured creditors' rights are to be affected by the plan and the need for their support of the plan.

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27. What happens if the plan is not approved?			The guide discusses modification of a proposed plan (para. 530); and conversion to liquidation (para. 531); rec. 145 provides for conversion by the court where, inter alia, "(c) a proposed plan is not approved".
28. Once approved, can a plan be challenged?			Rec. 138 sets forth the conditions which must exist in order for a plan to be confirmed by the court (where court confirmation is required); rec. 139 addresses challenge where no court confirmation is required; rec. 140 provides for challenge of a confirmed plan on the basis of fraud. Para. 535 discusses grounds for challenge available under different laws which may include that the plan is not feasible, e.g. secured assets are required for successful implementation of the plan, but secured creditors are not bound by the plan and no agreement has been reached with relevant secured creditors concerning enforcement of their security interests.
29. Does the stay on secured creditors continue in the case of conversion to liquidation?			Para. 550 notes that an insolvency law needs to consider this issue.
	Expedited reorganization proceedings	IV.B	Inclusion of secured debt: para. 559 notes that secured debt can be included in voluntary restructuring negotiations with the agreement of the secured creditors.
30. Are secured creditors required to submit claims? What are the consequences of submitting a claim?	Treatment of creditor claims	V.A	Rec. 156: "The law should specify whether secured creditors are required to submit claims" (footnote 104 to rec. 156 notes that under some laws a secured creditor who files a claim is deemed to have waived the security or some of the privileges attached to the credit, while under other laws failure to submit a claim has that result). See also paras. 567-569, 587. Paras. 586-589 discuss different approaches to failure to submit a claim and rec. 159 points to the need for an insolvency law to address the consequences of failure to submit a claim. Notification of need to submit: para. 570 suggests that where the claims procedure can affect the rights of a secured creditor, notification of the commencement of proceedings should include information regarding the submission, or failure to submit, secured claims: see rec. 19. Rec. 154 requires a creditor to submit a claim and establish the basis and amount of the claim; rec. 161 addresses evidence.
31. What happens if the value of the encumbered asset is less than the secured claim?			Rec. 167: "[The law should provide that the insolvency representative may determine the portion of a secured creditor's claim that is secured and the portion unsecured by valuing the encumbered asset.]". (See also 9 above.)

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			Paras. 567-569 discuss different approaches including that a secured creditor may be required to submit a claim for any unsecured portion of its claim as an ordinary unsecured creditor. The value of the unsecured claim thus depends upon the value of the encumbered asset, the time at which that value is determined and the method of valuation used. Another approach requires secured creditors to submit a claim for the total value of their security interest irrespective of whether any part of the claim is undersecured, a requirement which in some laws is limited to the holders of certain types of security interest, such as floating charges, bills of sale, or security over chattels.
32. Can statutory priorities, in insolvency, amend the first priority of secured creditors?	Priorities and distribution [of proceeds of liquidation]	V.B	Paras. 624-626 discuss ranking of claims and note that many insolvency laws recognize the rights of secured creditors to have a first priority for satisfaction of their claims, either from the proceeds of sale of the specific encumbered assets or from general funds. Para. 625 notes, however, that some insolvency laws do not afford that first priority and discusses the different approaches taken, including those that rank payment of secured creditors after administration costs and other claims, or limit the amount that can be recovered (in priority) by secured creditors from the assets securing their claim to a certain percentage of that claim. Para. 626 notes that a further exception to the first priority rule may also relate to priorities provided in respect of post-commencement finance, where the effect on the interests of secured creditors of any priority granted should be clear at the time the finance is obtained, particularly since it may have been approved by the secured creditors (see also 14-16 above). It is further noted that such approaches may create uncertainty with respect to the recovery of secured credit and the guide suggests that limiting the use of such exceptions to first priority is highly desirable. Rec. 173: "The law should specify that secured claims should be satisfied from the security in liquidation or pursuant to a reorganization plan, subject to claims that are superior in priority to the secured claim, if any. Claims superior in priority to secured claims should be minimized and clearly set forth in the law. To the extent that the value of the security is insufficient to satisfy the secured creditor's claim, the secured creditor may participate as an ordinary unsecured creditor." See also rec. 172, 174.
33. Should there be a statutory reservation of a percentage of the value of encumbered assets for distribution to those other than the secured creditor?			Para. 625 (see 32 above). The paragraph also notes that some laws which do reserve a certain percentage for payment of lower-ranked creditors make a distinction between security interests over essentially all assets of a business (enterprise mortgage or floating charge) and other types of security interest.

