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FOREWORD

Part 1 of this publication is a brief overview of the Asian Development Bank's (ADB) Law Policy Reform (LPR) work in the last year. In 2001 to 2002, LPR activities were focused on an access to justice program in Pakistan that concentrates on helping the poor. LPR activities also included a regional judicial independence project and a technical assistance project to the Philippines to strengthen the independence and define the accountability of the judiciary, regional support for anti-corruption measures and for combating money laundering, cross-border insolvency and secured transactions law reform, support for implementation of the land law in Cambodia, and continuing legal training in various ADB developing member countries.

We are very pleased with the achievements of these projects to date and their continuing contribution to improving and strengthening the legal system of ADB's developing member countries. We remain strongly committed to pursuing such law and policy reform initiatives that are welcomed by ADB developing member countries and to working with them on these critically important issues.

Part 2 of this publication presents a Guide to Movables Registries (the Guide). It follows up an earlier publication in *LPR at the ADB*, Vol. II, 2000 Edition on Secured Transactions Law Reform in Asia: Unleashing the Potential of Collateral.

Since the publication of *LPR at the ADB*, Vol. II 2000 edition, there has been increasing international interest in and commitment to secured transactions law reform. In 2001, two important international conventions were adopted: the Convention on International Interests in Mobile Equipment spearheaded by the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Convention on the Assignment of Receivables in International Trade developed by United Nations Commission on International Trade Law (UNCITRAL). In 2002, the Organization of American States (OAS) adopted the Inter-American Model Law on Secured Transactions, and UNCITRAL commenced work on a Model Legislative Guide to Secured Transactions. At the national level, there are a growing number of secured transactions reform initiatives underway in the Asian and Pacific region and elsewhere.

These recent initiatives share one common feature. They all contemplate the establishment of a movables registry for giving public notice of secured transactions affecting a debtor's movable property. As the reform momentum in ADB member countries expands and accelerates, the need for general guidelines on the functions, design, operations and scope of such a registry is becoming increasingly evident. Part 2 of this publication seeks to respond to that need by identifying the features and functions of a modern efficient movables registry, and analysing the design, operations, scope and underlying policy issues that must be resolved in the course of the reform process.

The *LPR at the ADB*, 2001 Edition on Legal Empowerment: Advancing Good Governance and Poverty Reduction concluded that the success of development projects depends in part on the creation of opportunities for beneficiaries to advance their interests through informed participation in decision-making processes. On the same basis, this Guide is intended for legislators, policymakers, and system designers in member countries, but also potential users of the system.

The recent surge of interest in secured transactions law reform is partly a result of the information technology revolution. Dramatic advances in the electronic communication, storage and retrieval of digital data mean that movables registries can increasingly operate with greater

efficiency and less cost. The Guide seeks to integrate secured transactions law reform with information technology in a manner that permits the most transparent, efficient and cost-effective registration and searching of charges.

The Guide offers for ADB member countries key features of and reform options for movables registry design and highlights the opportunities provided by technological innovations to enable ADB developing member countries to leapfrog to notice-filing, electronic movables registries. However, the Guide also recognizes the need for policy choices in secured credit legal policy and registry systems design as well as in transition regimes to accommodate the special challenges created by infrastructure constraints, unique demographics, existing registries and commercial practices in some of the region's developing countries. Consequently, the Guide gives due consideration to registry design for a document filing, paper-based movables registry. The Guide is designed to provide a flexible resource to enable interested constituencies in each member country of ADB to play an active role in the registry design process and thus to have their needs and perspectives accommodated and provide for pursuit of a sequenced registry reform process from document-filing to notice-based and paper to digital registry systems.

For movables registry operations, the Guide explores the policy choices among private, public and private-public arrangements, policy determination on liability of movables registries, and costs of movables registries. It also examines the policy choices on the legal effectiveness of registration from the perspective of registry clientele.

The Guide refers to national movables registries, but is fully cognizant of the need to take account of constitutional frameworks and other policy factors that may suggest the need or desirability of choosing provincial or other subnational registries. The Guide explores the rules needed to govern the interlinking of provincial or other subnational registries and the opportunities to participate in special international movables registries with reference to international registry developments.

The Guide is a concrete reflection of ADB's commitment to encourage the development of modern movables registries for publicizing secured transactions in active cooperation with ADB developing member countries.

I would like to thank Mr. Hamid Sharif, Assistant General Counsel, Mr. Arjun Goswami, Senior Counsel, and Mr. Said Zaidansyah, Young Professional, in the Office of the General Counsel for overseeing the production of this publication.

GERALD A. SUMIDA
General Counsel

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The views presented in this report do not necessarily reflect the views or position of ADB, or its Board of Directors or the Governments they represent. ADB does not guarantee the accuracy of the data included in this report and accepts no responsibility for consequence for their use. The term "country" does not imply any judgment by ADB as to the legal or other status of any territorial entity.

This publication, when cited should be referred to as "LPR at ADB, 2002 Edition".

Part 1:

An Overview of ADB's Law and Policy Reform Activities in 2001-2002

AN OVERVIEW OF ADB'S LAW AND POLICY REFORM ACTIVITIES IN 2001-2002

Supporting Law and Policy Reform

1. Law and policy reform is at the heart of good governance, supporting the legal and institutional framework for predictability, transparency, accountability, and participation. Over the years, ADB has provided numerous loan and technical assistance projects with law and policy reform components. In addition, stand-alone technical assistance grants focusing on law and policy reform have been provided for judicial reform; private sector development, particularly for finance, banking, and corporate governance; legal training; dissemination of legal information; and environmental protection.

2. During 2001-2002, ADB continued to pursue law and policy reform as a means of reducing poverty and strengthening good governance with its first stand-alone loans for judicial reform. Two policy loans to Pakistan amounting to \$330 million are supporting the Government's Access to Justice Program, which is strengthening legal protection for all, and is specifically designed to empower the poor and other vulnerable groups. ADB's assistance also includes a \$20 million technical assistance loan to translate the program's legal and policy framework into institutional and organizational arrangements.

3. The Access to Justice Program will give greater meaning to the rule of law in Pakistan. It will help the poor, support gender sensitization and provide resources to reform the police and the judiciary. The program will enable the poor to exercise their legal rights and protect their property from being taken away by the bureaucratic or political elite. Through a legal empowerment fund, the program will provide free legal advice and advocacy for the poor by civil society, including lawyers and nongovernment organizations, and promote awareness campaigns about legal rights in the national language, Urdu. The program will promote opportunities to encourage the appointment of women judges and provide training courses in gender sensitization for the judiciary and the police. The program aims for an independent, accountable, transparent and professional police force that is free of political interference. It will help establish a prosecution service and a police complaints authority, which will both be independent. The program will also strengthen judicial independence by separating the judiciary from the executive branch of government and ensuring adequate funds for the judiciary to meet its mandate. Finally by helping create a legal and judicial system that can uphold the rule of law, check bureaucratic excesses and enforce contracts, the program will contribute to an enabling environment for private sector-led growth.

4. Other activities in judicial reform in 2001-2002 included a regional judicial independence project and a technical assistance to the Philippines to strengthen the independence and define the accountability of the judiciary. The regional project is improving awareness of the importance of judicial independence and the means to achieve it in selected DMCs; it also includes surveys on judicial independence and challenges in these DMCs and selected developed countries, and a workshop and conference on conceptual and practical aspects of judicial independence (e.g., guidelines and methods for evaluating judicial independence and compensation for judges and other court staff). The technical assistance for the Philippine judiciary is supporting its independence, accountability, impartiality, and competence. A framework for the judiciary's fiscal and administrative autonomy is being designed; the appointment process and the accountability and incentive system, under which the judges and justices function, will be improved; and the capacity of the judicial training academy will be

strengthened. Extensive regional consultations were carried out in the Philippines at the end of 2002, with representatives from the judiciary, executive and legislative branches of government, and civil society.

5. ADB continued its support for good governance and anticorruption in 2001-2002 through a regional project to counter money laundering. This project is helping DMCs establish a sound financial framework to avoid becoming easy targets of money launderers. The project is also strengthening regional cooperation in collaboration with the Secretariat of the Asia-Pacific Group on Money Laundering. The importance of united efforts to fight money laundering became more evident following the 11 September terrorist attacks on the United States.

6. In promoting law and policy reform in the financial sector, ADB continued to contribute to the regional debate on issues of insolvency and secured transactions law reform in Asia and the Pacific. ADB assistance to the PRC, in connection with the country's entry into the World Trade Organization, includes strengthening the legal capacity of key government organizations and legal professionals—a hallmark of ADB's law and policy reform activities. Assistance to Cambodia to support the implementation of the recently issued Land Law includes development of implementing decrees and regulations, training of officials and practitioners, as well as outreach activities to ensure that the general population and in particular, the poor are made aware of their rights under the new law. In addition, ADB financed training for government lawyers, judges, and prosecutors in Bhutan, India, Indonesia, Lao People's Democratic Republic (Lao PDR), Maldives, Mongolia, Nepal, Pakistan, Tajikistan, Thailand, and Viet Nam. For more on law reform, see <http://www.adb.org/law>.

Part 2:

A Guide to Movable Registries

A GUIDE TO MOVABLES REGISTRIES

I. INTRODUCTION TO MOVABLES REGISTRIES

A. Purpose of the Guide

1. In 2000, the ADB highlighted the economic significance of modern secured transactions law reform for its member countries with the publication of LPR at the ADB Vol. II, 2000 Edition. The reform momentum has continued unabated since then. At the international level, secured transactions remains at the forefront of the agendas of a diversity of organizations, including UNIDROIT, UNCITRAL and the OAS. At the national level, more and more countries are devoting reform resources to modernizing their secured transactions laws.¹

2. Interest in reform is as strong in the Asian and Pacific region as it is elsewhere in the world.² Viet Nam and New Zealand already have instituted new secured transactions regimes. Similar projects are under development in a number of other countries in the region, including Nepal and Cambodia, or have been returned to the forefront of the reform agenda, as in Australia.

3. Although they differ on a variety of issues, virtually all reform initiatives agree on one key element: the importance of establishing a modern and efficient "movables" registry for publicizing notice of secured transactions affecting movable property.

4. The purpose of this Guide is to describe the functions and the key features, including possible variants, of such a registry. The target readership comprises legislators and policy makers in the Asian and Pacific region who are considering modernization of the registry infrastructure for secured financing in their home countries, as well as system designers, credit suppliers and other potential registry users.

5. The structure of movables registries can vary widely. A country may decide because of prevailing conditions that its registry system must be a simple one providing for document registration and manual, paper-based filing and retrieval of registrations. A country that now has such a registry may decide to move to a notice registry system in light of the country's need for speed in processing a growing volume of transactions. If the country does not now have a registry, it may well choose to start with a notice registry. If a country chooses to start with or has an existing manual paper-based registry system, this can be transformed into an electronic system. Under optimal circumstances, a country would opt for a completely electronic system under which registration information is transmitted electronically to and retrieved from the database of the registry. In such a system there are no paper documents and, consequently, no direct intervention on the part of registry personnel.

6. Experience in countries like Canada demonstrates that the transition from a document-filing registry to a notice registry using a computerized database and then to a completely electronic system can be accomplished without a great deal of disruption. This being the case, a

¹ For a recent example, see The Law Commission for England and Wales, Registration of Security Interests: Company Charges and Property Other than Land, Consultation Paper No. 164, 2002, www.lawcom.gov.uk.

² For an overview of the current laws dealing with secured financing in Regional Technical Assistance (RETA) countries (India, Pakistan, People's Republic of China, Thailand and Indonesia), see LPR at the ADB, Vol. II, 2000 Edition, Chapter VII, paras. 226-268.

country can make a choice as to what type of registry best suits its current needs without running the risk of being locked into a system that cannot be modified as circumstances change.

7. The principal role of a modern movables registry is to provide public notice of the existence of charges against movable property of debtors. The relevance of public notice is that it provides a method through which persons who deal with debtors after the charges have arisen can protect themselves in situations where any interests they acquire from debtors will be subject to the prior charges. If they can determine from a search of a registry that such prior charges exist, they can take preventive measures to avoid loss. It is important to bear this role in mind in reviewing the policy choices on movables registry design, operations and scope.

8. Registration does not guarantee protection of unsophisticated debtors from abusive conduct on the part of creditors or in any other way balance the rights of parties to secured lending or credit contracts. A registry system can function equally well in the context of a secured transactions law that provides no protection to debtors and in the context of one that provides elaborate protection measures for debtors. This is the province of policy choices made in the underlying secured transactions law discussed in LPR at the ADB, Vol. II, 2000 Edition. As a result, this Guide does not focus on any of those features of secured transactions law that regulate the rights of creditors and debtors in their dealings with each other.

B. Structure of the Guide

9. The Guide seeks to accommodate lay readers who wish to become acquainted with the basic concepts and structure of a modern movables registry. To this end, Chapter II introduces the idea and significance of secured credit and outlines the purpose of registration in a movables registry for such secured credit. It also explains the need to accomplish the objectives of registration through both registry reform and the more comprehensive reform of substantive secured transactions law, particularly at the level of determining the priority status of a charge. Factual scenarios are used in this chapter, and throughout the Guide, to concretely illustrate the ideas under discussion.

10. More experienced readers may elect to go immediately to subsequent chapters of the Guide that deal directly with registry design, operations, scope and accompanying policy issues.

11. Chapter III focuses on the options available when undertaking movables registry design. This chapter explains the advantages of choosing a movables registry structured to accommodate notice-registration system as opposed to document filing system. However, the chapter also highlights the means of transition from document filing to notice-registration if there is a pre-existing document filing system or an initial policy choice for such a document filing system. The chapter finally analyzes the design and policy issues associated with determining the factual particulars that should be required by law to be disclosed in the registered notice in a notice-based movables registry.

12. Chapter IV looks at the types of registration and search process when determining movables registry design. This chapter explains the options of maintaining the registry records in digital or paper format and why such a policy decision will have a direct impact on modes of access by registry clientele to the registry. This chapter then explains why, in a movables registry, the name of the debtor (or some other debtor identifier) constitutes the principal indexing and search criterion, while also recognizing the utility of using some form of collateral identifier, for instance vehicle serial number, as a supplementary or alternative criterion.

13. Chapter V identifies the diverse policy choices in movables registry operations that go into determining the legal effectiveness of a registration from the perspective of registry clientele, issues on which there is a need to ensure a balance between certainty and flexibility. These include the question of whether registration should be permitted in advance of the actual grant of a charge, of whether a single registration may cover successive charge agreements between the same parties, the relevant time at which registration should be considered legally to have occurred, the legal effect of unauthorized amendments and discharges, and the appropriate test for determining when errors or omissions in the entry of a registration data will be fatal to the validity of the registration

14. Chapter VI moves the discussion on movables registry operations to issues relating to the administration of the registry, including the management of security concerns, the possibilities for public-private administration, and considerations relating to the cost-effectiveness of establishing and sustaining a registry.

15. Chapter VII addresses the critical issue of determining which transactions should fall within the scope of a movables registry. Readers familiar with secured transactions law reform will already be well aware of the central theme of this chapter: the importance to effective reform of adopting a functional approach to the issue of which nonpossessory charges should fall within the scope of a movables registry, and the accompanying registration-based priority regime.

16. Chapter VIII turns to the important related issue of the territorial scope of a movables registry. In a world of cross border finance, this chapter explores the question of how best to define the territorial scope of each country's registry system. In examining the territorial scope of a registry, this chapter also analyzes the scope of and rules for a provincial or subnational registry and interlinked multi-provincial or multi-unit registries within a country with a federal structure where there is no single national movables registry.

17. Chapter IX offers concluding observations on the reform lessons that emerge from the Guide supplemented by 2 out of the 8 Appendices to the Guide, namely Appendix C, which sets out a checklist of recommendations for the design of a movables registry, and Appendix D, which summarizes the sequence of issues that must be confronted and resolved in designing a movables registry

C. Terminology in the Guide

18. Although the basic idea is the same everywhere, secured transactions terminology tends to vary from one country to the next. To avoid confusion, Appendix A contains a lexicon that explains the intended meaning of the technical terms used in the Guide. This lexicon is not based on the conceptual structure of any particular country's law or commercial practice. Rather, every attempt has been made to use generic, neutral, and functionally oriented terminology.

D. Sources and References for the Guide

19. The ideas in this Guide are drawn from the diverse international and national sources listed in the Bibliography in Appendix E.

20. The root idea of a single notice-based movables registry is based on the pioneering work of the drafters of Article 9 of the Uniform Commercial Code in the United States in the 1950s and 1960s. However, the recent global revival of interest in secured transactions reform is a

result in part of the technology revolution. Ongoing dramatic advances in the electronic communication, storage and retrieval of data mean that the kind of comprehensive registry that is seen as a key feature of a modern secured transactions law can operate more and more inexpensively and efficiently. Particularly in relation to the electronic aspects of registry design, this Guide therefore draws on more recent reform initiatives.

21. At the national level, these more modern influences include the various systems implemented in the provinces and territories of Canada over the last several decades, which anticipated in large part the registry provisions of revised Article 9 of the UCC that came into effect in most U.S. states in July 2001. Reliance has also been placed on a variety of international sources, beginning with the work of the European Bank for Reconstruction and Development (General Principles of A Modern Secured Transactions Law, 1997; Model Law on Secured Transactions, 1994). More recent international influences include the registry ideas developed by:

- UNIDROIT (Convention on International Interests in Mobile Equipment 2001);
- UNCITRAL (United Nations Convention on the Assignment of Receivables in International Trade 2001; draft Model Legislative Guide on Secured Transactions circa May 2002); and
- the OAS (Model Inter-American Law on Secured Transactions, 2002).

22. Although a fully electronic registry system may be the most efficient approach in the abstract, some developing countries may face practical limits on the degree of computerization that can be built into the system. The local context, including such infrastructure concerns as the reliability of the local electric power supply, may necessitate a less ambitious approach at least at the outset.

23. In the interests of flexibility, this Guide therefore canvasses an array of design options from paper-based to fully automated systems. To concretely illustrate the range of reform possibilities, Appendix B of the Guide reproduces the provisions for a fully electronic registry system found in the 2002 New Zealand Personal Property Securities Act (based on Canadian models), while Appendix F describes the paper-based registry system contemplated by recent Viet Nam reforms.

24. The extent of computerization is not the only issue on which local conditions may influence reform. Social or economic context raises other issues. As an example, differences in the legal and commercial sophistication and literacy of the marketplace will influence the relative scope of application of each state's registry and the extent to which registration can perform a priority ordering function. For example, the legal policy question of the extent to which a registered charge should attach to the collateral in the hands of a person buying from the debtor under an unauthorized sale depends on the extent to which potential buyers in the resale market of each country can be expected realistically to search the movables registry before buying. Similarly, existing commercial practice in a particular economy may mean that there is no immediate need to accommodate relatively complex financing arrangements, for instance, the issue of whether uncertificated investment securities should be accommodated within a registry charge structure.

25. The extant legal framework also plays a significant role. For example, if a jurisdiction already has a functioning title certificate system for motor vehicles, there is likely no need to bring charges on this type of asset within the scope of a general movables registry. A notation of

the charge on the face of the title certificate ensures sufficient notice of the charge to potential buyers and other secured creditors

26. Still other variations may result from geopolitical differences. For example, while a single national secured transactions regime may seem ideal, the constitutional structure in some federal nations may require enactment of a separate secured transactions law for each territorial subunit. However, this does not mean that territorial units cannot combine resources to create an inter-linked multi-unit or national registry system. Indeed, assuming sufficient commonality at the level of demographics and linguistic and commercial culture, it may be possible for countries to share resources to develop a regional registry.

27. Wherever relevant, this Guide seeks to explain how these contextual differences may influence the movables registry reform process.

E. The Concept of a Movables Registry Compared to Other Types of Registries and Credit Reporting Agencies

28. The term “registration” is typically used to refer to the act of recording information relating to a person or an object in a government record. The purposes of requiring that information to be recorded vary widely, and may include revenue collection, public security or collection of statistics. For example, in many countries, all motor vehicles must be “registered”. The usual reasons for this type of mandatory registration are to regulate the collection of taxes, or to monitor the operation of compulsory automobile insurance schemes, or to allocate presumptive legal responsibility for losses caused through the negligent operation of the vehicle. Registration generally does not create or record property rights in the motor vehicles for the purposes of private commercial law and the registry is typically not searchable by the public.

29. By contrast, in a title or ownership registry, registration constitutes the final step in the creation or transfer of ownership rights in an asset. Title to the asset is considered to vest legally in a person when that person becomes the registered owner of the asset as a result of an entry in the title registry. Property rights are created or completed through the registration process. Registrations in a land registry, a ship’s registry or a patent registry are familiar examples.

30. Title registries typically also make provision for the registration of charges that operate to qualify the registered owner’s title. Nevertheless, a title registry is quite distinct from a pure movables registry.

31. Unlike registration in a title registry, a movables registry does not record the existence or transfer of title, or guarantee title, for the reason that it would be administratively impossible to maintain a reliable ownership record for the great variety of movable assets that routinely and frequently change hands in the commercial marketplace. Whether or not the debtor owns the charged assets depends on the effectiveness of the off-record commercial transactions leading to the debtor’s alleged acquisition of title.

32. As Chapter II of the Guide explains in detail, registration in a movables registry nonetheless performs two important functions. First, it reduces legal risk in secured financing transactions by publicizing notice of a charge over assets in the possession of the debtor to interested third parties, such as subsequent buyers or the debtor’s other secured and unsecured creditors. Second, it provides a coherent framework for ordering priorities among competing claimants to the same item of charged collateral by adopting an objective public act—registration—to establish the effective priority date of a charge.

33. Most countries that have modern movables registries also have credit-reporting agencies. However, a credit-reporting agency is quite different from a movables registry. Such agencies collect and disseminate a much wider range of credit information than is found in a movables registry. The function of a credit-reporting agency is to provide information relating to the credit record, reputation and practices of businesses and individuals. This includes the amount of indebtedness owed by the specific business or individual, and any history of previous default or bankruptcy or fraudulent conduct in their employment or business record. This information is made available on the request of credit grantors to assist them in assessing the creditworthiness and default risk of applicants for credit. Unlike a movables registry, a credit-reporting agency is rarely established by legislative enactment. However, in order to ensure that the information supplied is correct, relevant and not unfairly prejudicial to credit users, government often regulates its activities. Most importantly, a credit-reporting agency is merely a source of information for credit grantors. The legal rights of credit grantors and of interested third parties are not affected by the availability or accuracy of the credit information stored in the records of the agency.