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34. What is the treatment of subordination agreements in insolvency?			Paras. 617-623 discuss types of subordination; rec. 174 establishes ranking of claims, including deferred or subordinated claims. There is neither comparative discussion nor recommendations on the treatment of subordination agreements in insolvency.
35. Should secured creditors contribute to the costs of the administration of the insolvency?			Para. 626 notes that the secured creditor may be required to contribute to costs directly related to its interests, such as the administrative expenses related to the maintenance of the encumbered asset. If the insolvency representative has expended resources in maintaining the value of the secured asset, it may be reasonable to recover those expenses as administrative expenses from the amount that would otherwise be paid in priority to the secured creditor from the proceeds of the sale of the asset.
	Treatment of corporate groups in insolvency	V.C	Para. 651 notes that insolvency laws providing for consolidation of debts do not affect the rights of secured creditors, other than possibly the holders of intra-group securities (where the secured creditor is a group company).
	Applicable law governing in insolvency proceedings	V.D	See A/CN.9/WG.V/WP.72. Rec. 179 provides that the insolvency law should recognize rights, entitlements and claims arising under general law, except to the extent of any express limitation and rec. 180 that the law applying to the validity and effectiveness of any right, entitlement or claim existing at the time of commencement of insolvency proceedings should be determined by the private international law rules of the jurisdiction in which insolvency proceedings are commenced. Rec. 181 provides that the law of the State in which insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of those proceedings and their effects. Recs. 182-184 address exceptions to the application of the law of the insolvency proceedings: the effects of insolvency proceedings on the rights and obligations of participants in a payment or settlement system or in a regulated financial market should be governed by the law applicable to the system or market; rejection, continuation and modification of labour contracts and relations may be governed by the law applicable to the contract; and any additional exceptions should be limited in number and clearly set forth in the insolvency law.
36. Treatment of title arrangements in insolvency	Title arrangements		The guide does not specifically address the treatment of title arrangements in insolvency, except to the extent that they may be covered by the discussion of security interests, treatment of third-party-owned assets and treatment of contracts. See generally paras. 162-164; 236-237; treatment of contracts II.E. Paras. 162-163 note that some insolvency laws permit assets in which the creditor retains legal title or ownership to be separated from the insolvency estate; and that under some laws separation of the asset may be subject to provisions on

Issue	Subject heading	Ref.	Basic Treatment in draft UNCITRAL Legislative Guide on Insolvency Law
			treatment of contracts. It is noted that the insolvency estate will generally include any rights that the debtor might have in respect of those assets (see issue 1). It is further noted that third-party assets may be crucial to reorganization or sale of the business in liquidation and that it will be desirable for the insolvency law to include a mechanism that will enable those assets to remain at the disposal of the insolvency proceedings, subject to protecting the interests of the third-party owner and the right of that party to dispute that treatment. Para. 236 also notes the possible need to use third-party-owned assets in reorganization and sale of the business in liquidation and that insolvency laws generally treat that issue in the context of constitution of the estate or the treatment of contracts, imposing restrictions on the termination of a contract or preventing the owner from reclaiming the assets for a limited period of time. Para. 237 discusses the need to protect against diminution of value of the assets. No specific reference is made to title arrangements in the chapter on treatment of contracts.
37. Does stay extend to retention of title arrangements?			It is intended that the stay would apply either (i) because the retention of title arrangement is treated as a security interest and rec. 34(b) applies to stay the "enforcement of security interests", subject to the normal relief measures available (see rec. 38); or (ii) because the arrangement is treated as a contract where both parties have obligations to perform and rec. 34 (a) (stay on commencement or continuation of actions concerning the rights, obligations or liabilities of the debtor) or (d) (stay on termination of contracts) would apply. *With respect to (ii), however, the Working Groups may wish to consider whether, as currently drafted, rec. 34 would be broad enough to include a prohibition on the recovery of, or interference with, property held or occupied by or in the possession of the debtor, which may not be a termination of the contract under rec. 34(d) or an action falling within rec. 34(a)?*
38. What power does the insolvency representative have to use or sell assets subject to retention of title arrangements?			If treated as a security interest, the insolvency representative will have the same powers as apply in the case of an encumbered asset: recs. 40, 43, 44. If treated as a contract where both parties have obligations to perform, the insolvency representative may use the procedure governing continuation of a contract: recs. 58-71.
39. Under what circumstances will the holder of a right of retention of title be bound by a reorg. plan?			If treated as a security interest, the holder of a right of retention of title would be bound in the same manner as a secured creditor: rec. 137. If treated as a contract where both parties have obligations to perform, the outcome will depend upon treatment of the contract.

Issue	Subject heading	Ref.	Basic Treatment in draft UNCITRAL Legislative Guide on Insolvency Law
40. What is the treatment of conditional sales in insolvency?			Not specifically addressed.
41. What is the treatment of financial leases in insolvency?			Not specifically addressed, although see para. 163.
42. Is "surplus value" part of the insolvency estate?			Not specifically addressed.
43. Does stay extend to lessor of property that is in possession or control of debtor?			See Insolvency Guide chapter II.B Application of the stay; discussion of use of third-party-owned assets (paras. 236-237) and the note to Working Groups in respect of issue 37.