II. PURPOSES OF REGISTRATION

A. Economic Role of Secured Credit

34. Access to credit at reasonable rates is considered essential to economic development everywhere. For commercial enterprises, financing may be needed to fund capital start-up and expansion costs, or to provide the working capital needed for the acquisition of the goods, services, and information that go into producing the enterprise's product from which its profit is ultimately generated. Consumers, as well, have come to depend on some form of financing particularly for the acquisition of relatively high-value durable goods—for instance, road vehicles—to support their day-to-day lives and livelihoods.

35. The availability and cost of access to credit is a function, in part, of the risk of nonpayment faced by the credit-supplier. Secured credit is a long-established means of reducing the financial consequences of this risk. The basic idea is an intuitively simple one. If the debtor defaults, the secured creditor has the right to look to the value of the debtor's assets that were charged with security as a source of payment. This collateral, more accurately its value, offers a concrete source of alternative funds to back up the debtor's bare promise to pay.

B. Priority Risk Created by Nonpossessory Charges in Absence of a Movables Registry

36. Taking security reduces risk only if the secured creditor has the legal right to appropriate the value of the collateral to satisfy the secured obligation in preference to the claims of the debtor's other creditors. The distinction between a possessory pledge and a nonpossessory charge is important to the management of this priority risk.

37. In its classic form, a possessory pledge involves delivery of possession or control of the pledged collateral to the secured creditor. The requirement for delivery of possession means that the secured creditor can be confident that the debtor has not already pledged the collateral to another creditor. Dispossession of the debtor also alerts subsequent third parties that the debtor no longer has unencumbered title to the collateral.

38. However, possessory pledges are possible only if the collateral is of a kind that is practically capable of being delivered into the possession or control of the secured creditor. This excludes many types of movable property including the debtor's future assets, as well as purely intangible property, such as the trade receivables owed by a debtor's customers and intellectual property. Even when delivery of possession is physically feasible, the costs of storage and insurance for the creditor are likely to outweigh the economic value of the reduction in risk represented by the value of the collateral.

39. Most importantly, if the debtor had to give up possession, there would be little incentive to use secured credit in the first instance. Commercial debtors need to retain possession of their equipment, inventory and other business assets in order to generate the income necessary to satisfy the secured obligation. Similarly, the objective of most consumer financing is to enable the debtor to have the immediate use and enjoyment of the type of consumer assets typically financed through secured sale or loan credit, e.g., vehicles and appliances.

40. Although they constitute a necessary and useful type of security, nonpossessory charges create priority risks for secured creditors. Because the debtor retains possession of the collateral, third persons, including prospective secured creditors, have no means of knowing which of the debtor's assets are already charged with security. The debtor's assurances and representations are not an objectively reliable source of information. Deliberately, or, more likely, inadvertently, the debtor may fail to disclose the existence of a prior charge in favor of another creditor. The negative consequence of this risk are illustrated by the scenario that follows.

Box II-1

Scenario 1: Increased Priority Risk Created by Legal Recognition of Nonpossessory Charges in the Absence of a Movables Registry

On 1 June, Debtor obtains a loan from Secured Creditor 1 to finance the acquisition of equipment for his business. Secured Creditor 1 takes a charge in the equipment to secure repayment of the loan.

On 1 July, Debtor, in need of additional financing for his business, obtains a loan from Secured Creditor 2. To secure repayment, Secured Creditor 2 takes a charge in the equipment that Debtor purchased with the money loaned by Secured Creditor 1. Debtor fails to tell Secured Creditor 2 about Secured Creditor 1's prior charge.

Debtor's business falls into financial difficulty and Debtor is unable to repay either Secured Creditor 1 or Secured Creditor 2. When Secured Creditor 2 attempts to enforce its charge against the equipment, it finds out about Secured Creditor 1's prior charge for the first time. Unhappily, the liquidated value of the equipment is sufficient to pay the amount owed to Secured Creditor 1 or Secured Creditor 2, but not to pay the aggregate amount owed to both. In other words, Secured Creditor 2 discovers that it is not a secured creditor after all.

41. Unless secured creditors in the position of Secured Creditor 2 in this scenario have a reliable means of discovering the existence of prior charges, they will need to factor this priority risk into their decision to extend credit. The existence of this additional risk reduces access to secured credit, particularly for debtors without an established credit reputation. Even when secured credit remains available, creditors will naturally charge a premium to cover the adverse economic consequences of the potential loss of value represented by the risk of prior "secret" charges.

42. A secured transactions regime that provides for disclosure of nonpossessory charges by public registration offers an efficient and simple solution to the legal risk posed by this “secret charge” problem. The following scenario illustrates the information-disclosure benefits of a movables registry for secured creditors.

<p style="text-align: center;">Box II-2</p> <p>Scenario 2: Role of Movables Registry in Reducing the Legal Risks Posed by Nonpossessory Charges</p>
<p>On 1 June, Debtor obtains a loan from Secured Creditor 1 to finance the acquisition of equipment for her business. Secured Creditor 1 takes a charge in the equipment to secure repayment of the loan. The applicable secured transactions law provides for registration of notice of such a charge in a public movables registry. Secured Creditor 1 duly registers its charge.</p> <p>On 1 July, Debtor is in need of additional financing for her business. She applies to Secured Creditor 2 for a loan to be secured by a charge in the equipment purchased with the money loaned by Secured Creditor 1, forgetting to inform Secured Creditor 2 about the existence of Secured Creditor 1's charge.</p> <p>On receipt of Debtor's application, Secured Creditor 2 searches the records of the movables registry and discovers the existence of Secured Creditor 1's charge. Secured Creditor 2 tells Debtor that her application for credit will be refused unless she either repays Secured Creditor 1 (and Secured Creditor 1's charge is expunged from the registry record), or persuades Secured Creditor 1 to voluntarily subordinate the priority of its charge to that of Secured Creditor 2.</p>

43. In this scenario, the existence of a movables registry enabled both Secured Creditor 1 and Secured Creditor 2 to protect themselves. Secured Creditor 2 was able to search the registry and find out about Secured Creditor 1's prior charge before advancing any funds in reliance on the collateral offered by Debtor. Conversely, by registering its charge in a timely fashion, Secured Creditor 1 was able to protect itself against the risk of Debtor granting a charge in the same item of collateral to a later creditor in the position of Secured Creditor 2.

C. Registration and Priority Ordering among Secured Creditors in a Movables Registry

44. Establishment of a registry by itself does not protect a secured creditor against the risk that a debtor has already charged the collateral in favor of another creditor. To create an effective incentive for secured creditors to register promptly, establishment of a movables registry must be accompanied by substantive legal reform ordering the priority of charges according to their order of registration.

45. The need to support registry reform with substantive legal reform to provide for the priority ordering function of registration is illustrated by the scenario that follows.

Box II-3

Scenario 3: Role of Movables Registry in Ordering Priority among Nonpossessory Secured Creditors³

On 1 June, Debtor obtains a loan from Secured Creditor 1 to finance the acquisition of equipment for his business. Secured Creditor 1 takes a charge in the equipment to secure repayment of the loan but does not bother to register notice of the charge immediately.

On 1 July, Debtor is in need of additional financing for his business. He applies to Secured Creditor 2 for a loan to be secured by a charge in the equipment purchased with the money borrowed from Secured Creditor 1. On receipt of Debtor's application, Secured Creditor 2 searches the records of the movables registry. Having satisfied itself that there are no prior charges registered against the equipment, Secured Creditor 2 approves Debtor's application, registers notice of its charge in the movables registry, and advances the loan funds to Debtor.

On 1 August, Secured Creditor 1 registers notice of its charge.

Debtor's business falls into financial difficulty and Debtor is unable to repay either Secured Creditor 1 or Secured Creditor 2.

46. In this scenario, if registry reform is accompanied by legal reform establishing a first-to-register priority rule, secured creditors in the position of Secured Creditor 2 can confidently predict the relative priority of their claims against competing secured creditors by conducting a search of the movables registry. In the absence of a first-to-register substantive rule, secured creditors would not be able to rely on a 'clean' search result to accurately indicate their priority over other secured creditors.

47. In enacting a first-to-register rule, lawmakers must address the impact, if any, of actual knowledge on priority ordering. Should a creditor in the position of Secured Creditor 2 in the above scenario take priority even if it had actual knowledge of Secured Creditor 1's prior charge when it acquired and registered its own charge? Or should cases of actual knowledge constitute an exception to a first-to-register rule?

48. The modern trend is to apply the first-to-register rule without regard to considerations of actual knowledge. This approach operates to reduce litigation on the questions of priority. Proof of the presence or absence of actual knowledge may be difficult to establish. This is especially problematic if the secured creditor is a large multi-department institution with many employees: when does the knowledge of an individual employee or department become the knowledge of the creditor enterprise as whole? In contrast, a straightforward first-to-register rule enables all secured creditors to confidently rely on an external objective event—public registration in a movables registry—to predict the order of payment of their claims. The unregistered charge holder cannot complain of unfairness since, under the rules applicable to the players, it could and should have protected itself by prompt registration.

³ This scenario is based on the assumption that the contractual and evidentiary requirements for creation of a charge have already been satisfied. As explained later in the Guide, the operation of the first-to-register priority rule requires a somewhat more refined analysis in a system that permits registration in advance of creation of the charge.

D. Exception to First-to-Register Priority in a Movables Registry for Acquisition Financing Charges

49. A legal system that permits nonpossessory charges greatly expands the range of collateral capable of being charged by a debtor. The debtor can charge its intangible assets in addition to its tangible assets, and its after-acquired assets in addition to its presently owned assets. This latter facility is considered especially important in enhancing access to credit for commercial borrowers since the asset base of a commercial enterprise is typically in a state of constant flux.

50. Unqualified application of the first-to-register rule of priority means that a secured creditor who takes and registers a charge in the present and future movable property of an enterprise will enjoy priority over subsequent creditors who take and register charges in specific later-acquired assets. In general, this works efficiently and fairly, since the subsequent secured creditor can and should protect itself by searching the movables registry before advancing credit.

51. However, what about the situation where the second registered creditor provides the funding needed and used by the debtor to acquire the very collateral—such as a new item of capital equipment, or new inventory—in which the second charge is granted? In this scenario, unqualified application of the first-to-register priority rule seems unfair. Since it is the second creditor's credit that financed the debtor's acquisition of the additional collateral, why should the first creditor be entitled to claim the value of that collateral simply because it registered first? If this were the rule, the purchase financing credit market would be less accessible and less competitive for borrowers.

52. To avoid giving an unfair windfall to the first-registered creditor, legal regimes that have adopted a general first-to-register rule often create an exception to protect subsequent secured creditors who finance the debtor's acquisition of new assets. The existence of this exception has the additional benefit of enabling a debtor who has granted a general charge on all its present and after acquired movable assets in favor of one creditor to retain practical access to competitive sources of credit to finance later acquisitions.

53. The operation of such an acquisition financing exception to first-to-register priority is illustrated by the scenario that follows.

Box II-4

Scenario 4: Priority of Subsequent Acquisition Financing Charge over Prior-Registered Charge in Debtor's After-Acquired Movable Assets

On 1 June, Debtor grants a general charge in favor of Bank in all its present and after-acquired movable property. Bank duly registers notice of the charge.

On 1 July, Debtor approaches Specialized Equipment Financing Company ("Specialized") for a loan to finance the acquisition of a specific item of equipment for use in its business. Specialized agrees on condition that Debtor grant a charge in the equipment as security.

Debtor falls into financial difficulties and defaults in its payment obligations to both Bank and Specialized.

If the applicable priority regime has adopted a first-to-register rule, the Bank in this scenario will have the presumptive right to be paid the value of the Debtor's movable assets in priority to all other creditors. However, if the regime incorporates a special priority rule to protect acquisition financing charge holders, Specialized will be entitled to priority of payment with respect to the specific item of equipment acquired by Debtor with the credit supplied by Specialized.

54. To obtain this special priority, the applicable legal regime will typically require the acquisition financing secured creditor to register notice of its charge within a specified time period (such as fifteen days) after the charge is created. The purpose of requiring timely registration is to enable the first-registered creditor to verify whether an acquisition financing charge exists on any new assets acquired by a debtor by conducting a search of the movables registry before advancing new credit on the security of those new assets.

55. If the collateral is inventory, some legal regimes do not allow any "grace period" for registering, and the creditor is further required to send a notice to any prior-registered secured creditors of its intention to provide acquisition financing. The reason for this added burden in the case of inventory is to protect prior registered creditors who have taken a general charge to finance the working capital of a debtor enterprise, including the ongoing funds needed by the debtor to acquire new inventory. Since such creditors have likely set up a revolving credit arrangement based on the debtor's ongoing acquisition and resale of inventory, it would be impracticable and inefficient to expect them to conduct periodic searches of the movables registry to verify their continued priority.

E. Role of Movables Registry in Balancing Rights of Secured Creditors and Buyers

56. It is inherent in the very idea of security that a secured creditor has the right to follow the collateral into the hands of a subsequent purchaser to enforce its security rights. Otherwise, the debtor would have the unilateral power to terminate the secured creditor's rights simply by selling the collateral.

57. In the case of a nonpossessory charge, however, legal systems may be reluctant to prejudice "innocent" purchasers of an item of collateral that turns out to be subject to a "secret charge." The establishment of a movables registry permits a legal system to protect the interests of both secured creditors and buyers by making registration a precondition to the exercise of a secured creditor's right to follow the asset into the hands of a purchaser.

58. The utility and fairness of making registration a precondition to the right of a secured creditor to enforce its charge against subsequent buyers is illustrated by the scenario that follows.

<p style="text-align: center;">Box II-5</p> <p>Scenario 5: Role of Movables Registry in Protecting Purchasers of Charged Collateral</p>
<p>On 1 June, Debtor obtains a loan from Secured Creditor to finance the acquisition of equipment for her business. Secured Creditor takes a charge in the equipment to secure repayment of the loan, and promptly registers notice of the charge.</p> <p>By 1 July, Debtor is facing financial difficulty and decides to sell the equipment to generate quick cash for the business.</p> <p>Before advancing the purchase price, Buyer searches the records of the movables registry and discovers the existence of Secured Creditor's charge. Buyer refuses to purchase the equipment from Debtor except on condition that Debtor discharges her obligation to Secured Creditor (and ensures that the discharge is entered in the registry records), or on condition that Debtor discounts the purchase price by the amount still outstanding to Secured Creditor.</p>

59. In this scenario, the existence of a movables registry meant that Buyer was able to find out about Secured Creditor's prior charge before advancing any purchase funds, and to protect

itself accordingly. Conversely, by registering promptly, Secured Creditor was able to acquire protection against the risk of a subsequent unauthorized sale of the collateral by Debtor.

60. Once again, it is not the existence of the registry in the abstract that protects the interests of the parties. In order for secured creditors and buyers to be able to rely on the registry to protect their interests, the registry must be supported by a substantive legal regime that makes registration a precondition to the legal effectiveness of a charge against buyers.

61. Legal regimes differ on whether the law should go so far as to protect a purchaser who buys with actual knowledge of an unregistered charge. The current trend seems to favor making registration a precondition to the effectiveness of a charge against all purchasers, regardless of the presence or absence of knowledge. The reasons for this are the same as the reasons for adopting an unqualified first-to-register rule to order priority amongst competing registered charges. Such a rule enables buyers to confidently rely on an external objective event—public registration—to determine whether or not the debtor's title is free from prior charges. It also reduces the need for *ex post facto* litigation to prove the presence or absence of knowledge in order to resolve issues of priority.

F. Effectiveness of Registered Charge in a Movables Registry against Creditors Generally

62. Should registration be a prerequisite to the secured creditor's right to payment of the value of the collateral in preference to the claims of the debtor's unsecured creditors and their representatives, for instance, the debtor's insolvency administrator? This is the predominant rule in jurisdictions that have established a modern movables registry.

63. Making registration a precondition to the general effectiveness of a nonpossessory charge against third party creditors produces a number of benefits. It creates a powerful incentive for secured creditors to register promptly. It gives judgment creditors and insolvency administrators an efficient means of determining which of the debtor's assets are effectively charged with security, thereby dispensing with the need for them to undertake the trouble and expense of initiating futile enforcement proceedings. It operates to reduce litigation to resolve third person suspicions that the contractual documents creating a charge were fraudulently antedated. It also gives creditors the opportunity at any given time to determine the extent of secured indebtedness of the debtor, knowledge that may contribute to their overall assessment of the debtor's personal creditworthiness.

64. The scenario that follows illustrates the operation of such a rule.

Box II-6

Scenario 6: Role of Movables Registry in Ordering Effectiveness of a Charge against the Debtor's Unsecured Creditors and their Representatives

On 1 June, Debtor grants a charge to Secured Creditor in specific assets owned by Debtor.

By 1 July, Debtor is in evident financial difficulty and insolvency proceedings are formally commenced.

On 15 July, Secured Creditor registers its charge.

Even though Secured Creditor obtained its charge before the collateral fell under the control of the debtor's insolvency administrator, the charge is not effective in insolvency proceedings since it was not registered when the insolvency proceedings were initiated. Consequently, the liquidated proceeds of the collateral, instead of being paid first to satisfy the secured claim, will be divided among the creditors entitled to participate in the insolvency proceedings in accordance with the insolvency ranking rules applicable to unsecured creditors. In effect, the failure to effect timely registration means that the secured creditor's claim will be demoted to unsecured status.

65. Timely registration should not necessarily immunize a secured creditor from challenge by unsecured creditors or an insolvency administrator. In particular, registration should not protect a secured transaction from attack by other creditors on the basis of generally applicable rules governing unjust or fraudulent preferences, or governing the effectiveness of transactions entered into on the eve of insolvency. In other words, while failure to register results in demoting the secured creditor to unsecured status, registration does not guarantee that this same result will not come about by operation of general bankruptcy and insolvency law policy.

G. Exceptions to Effectiveness of Registered Charges in a Movables Registry

66. Although registration should be made a precondition to the effectiveness of a charge against buyers and other third parties, it does not follow that every registered charge should be enforceable against third parties in every circumstance. Countervailing considerations, including the need to protect the reasonable expectations of the local marketplace, may require exceptions to the role of registration in preserving the enforceability of a charge against third parties.

67. For instance, legal regimes invariably provide that a purchaser of charged collateral, who buys in the ordinary course of the debtor's business, acquires the collateral free of the charge, whether registered or not.⁴ The reasons for this exception are persuasive. A retail buyer who purchase an item from the inventory of a commercial enterprise cannot be expected to first check the registry to find out about any charges granted by the enterprise in its inventory. On the contrary, the seller's secured creditor will have taken the charge on the understanding that the inventory may be sold free of the charge in the ordinary course of the debtor's business. After all, the secured creditor has no desire to impede the operation of the debtor's enterprise, which is the vehicle for generation of the funds to pay the secured obligation.

68. To preserve commercial negotiability, similar protection from the binding effects of a registered charge is typically extended to purchasers who take possession of money and negotiable documents or instruments (such as checks and negotiable securities) in the ordinary

⁴ For example, see section 53(1) of the New Zealand Personal Properties Securities Act, 1999, reproduced in Appendix B.

course of business.⁵ For the same reason, this exception usually protects not just subsequent purchasers but subsequent possessory pledgees as well.

69. The need for any additional exceptions turns on the particular social and economic context of each country. For instance, the presumed level of sophistication and legal literacy of the particular marketplace will determine the extent to which a buyer of noninventory collateral—e.g., capital equipment and consumer assets—should be protected from even a registered charge as long as he or she buys in good faith without actual knowledge of the charge. If the local context suggests that it is unrealistic to expect a buyer to search the movables registry, then universal protection for all buyers may be the most appropriate approach. Other countries may consider it sufficient to limit protection to consumer assets or to transactions that involve a relatively low value asset on the theory that buyers engaged in more sophisticated transactions will have access to the legal advice necessary to understand that a search should be conducted.⁶

H. Should there be Additional Sanctions for Failure to Register in a Movables Registry?

70. Should lawmakers impose any additional sanctions for nonregistration of a charge in a movables registry? For instance, should failure to register subject the secured creditor to a fine? Should it reduce or eliminate the enforceability of the charge against the debtor as opposed to third parties? The predominant view is that these sanctions are not needed nor efficacious.

71. Experience shows that the negative priority repercussions that follow from nonregistration under the rules outlined in the preceding sections provide a sufficient incentive to ensure prompt registration. Moreover, imposition of additional sanctions would be excessive. The purpose of the movables registry is to protect the informational needs of third parties. That objective is clearly within the appropriate scope of a priority regime that conditions the effectiveness of the charge against third parties on registration. To impose an additional penalty, or to deprive the creditor of the economic benefit of the security as against the debtor, would exceed the policy objectives of the registration requirement.

72. An additional consideration is the wisdom of placing on courts the burden of having to deal with legal proceedings necessitated if penalties were imposed on secured creditors who do not register their charges. There is little commercial or social benefit to be gained from making failure to register an offence.

I. Enforcement of Registered Charges in a Movables Registry

73. The creation of a movables registry supported by a coherent priority regime will not reduce all legal risk for secured creditors holding nonpossessory security. The effectiveness of a charge also depends on the secured creditor's practical ability to take control of the collateral on the debtor's default in order to realize its value. Consequently, legal reform of secured transactions law at the registration and priority levels should ideally be accompanied by legal reform at the level of maximizing the efficiency and fairness of the enforcement process, including the rules governing the impact of bankruptcy and insolvency proceedings on secured creditors.

⁵ For example, see sections 94, 96, and 97 of the New Zealand Personal Properties Securities Act, 1999, reproduced in Appendix B.

⁶ For example, see section 54(1) of the New Zealand Personal Property Securities Act, 1999, reproduced in Appendix B. The full Act and accompanying regulations can be accessed at: www.ppsr.govt.nz

74. Although the reform issues relating to registration and priorities are independent of those relating to enforcement, the establishment of a movables registry-based priority regime indirectly contributes to more effective enforcement. Because more than one nonpossessory charge can be created in the same item of collateral, more than one secured creditor may simultaneously have the right to enforce its charge against the same collateral. A movables registry-based priority regime brings order to a multiple-creditor enforcement process because it enables each creditor to discover efficiently and easily what other charges subsist against the same item, and to determine the priority of these other creditors' claim to payment out of the liquidated value of the collateral.

III. MOVABLES REGISTRY DESIGN: WHAT MUST BE REGISTERED

A. Comparison Between Notice-Registration System and Document-Filing System in a Movables Registry

75. Traditional movables registries in some countries require a secured creditor to send a copy of a charge agreement to the registry. The agreement is manually filed under a system that permits retrieval of it on the basis of a criterion such as the debtor's name. When a search is requested, a registry clerk retrieves the contract and provide a copy of it to the person requesting the search or an abstract of its contents. This type of system works reasonably well when volumes of registrations are small and the labor costs are low. However, experience demonstrates that this type of system is not adequate where a significant amount of secured financing occurs.

76. If a movables registry is to provide effective public access to information about potential charges on movable property, it must be accessible, efficient, transparent, and cost effective. Perhaps the most significant design element in achieving these goals is the adoption of a notice-registration as opposed to a document-filing registry.

77. As noted in para. 75, a document-filing registry system involves tendering to the registry office a copy of the actual documentation creating the charge. The registry staff then file these documents in the registry records.

78. Unlike a document-filing registry system, a notice-registration system does not require the actual charge documentation to be filed or even tendered to the movables registry. Instead, secured creditors submit a separate notice of the charge in standard format, setting out only the basic factual particulars needed to alert third parties to the potential existence of a charge against the identified debtor's movable assets.

79. Notice-registration system is preferred to document filing system in the majority of modern movables registry.⁷ There are a number of compelling reasons for this.

80. First, a notice-registration system significantly reduces the registry's administrative and archival costs, owing to the minimal nature of the registered particulars and the fact that they subsist in a standardized notice format, independent of the actual charge documentation. These

⁷ The recently established New Zealand and Viet Nam charge registries are based on notice-registration system. The key registry provisions of the *New Zealand Personal Property Securities Act*, 1999 are set out in Appendix B. The structure and operation of the Viet Nam registry is described in Appendix F.

same factors facilitate the efficient operation of multi-lingual registries and ease transition from a paper notice registry system to an electronic system.

81. Notice-registration system is also preferable from the point of view of reducing transaction costs for registry clientele. Instead of having to work through complex lengthy documentation, third party searchers can quickly and efficiently extract the essential particulars of the charge from the registry. From the point of view of secured creditors, notice-registration substantially reduces their ongoing registration burden. The terms of their security agreement can be amended in response to ongoing circumstances without the secured creditor having to worry about rectifying the registration record so long as the changes do not affect the registered particulars. Indeed, notice registration makes it possible for registration to take place even before the charge transaction is completed, and to have a single registration cover successive agreements between the same parties. These latter two issues are addressed in detail in Chapter V of the Guide.

82. Notice-registration system also responds effectively to the privacy concerns of both debtors and secured creditors. There is an inverse relationship between the amount of information that must be included on the public record and the extent to which the confidentiality of the details of the operations of the relevant parties can be preserved.

B. Transition from Document-Filing to Notice-Registration

83. If a country has initially chosen a document-filing system or already has some form of document-filing system in place, transition issues must be addressed in the course of reform. The simplest approach is to require that all registrations and renewals relating to extant documents that are made after a specified date be effected by registering the form of notice, electronic or paper or both, required by the notice-registration system.

84. Implementation of this approach is straightforward if the effectiveness of registrations under the prior system was subject to a limited, relatively short-term, period. The document-filing and notice-registration systems can simply be left to function side-by-side until expiry of the relevant period of effectiveness. For example, if the old document-filing system provided for a set registration period of 5 years, the old system would remain operational for a maximum period of 5 years after the specified date.

85. The transition is a little more difficult if filings under the old document system were not subject to a set term but were treated as effective until positively discharged. The only feasible solution is to change the law to limit the remaining registration life of extant filings to a specified period, such as for example, 3 years, following implementation of the notice registration system, and to require secured creditors who wish to renew to conform to the new notice-registration system before that time period expires. This approach is workable provided the change in the law is adequately communicated to the extant secured creditors—either directly or through the media—so as to alert them to the need to effect a timely transition to the new system. The only alternative to this approach is for the registry staff to convert the document filings into notice registrations, a labor-intensive exercise, and one that may not be feasible if the notice-registration system requires the entry of information that was not mandatory under the old document filing system. For example, to accommodate computer searching, a new electronic notice system may require the debtor's name to be entered in a more precise fashion than what was the rule under the old document-filing system.

86. The experience of the Canadian province of Saskatchewan illustrates one approach that was successfully used to facilitate transition from a document filing system to a notice

registration system. Under the prereform law of the province, it was necessary to file a copy of each chattel mortgage in a central registry. This filing resulted in a mortgage being effectively registered for a period of 3 years. Another type of secured financing agreement, assignment of book debts, was registered in the same way, but there was no limit on the period of registration. Once a copy of the agreement was filed, the registration remained effective until it was discharged by the secured creditor.

87. A new law, the Personal Property Security Act, came into force which provided for a modern, computerized, notice-registration system. The registration requirements under the new system were very different from those of the old system. Given the large number of registrations in the old system, the government concluded that it would be too costly to have registry staff transpose registrations from the old system into the new one. A different approach was used. This approach placed the obligation to re-register under the new system on secured creditors who had registered their agreements under the old system.

88. The new law did not require immediate re-registration of all agreements registered under the replaced system. It provided that a registration of a chattel mortgage under the old system was to be treated as having been registered under the new system for the balance of the 3 years of the registration under the old system. Consequently, a chattel mortgage that was registered under the old system 1 year before the new system came into effect was treated as being registered under the new system for 2 years without the mortgagee having to do anything. However, this registration would lapse at the end of the 2-year period unless it was actually registered under the new system by the tender of registration notice to the registry before the expiry of that 2-year period.

89. A different approach was required with respect to registered assignments of book debts. The new law provided that all registrations of assignments of book debts would be treated as being registered under the new system for a period of 3 years. These registrations would lapse at the end of this period unless they were actually registered under the new system.

90. The new law was designed to address another problem. Under the old law, it was not necessary to register leases of movables in any registry. However, the new law required that leases of movables having a term of more than one year must be registered in the registry established under the new law. In order to provide for a transition from the old system to the new one, leases having a term of more than one year that were entered into before the new law came into effect were treated as having been registered under the new system for a period of one year. These registrations would lapse at the end of the one-year period unless they were actually registered under the new system.

91. This approach worked very well. However, its success was dependent upon users of the new system being aware of the implications of this approach to transition. Secured creditors and lessors had to be aware of the necessity to re-register, in the case of chattel mortgages and assignments of book debts, or register, in the case of leases, their interest during the grace periods allowed. In addition, persons searching the registry to determine whether or not a chattel mortgage or assignment of book debts had been given by a particular person, had to be aware of the necessity to search both the old and the new registries during the 3-year grace period. Persons who needed to know whether or not movable property was held under a lease could not rely on the registry during the 1-year period after the new law came into effect since, as noted in the preceding paragraph, such leases were treated as being registered during that period even though they were not, in fact, registered.

92. The success of the approach to transition from a document filing system to a notice-registration system used in Saskatchewan can be attributed in large part to measures taken by the government to inform users of the system of the necessity to take into account the extra measures required during the transition period.

C. Access to Further Information in a Notice-Based Movables Registry

93. Even though the secured creditor's priority in a notice-based movables registry is retroactive to the date of registration, the registered notice does not evidence the actual existence of a charge agreement between the parties. It merely gives notice that the debtor may have created a charge in the relevant assets. The actual existence and extent of the charge depends on off-record evidence of the security agreement and its current status.

94. Registry searchers in the position of prospective buyers and prospective secured creditors will normally be able to take the steps necessary to address the legal risk associated with acquiring an interest in assets covered by a registered charge without having to investigate the off-record evidence of that charge. They may refuse to deal further with the debtor, or require a discharge of the registration (in cases where the registration does not support an extant charge), or buy out the position of the registered charge holder.

95. However, the position is different for existing creditors of the debtor, for their representatives such as an insolvency administrator, and for third parties with an existing ownership interest in the charged collateral. For these classes of third parties, the debtor may not be an available or reliable source of information. To meet their informational needs, it is desirable for the secured transactions regime to provide a summary procedure requiring the secured creditor of record, in response to a demand from third parties within these categories, to directly confirm the nature, details and current status of its charge relationship with the debtor.⁸

D. Minimum Content of Registered Notice in a Notice-Based Movables Registry

96. A notice-based movables registry is predicated on the assumption that there is no need for public disclosure of the detailed aspects of the relationship between the secured creditor and the debtor. Indeed, the more minimal the information required to be set out in the notice, the greater the privacy protection, and the lower the risk of error in entry of the registration information.

97. There are compelling reasons to include the identity of the debtor in the registration particulars. As explained in detail in Chapter IV of the Guide, the debtor's name (or other identifier) is the principal criterion used for searching the records of a general movables registry. The debtor's address particulars should also be included, both to assist in debtor identification, and to enable interested third party searchers to locate the debtor for the purposes of demanding further information.

98. In a notice registration system, identification of the name and address of the secured creditor is also essential. After all, the secured creditor is the ultimate source of reliable information about the actual existence of a charge agreement for existing creditors, their representatives, and others with an existing interest in the charged assets.

⁸ For example, see section 77 of the New Zealand Personal Properties Securities Act, 1999, reproduced in Appendix B.

99. In theory it would be possible to have a movables registry that simply recorded the identity of the parties without giving any further particulars as to the nature of the movable assets covered by the charge. However, such a system would require third parties to contact the parties directly in every case to verify the scope of the actual collateral covered by the registered notice. This added inquiry burden would diminish the publicity value and therefore the efficiency of the system. Furthermore, it would increase the likelihood of legal challenges questioning the authenticity of the off-record information relating to the scope of the collateral.

100. For these reasons, a description of the collateral is typically considered an essential element of the registered particulars in a notice-registration system. However, there is room for variation on the nature and specificity of the required collateral description. This important issue is taken up later in the Guide, in Chapter V.

E. Additional Registered Particulars in a Notice-Based Movables Registry: Value of Secured Obligation

101. If secured creditors were required to disclose the financial details of the credit obligation in the registered notice, the benefits associated with advance registration could not be made available. More importantly, such a requirement is commercially unworkable in view of the modern day prevalence of indeterminate credit obligations, such as lines of credit and credit facilities for ongoing advances. In any event, the value of publicizing such information would be limited. With the passage of time, the financial particulars are apt to change and it would be administratively unworkable to require the secured creditor to maintain an up-to-date public record.

102. However, some regimes require the registered notice to disclose the maximum value of the obligation capable of being secured by the charge. The idea behind this requirement is to facilitate the debtor's access to future financing from other secured creditors using the residual value of its charged property as collateral. In the absence of such a limitation, later secured creditors will be reluctant to lend on the strength of the residual value of the collateral. This is because the first registered creditor may later decide to advance further credit to the debtor to be secured by the same charge. In a system that permits a single registration to cover successive agreements between the same parties, this risk exists even if the original agreement with the first registered creditor does not explicitly authorize later credit to be secured by the charge.

103. The scenario that follows illustrates the practical consequences of a system that does not require the maximum value of the secured obligation to be disclosed in the notice that is registered in the movables registry.

Box III-1**Scenario 7: Practical Effect of Absence of any Requirement to Disclose the Maximum Potential Value of the Secured Obligation in the Notice Registered in a Movables Registry**

On 1 June, Debtor obtains a line of credit for her business from Secured Creditor 1 secured by a charge in Debtor's inventory and equipment. The agreement provides for a stated maximum of credit (50,000). However, the nature of debtor's business prospects makes it difficult to accurately predict the total amount of the credit that might eventually be extended. Consequently, the agreement gives Secured Creditor 1 the discretion to advance additional amounts in excess of the stated maximum.

On 1 July, Debtor is in need of additional financing for her business. She approaches Secured Creditor 2, who is offering more competitive interest rates than Secured Creditor 1, offering to grant a charge in her inventory and equipment. Debtor acknowledges that she has already granted a charge in the same collateral to Secured Creditor 1, but explains that the current value of the collateral – 100,000- is four times in excess of her actual current indebtedness to Secured Creditor 1 (25,000).

However, Secured Creditor 2 points out that there is a risk that Secured Creditor 1 might later increase Debtor's credit facility to an amount that equals the value of the collateral. To protect itself against this risk, Secured Creditor 1 refuses to grant the loan unless Debtor obtains from Secured Creditor 1 an explicit waiver of its priority with respect to any such later advances in favor of Secured Creditor 2.

104. It is sometimes pointed out that in a competitive credit market, the need to obtain an explicit waiver in this scenario should not be burdensome. After all, Debtor can simply threaten to terminate its credit relationship with Secured Creditor 1 by borrowing sufficient funds from Secured Creditor 2 to pay out the full amount of its existing indebtedness to Secured Creditor 1.

105. However, even in a competitive market, the debtor's practical leverage will be limited if Debtor is required to pay a financial penalty for the right to accelerate payment under its agreement with Secured Creditor 1. If the cost of this financial penalty is equal to the economic benefit of the lower financing rate available from Secured Creditor 2, there is no competitive incentive for Secured Creditor 1 to either grant a waiver or reduce its own interest costs.

106. On the other hand, a system that requires a secured creditor to specify the maximum sum to be secured at the outset greatly reduces the parties' flexibility to adjust the financing arrangement in the light of new circumstances. In the absence of such a requirement, the first registered secured creditor can agree with the debtor to increase the credit facility, or even enter into wholly new credit arrangements, without fear of losing priority with respect to sums advanced under the new terms and without incurring additional registration costs.

107. Alternatively, the parties can always agree to a maximum sum that is sufficiently high to accommodate any conceivable need for a later increase in the value of the secured obligation. However, if inflated estimates are routinely registered, this effectively undermines the objective of the requirement – to preserve the debtor's ability to charge the residual value of the same collateral in favor of later creditors.

108. The scenario that follows illustrates why the likelihood of inflated estimates may have no practical benefit in protecting the debtor's ability to use the residual value of its already charged collateral to obtain access to more competitive credit from other sources.

Box III-2

Scenario 8: Practical Effect of Requirement to Disclose the Maximum Value of Secured Obligation in the Notice registered in a Movables Registry

On 1 June, Debtor obtains a line of credit for her business from Secured Creditor 1 secured by a charge in Debtor's inventory and equipment. The agreement provides for a stated maximum of credit (50,000), but gives Secured Creditor 1 discretion to advance additional amounts in excess of the stated maximum.

The applicable secured transactions registration regime requires the maximum value of the obligation secured by a charge to be indicated in the registered notice of charge.

In fact, the nature of debtor's business prospects makes it difficult to accurately predict the total amount of the credit that might eventually be extended. To preserve its registered priority, and to avoid the costs of having to make a new registration to accommodate the potential discretionary advance of a sum larger than the maximum stated, Secured Creditor 1 specifies a maximum value in the registered notice (100,000) that is far in excess of the maximum amount stated in the agreement (50,000).

On 1 July, Debtor is in need of additional financing for her business. She approaches Secured Creditor 2 offering to grant a charge in her inventory and equipment. Debtor acknowledges that she has already granted a charge in the same collateral to Secured Creditor 1, but explains that the current value of the collateral – 100,000 – is four times in excess of her actual current indebtedness to Secured Creditor 1 (25,000).

Secured Creditor 2 points out that, according to the maximum amount stated on the registered notice, the current value of the collateral is equal to the maximum amount of the credit capable of being secured by Secured Creditor 1's charge. To protect itself against the risk that Secured Creditor 1 might later increase Debtor's credit facility, Secured Creditor 2 refuses to grant the loan unless Debtor obtains an explicit waiver of priority from Secured Creditor 1 in favor of Secured Creditor 2.

109. The risk illustrated in this scenario does not pose a problem if the debtor has sufficiently strong bargaining power to prevent the registration of a grossly inflated maximum amount. However, debtors rarely bargain from a position of strength. Accordingly, if policymakers decide to impose a maximum value registration requirement, they should also provide some procedure to enable the debtor to require the registered amount to be reduced where it does not reflect the actual obligation owed to the secured creditor under any existing agreement between them. Otherwise, the presence of this requirement will simply complicate the registration process, and increase the risk of error, without producing any real benefit for debtors.

F. Additional Registered Particulars in a Notice-Based Movables Registry: Duration of Registration

110. In some systems, all registrations are treated as effective for a uniform fixed term of years and must be renewed if the charge agreement continues in effect beyond the expiry of that term. The disadvantage of a fixed term approach is that the natural life span of a financing relationship is not uniform from one transaction to the next. Although secured loans to finance the acquisition of charged collateral are typically short term (3 to 5 years), a bank extending general working capital financing to a commercial customer may anticipate a relationship extending over several decades. In view of these variations, the stipulated fixed term is apt to be either too short or too long for most transactions. Where the term is too short, secured creditors face the risk that an inadvertent failure to effect a timely renewal will result in a loss of priority. Where the term is too long, the registry record becomes cluttered with stale registrations. The archival burden this imposes on the registry is less serious if the registry record is maintained in

electronic as opposed to paper format since storage costs will be minimal. Nonetheless, the persistence of stale registrations on the record should be discouraged regardless of the nature of the record, since they prejudice the ability of the named debtors to deal with the assets alleged to be still charged.

111. To facilitate a closer match between the duration of registration life and the duration of the charge relationship, a number of regimes permit secured creditors to select for themselves the term of the initial registration (while also permitting renewals in the event circumstances change). In such systems, the duration of the registration will be part of the mandatory registration particulars.

112. Self-selection of the registration does not completely alleviate the problem of stale registrations since some secured parties may be tempted to select an inappropriately lengthy registration period out of an excess of caution. However, two proven techniques are available to reduce this risk. First, registration fees can be calculated by reference to the length of the registration term selected by the secured party so as to discourage secured creditors from attempting to pass on registration fees to the debtor that are excessive relative to the value and anticipated real duration of the financing relationship. Second, a secured creditor can be placed under a legal obligation to discharge any registrations that does not represent an extant charge, backed up by a financial penalty for breach and a simple low-cost procedure enabling the named debtor to unilaterally compel discharge of the registration.⁹

G. Should the Debtor's Signature or Consent be required in a Notice-Based Movable Registry?

113. A registered notice of a charge where none in fact exists or is contemplated may have a negative impact on the alleged debtor's perceived creditworthiness. Should the secured creditor therefore be required to obtain the debtor's signature on the registered notice as evidence of its authority to register? Such a requirement is incompatible with the efficient administration of a computerized registry. More importantly, it creates unnecessary transaction costs and risk of error for secured creditors, since the concern underlying the requirement can be more efficiently dealt with in other ways. One possibility is to impose a legal obligation on secured creditors to obtain a written record of the debtor's consent or waiver of objection to registration. This provides more than adequate protection for debtors if backed up by a financial penalty for breach and a summary procedure whereby the named debtor can unilaterally compel discharge of the registration.¹⁰

⁹ For example, see sections 161-169 of the *New Zealand Personal Property Securities Act, 1999* reproduced in Appendix B. See, also, section 44(1) of *The Saskatchewan Personal Property Security Act, 1993*, c. P-6.1, s. 35(7) and section 4(1) of the Saskatchewan Personal Property Security Regulations, P-6.1 Reg.1. This legislation is reproduced at: www.qp.gov.sk.ca.

¹⁰ For example, see sections 161-169 of the *New Zealand Personal Property Securities Act, 1999*, reproduced in Appendix B.

IV. MOVABLES REGISTRY DESIGN: THE REGISTRATION AND SEARCH PROCESS

A. A Paper or Digital Registry Record?

114. Technological advances give registry designers a choice between maintaining the records of the registry in either paper or digital form. In most modern systems, the records are maintained in digital form, in a computerized database.¹¹

115. Digital records offer several important advantages over paper archives. They are less vulnerable to the risk of destruction or damage through sabotage or theft, or through fire, flood or other disaster. Most importantly, the electronic entry and retrieval of data from a computerized database is inherently more efficient at the level of speed and administrative costs than having to manually file and search for hard copy notices in a paper archive.

116. However, the feasibility of creating a digital database depends on the particular context. From a developing country perspective, the relatively modest initial capital cost required to set up a paper-based registry may make this option seem more attractive. Nonetheless, in comparing the true relative costs, account needs to be taken of whether the labor and space costs involved in the ongoing administration and preservation of a paper archive can be kept sufficiently low, in light of the anticipated registration volume, to ensure the prompt entry and retrieval of the paper notices, and the continued accuracy of the record.

117. Infrastructure constraints may also impede computerization of the registry record. While every country experiences failures in its electrical supply, the number and duration of such failures is often more severe in developing countries. The regulations governing registry operations can be crafted to minimize the legal risk arising from such temporary interruptions in the power supply needed to maintain access to a digital database. Nonetheless, if the reliability of supply is sufficiently unpredictable, it may be safer to begin operations with a wholly paper based registry record of the kind recently instituted in Viet Nam.¹²

118. If it is decided to implement a manual paper-based registry, consideration might usefully be given to the complementary creation of a supplementary back-up digital record constructed by scanning the paper notices into a digital database. This would enable more efficient administrative access to the registry records during periods when the electrical supply is available. It would also provide a safe testing method for assessing the real extent of the risk of serious interruptions. Finally it would provide back up protection against the risk of physical deterioration or destruction inherent in paper archives.

119. Should a country start with a manual paper based registry or now have such a system, it is foreseeable that at some time in the future transition to an electronic system with digital records will have to be considered. Experience in Canadian provinces demonstrates that, as the volume of registrations increases, the costs of handling and storage of paper records and of dealing with requests for search of registry information soon become prohibitive.

120. If the existing paper system is based on document filing, then the first transition step will be to convert to notice-registration system. Paper notices are simple, one page documents, and,

¹¹ For example, see the Personal Property Securities Registry established under the New Zealand Personal Properties Securities Act 1999, the relevant provisions of which are reproduced in Appendix B.

¹² For a description of the recently implemented system in Viet Nam, see Appendix F.

as such, require much less handling and storage room than security agreements, some of which can run into hundreds of pages. The experience of a Canadian province in taking this step is described in paras. 86 to 92.

121. The next step in the transition is to have data recorded in paper registration notices (registration information) entered into a computer database by registry staff. This can be done by key-editing (with the appropriate safeguards against typing errors) or through character recognition software (assuming registration information on registration notices is in a standardized form). Once the data are entered, storage problems are dramatically reduced and retrieval of registration information is much more efficient and cost effective. If back-up record keeping is required, storage costs can be further reduced by having the paper registration notice reformulated through a photo reduction process.

122. The final step in the process of movement from a paper based to an electronic system is to provide for direct electronic on-line entry of data into a computerized database and direct on-line searches of the database by users without the involvement of registry staff. While this step offers greatly enhanced efficiency, it is quite possible to have a modern, functioning system without providing for direct on-line access to registry services as discussed in more detail in paras. 127-129.

B. Client Access to a Paper-Based Registry Record

123. The format of the registry record—electronic or paper—has an obvious direct impact on the media used for entering registrations and submitting search requests.

124. If the record is in digital form registrations and search requests can be entered from computer facilities located anywhere in the country. In other words, the geographic location of the registrant or searcher has no impact on accessibility.

125. In the case of a paper-based system, however, the paper notices must be physically delivered to a central registry. If individual secured creditors were required to bear this cost, it would distort the national credit market; secured creditors located at a distance from the central registry would necessarily have to charge a premium for their additional transportation and agency costs. To avoid this, procedures should be established to permit the submission of the paper registration data by mail or telecopy and the communication of search requests and search results by mail, telephone, telecopy or electronic mail.

126. The establishment of branch registry offices responsible for transmitting registrations and requests to the central office would further ease the additional burden faced by remote users in a paper-based system. These alternatives do not wholly eliminate the higher transaction costs and risk for registration and searching that is inherent in a paper record. However, they do permit equality of treatment through the establishment of uniform registration and search fees for all registry users regardless of their geographic location.

C. Client Access to a Computerized Registry Record

127. If the registry record is in paper form, access to the registry for registration and searching necessitates the manual filing or looking up of the paper notices. If the registry record is in digital form, however, it becomes possible to computerize the entire registration and search process.

128. In systems that have fully exploited this possibility,¹³ secured creditors are responsible for directly entering the required registration data in digital format into an electronic database and searchers are responsible for entering their own search criteria, and retrieving their own search results. Frequent users are typically afforded direct access to the database from their own computer systems either through the Internet or through specialized software communication systems. Users who have not entered into an arrangement with the registry for direct access are expected to use the computer access facilities located at registry branch offices or to employ a private agency that has arranged for direct access to register the required data or search on their behalf.

129. A completely electronic system of this kind offers many advantages. The registry's labor costs are dramatically reduced since the administrative burden of registration and searching is vested exclusively in the registry clientele. Secured creditors and searchers also benefit. They have complete control over the timing of registration and searching. They also face less risk of error in data entry than in a system that requires registry staff to manually re-enter or manually scan information originally submitted in paper form into an electronic database.

130. However, the extent of computerization in registry design that is feasible depends on the particular social and economic context. In the developing country context, access to computers may be very limited, and the rate of computer literacy may be low, making it impracticable and unfair to impose the full responsibility for electronic registration and searching on the registry clientele. Nonetheless, a hybrid system may still be feasible in which clients have the choice of entering into an arrangement for direct electronic access to the database, or of submitting registration data and search requests in paper form to the registry staff to effect the required action on their behalf.¹⁴

D. Registration-Search Criteria

131. A feature of every registry system is the use of standardized indexing criteria to enable the accurate entry and retrieval of registered information. In the absence of any registration-search criteria, registrations of charge would be undiscoverable.

132. Two different registration-search criteria can be used in a movables registry. One is information specific to the debtor; that is, the name and address of the debtor, along with alternative or supplementary information such as the debtor's birth date or government issued identification number ("debtor identifier"). The other is some form of unique identifier for the collateral ("collateral-identifier").

133. Some systems use only the debtor identifier as the registration-search criterion. Others provide for some form of collateral identifier as an alternative or supplementary criterion where certain specific types of assets are involved.¹⁵

¹³ An example of such is the New Zealand Personal Property Securities Registry, which is based on precedents in the Atlantic provinces of Canada. See further the registry provisions of the New Zealand Personal Properties Securities Act, reproduced in Appendix B.

¹⁴ For example, the registry systems in most Canadian provinces give clients the option of electronic or paper-based registration and searching, see British Columbia Personal Property Registry Regulations, Reg. 279/90, Div. 12.1 reproduced at: www.qp.gov.bc.ca.

¹⁵ For example, see section 142 of the *New Zealand Personal Property Securities Act, 1999* reproduced in Appendix B.

E. Debtor Identifier: The Principal Registration-Search Criterion

134. In order to maximize access to secured lending for business, a modern secured transactions regime must accommodate the grant of an effective charge on the full range of the debtor's asset base: fungible assets, inventory, intangibles and future and after-acquired assets generally. As a practical matter, such assets cannot be identified on the registry record other than by a generic or categorical description. To require a specific description would make the registration process unworkable. The secured creditor would have to amend the record on an ongoing basis. Consequently, a debtor identifier is the only workable universal registration-search criterion.

135. To ensure the effective operation of a movables registry, the rules governing registration and searching should give explicit guidance on the sources and form of the required debtor identifier. In the absence of such guidance, secured creditors and searchers cannot be confident about the legal effectiveness of registrations and search results. Explicit guidance is especially critical if the registry record is in electronic form since the effective retrieval of information from a computerized database typically requires a high level of precision in the entry of the search criterion.

136. If the name of the debtor is adopted as the principal registration-search criterion, the rules should specify the source to be relied on to verify the debtor's 'legal' name for registration and searching purposes.¹⁶ This is especially important for individual debtors where there is often some discrepancy between the names as they appear in official government records and the names by which the individuals are popularly known. In the case of enterprise debtors, reliance logically should be placed on the name of the enterprise as it appears in the corporate and business records, assuming these are searchable. These records are typically maintained in every country for the purposes of regulating the activities of those carrying on business within its borders.

137. In countries in which a significant number of persons share the same or similar names, it may be necessary to require entry of the debtor's birth date as supplementary information.¹⁷

138. Some countries may elect to employ a government-issued identification number (e.g., the number used for tax or social security purposes) as either an exclusive or supplementary debtor identifier. If this is to be done, it is important to be confident about the reliability of the system under which such numbers are issued. The rules should also provide a supplementary method of identifying debtors who are not nationals and who, consequently, may not have a local government-issued identification number.

F. Collateral Identifier: A Supplementary Registration-Search Criterion?

139. The use of a debtor identifier as the registration-search criterion greatly simplifies the registration and searching process because it enables a single registration to capture a charge taken on the debtor's movable assets generally, or on significant generic categories.

¹⁶ See, for example, New Zealand Personal Property Securities Regulations, 2001, Schedule 1, Part 1, reproduced at www.ppsr.govt.nz and section 20 of the New Brunswick Personal Property Security Regulations, Regs.95-97 reproduced at: www.gnb.ca/justice.

¹⁷ See for example, sections 140 and 142 of the *New Zealand Personal Property Securities Act, 1999*, reproduced in Appendix B.

140. However, the value of a debtor identifier for searching purposes suffers from a fundamental weakness if the collateral is a specific capital or consumer asset—such as a motor vehicle or a piece of large equipment—for which there exists a ready resale market. In this situation, secured creditors and prospective purchasers must deal with the significant risk that the original debtor may dispose of the collateral to a purchaser who then seeks to resell it to a second buyer. The scenario that follows illustrates the problem posed by this situation.

<p style="text-align: center;">Box IV-1</p> <p>Scenario 9: Illustration of Potential Weakness of Debtor Identifier as the Sole Search Criterion</p>
<p>On 1 June, Debtor grants a charge on a specific item of road building equipment to Secured Creditor, who effects a registration against the Debtor's name.</p>
<p>On 1 July, in violation of the charge agreement, Debtor sells the equipment to Buyer 1.</p>
<p>On 1 August, Buyer 1 offers the equipment for sale to Buyer 2. Buyer 2 is unaware of the identity or even the existence of either Secured Creditor or Debtor. Before purchasing the machine, Second Buyer searches the registry using Buyer 1's name as the search criterion.</p>

141. In this scenario, it seems unfair to require Buyer 2 to suffer the consequences of Debtor's misbehaviour and Buyer 1's fraud or negligence in failing to search the registry. Indeed, to do so would undermine the reliability of a registry search from the perspective of searchers in the position of Buyer 2, or in the position of a secured creditor to whom Buyer 2 might seek to grant security in turn. On the other hand, there is the equally compelling need to protect the holder of a registered charge against the loss of its security rights as a result of an unauthorized transfer of the collateral by the debtor.

142. Buyer 2 would be protected if the law required Secured Creditor 1 to amend its registered notice to add the name of Buyer 1 as an additional debtor in order to preserve its right to enforce the charge against third parties who acquire an interest in the collateral from Buyer 1. However, it seems unreasonable to expect Secured Creditor to undertake the excessive monitoring costs that would be necessary to ensure the registry record was amended in a sufficiently timely fashion.

143. A compromise solution is to place the onus on Secured Creditor to amend its registration within a reasonably short period of time after acquiring knowledge of the transfer by Debtor and the identity of Buyer 1. In regimes that incorporate this rule, a similar amendment obligation is imposed where the secured creditor discovers that the initial debtor has changed its name pursuant to change of name legislation or because of a corporate amalgamation or succession.¹⁸

144. A more complete solution to the problem would be to adopt a specific collateral identifier as a supplementary registration-search criterion. Because charges would be catalogued by reference to each specific item of collateral in addition to debtor name, third party searchers who searched using the collateral identifier for the asset in which they are interested as their search criterion would find out about the existence of a registered charge even where it had been granted by a predecessor in title to the current apparent owner.

¹⁸ For example, see sections 88-90 of the *New Zealand Personal Properties Security Act, 1999* reproduced in Appendix B.

145. For most types of movable assets, the imposition of a requirement for specific collateral identification would be administratively unworkable. The benefit would not be worth the additional registration burden and risk—having to enter a specific collateral description for each item, and having to continually update the description as new assets are acquired. This would be especially problematic for assets within a category, the contents of which are continually changing. This would apply, for example, to trade receivables and the other intangible claims of an enterprise, as well as its inventory, including the raw materials and other supplies consumed in the course of production.

146. Moreover, such a requirement is unnecessary. In the case of inventory, buyers normally take free of a registered charge in any event, so long as the sale occurs in the ordinary course of the debtor's business (as explained earlier in Chapter II). As for the accounts receivable and other intangible claims of a business, a remote transferee does not face any real risk since the name of the original debtor, as originator of the claim, is readily identifiable from the records relating to the assigned claims.

147. Specific collateral identification is, however, feasible and valuable for tangible assets acquired by the debtor for ongoing use (as opposed to resale), provided they possess a unique, reliable identifier, such as a serial number, and are of sufficiently high value to justify the additional registration burden.¹⁹

148. The need for a system that provides for a collateral identifier as an alternative registration-search criterion is particularly acute where the collateral is property for which there is an active resale market. Motor vehicles are the most important example. If a jurisdiction already has an efficient certificate of title system under which charges can be recorded on paper titles issued for all motor vehicles, there is no need to design a movables registry with this capability. The existence of the charge can be noted on the face of the paper title as opposed to having to be disclosed through the registry.

149. However, few, if any, jurisdictions have certificate of title systems for all of the types of high-value assets having some form of unique identifier, such as boats, trailers, mobile homes and farm machinery, all or most of which are frequently traded in used goods markets. For these types of assets, the registry regulations ideally should adopt a specific unique collateral-identifier as a supplementary registration-search criterion.

V. MOVABLES REGISTRY OPERATIONS: EFFECTIVENESS OF REGISTRATION OF REGISTRY CLIENTELE

A. Introduction

150. This chapter is focused on the day-to-day operation of movables registry from the perspective of registry clientele, primarily secured creditor registrants or their agents, and interested members of the public, such as other creditors, insolvency administrators and prospective purchasers and secured creditors. In particular, this chapter identifies and analyzes policy questions relating to the requirements for an effective registration, and the impact on the

¹⁹ For example, see section 142 of the *New Zealand Personal Properties Security Act*, 1999 reproduced in Appendix B.

effectiveness of a registration of errors or omissions in the entry of registration data and of unauthorized amendments and discharges.

B. Advance Registration

151. In a document filing registry system, it is clearly not possible for a secured creditor to effect registration until the charge agreement has actually been concluded with the debtor. However, in a notice-registration system, advance registration becomes a practical possibility.

152. Although the charge does not actually take effect until it is granted, modern movables registry systems typically authorize advance registration.²⁰ Advance registration offers important advantages for both secured creditors and debtors. Since priority among charge-holders in a movables registry system is ordered by reference to the time of registration, advance registration enables a secured creditor to establish a first-ranking priority position against subsequent charge holders at an early stage in the negotiation process. This enables the prompt advance of credit to the debtor as soon as the charge agreement is concluded.

153. In a system that does not permit advance registration, the secured creditor runs the risk that by the time negotiations are concluded, an intervening secured creditor will have taken and registered a charge against the same collateral. Such a system also promotes litigation on the precise time when a particular charge took effect legally since third parties would be able to challenge the validity of a registration on the basis that it was made prematurely.

154. The scenario that follows illustrates the operation of the general first-to-register priority rule explained in Chapter II in a system that permits advance registration.

<p style="text-align: center;">Box V-1</p> <p style="text-align: center;">Scenario 10: Advance Registration and Priority Ordering</p>
<p>On 1 June, (Prospective) Secured Creditor 1 registers notice of a charge that potentially covers certain described movable assets owned by Debtor. At this time, no charge agreement yet exists between the parties.</p> <p>On 1 June, (Prospective) Secured Creditor 2 registers notice of a charge that potentially covers certain described movable assets owned by Debtor. At this time, no charge agreement yet exists between the parties.</p> <p>On 1 August, Secured Creditor 1 enters into a charge agreement with Debtor giving Secured Creditor 1 a charge on the assets described in Secured Creditor 1's registered notice.</p> <p>In a system that permits advance registration, priority among competing secured creditors holding a charge in the same assets is determined by the order of the registration, not the order in which the competing charges were actually granted. It follows that although Secured Creditor 2 was the first to obtain a charge on the relevant assets, Secured Creditor 1 has priority because it was the first to effect a registration relating to the same assets.</p>

155. Advance registration carries a risk of false registrations in cases where the credit negotiations between the debtor and the registering party are aborted and no charge is ever granted. The fact that a registered charge still subsists on the record may adversely affect other

²⁰ For example, see section 146 of the *New Zealand Personal Property Securities Act, 1999*, reproduced in Appendix B.

creditors' perceptions of the creditworthiness of the alleged debtor. Imposing a legal obligation on registrants to discharge any registrations that do not represent an extant charge can effectively control this risk. To ensure compliance, this obligation should be backed up by a financial penalty for breach and a summary procedure whereby the named debtor can unilaterally compel discharge of the registration.²¹

C. A Single Registration for Successive Security Agreements

156. A notice registration system that permits advance registration carries with it a related benefit. If registration can be effected before any charge agreement has been concluded, there can be no objection to allowing parties in an on-going credit relationship to use a single registration to protect charges created under a succession of charge agreements entered into by them.²²

157. This facility dramatically reduces registration costs for the parties and gives them flexibility to amend and change their financing arrangement to meet changing circumstances without fear of loss of priority. Third persons searching the registry are not prejudiced provided that the secured transactions law makes it clear that a single registration is effective in relation to multiple charge agreements only if the registered information, including the collateral description, accurately reflects the terms of all related charge agreements. So long as this qualification is satisfied, it is immaterial that the registered information may reflect the terms of a series of charge agreements, rather than a single agreement. Either way, the third party searcher is alerted to the existence or potential existence of a charge.

D. Effective Time of Registration

158. If a movables registry system contemplates the submission of paper notices, there will inevitably be some delay between receipt of the completed notice in the registry office and the time when the notice or the information on it is entered into the registry record by the registry staff so as to be searchable. The same potential for delay exists, though less acutely, if the registration process allows for the electronic submission of the registration data, but requires that it be first checked or verified by registry staff before being entered in the record.

159. When should the registration be considered legally effected? Should this be on receipt of the notice in the registry, or only after the charge information becomes searchable by third parties?

160. If a registration is treated as legally effective as soon as the information is received in the registry office, third parties searching the registry must accommodate the possibility that any search result they obtain will not necessarily disclose all legally effective registrations. This burden is more easily dealt with if the system is programmed to disclose the latest processing date on all search results.²³

161. The alternative approach, under which a registration is effected only when the registration information is entered into the record so as to be searchable²⁴ allocates to the

²¹ For example, see sections 161-169 of the *New Zealand Personal Property Securities Act, 1999*, reproduced in Appendix B.

²² For example, see section 147 of the *New Zealand Personal Property Securities Act, 1999*, reproduced in Appendix B.

²³ This approach is used in the Ontario (Canada) Personal Property Registry. See further the Ontario Personal Property Security Act and regulations at www.e-laws.gov.on.ca/home.

²⁴ Articles 19(2)-(3) of the Convention on International Interests in Mobile Equipment, 2001, Appendix G.

registering secured creditor the risk and inconvenience associated with any delay in entry on the part of the registry staff. This allocation of risk can be justified on the basis that the secured creditor is in the best position to manage it by refusing to advance credit until a search result is obtained demonstrating that the registration has been successfully entered into the record.

162. If the registration process is very efficiently administered, secured creditors are unlikely to object to implementation of the latter approach since the delay between receipt of the registration information and its entry into the record will be negligible. Thus, in systems that have fully computerized the registration and searching process to enable registrants to directly enter their own data, the effective time of registration is invariably the time at which the registration data is entered by the registrant into the database so as to be searchable.²⁵ However, even in the most efficiently designed and operated systems, the potential for delay resulting from labor action or other events beyond the direct control of the registrar cannot be wholly eliminated.

E. Legal Effect of Unauthorized Amendments and Discharges

163. Chapter VI of the Guide addresses the range of possible administrative and technological measures that can be adopted to alleviate the risk for secured creditors of an unauthorized amendment or discharge of a registered notice.²⁶ However, it is administratively unworkable to oblige the registrar to verify or guarantee the background legal authority of registrants. Consequently, it is necessary to provide substantive guidance on the legal effect of entry into the record of an unauthorized amendment or discharge.

164. One possible approach would be to deny any conclusive legal effect to the entry of an amendment or discharge, thereby requiring searchers to obtain verification of the validity of the amendment or discharge directly from the secured creditor. A variant of this approach would delay the legal effectiveness of the amendment or discharge for a set time period after initial entry.

165. These solutions presume that registry searchers are sufficiently sophisticated to appreciate the limited information disclosure role of the system. They must understand that even though a search of the registry might disclose that a registration has been discharged or amended, they cannot legally rely on that information. Even if one assumes that the target users possess this level of legal sophistication, their inability to rely on amendment and discharge information disclosed in the registry results in serious inefficiencies. In addition to having to search the registry record, a third party searcher would also need to contact the named secured creditor in every case to obtain confirmation that registration of a recorded amendment or discharge had in fact been authorized. This would create delay and might even prevent the debtor from being able to deal with the relevant asset if confirmation could not be obtained because the secured creditor could no longer be located or had ceased to exist.

166. These transactional inefficiencies are eliminated if all registered discharges and amendments are treated as legally effective from the perspective of third party searchers even if it turns out later that the registrant had acted fraudulently or without the authority of the secured creditor of record. Under this approach, there would be no need for searchers to incur the delay and cost associated with having to obtain verification of discharges and amendments through direct contact with secured creditors. Since all registered amendments and discharges would be

²⁵ For example, see section 141 of the New Zealand Personal Properties Securities Act, reproduced in Appendix B.

²⁶ The liability of the registry for the consequences of error, or even deliberate fraud, on the part of its staff is a separate issue that is also addressed in Chapter VI of the Guide.

considered *ipso facto* effective, searchers would not have to go beyond or behind the information disclosed on the public record.

167. This second approach preserves the ability of the public to rely on the integrity of the information disclosed on a registry search. On the other hand, it transfers to the secured creditor the risk that its charge will be defeated or subordinated through no fault of its own. Nonetheless, as a frequent volume player in the credit market, the secured creditor is in a better position to absorb and redistribute that loss than the equally innocent searcher who may be a one-time buyer, particularly since the experience to date indicates that the incidence of unauthorized or fraudulent entries is very small. In any event, even this relatively minor risk can be all but eliminated if the registry system is programmed to immediately notify the secured creditor of record of any changes made to its registration, and the secured creditor is then given the legal right to promptly reinstate its registration, subject only to intervening third party interests acquired in the collateral.²⁷

F. Adequacy of Registered Collateral Description

168. Chapter IV of the Guide explained the utility of adopting a collateral identifier as a supplementary or alternative registration-search criterion for limited categories of tangible, relatively high-value, items of collateral. In systems that adopt this approach, a specific description in accordance with the registry regulations or guidelines will be necessary to ensure a legally effective registration for charges granted on the relevant types of collateral. Moreover, to ensure that the collateral will be indexed properly so as to be searchable, secured creditors will have to take care to enter the prescribed description on the appropriate line or electronic field of the notice to be registered.

169. Explicit guidance should be given—either in the regulations or in the statute establishing the registry—on what constitutes a legally adequate description. Otherwise, at least some secured creditors will feel compelled, out of an excess of caution, to enter highly itemized collateral descriptions, thereby unnecessarily increasing their transaction costs.

170. Explicit legal approval of the use of generic collateral descriptions greatly enhances the extent of the collateral that can be effectively charged.²⁸ A single registration can cover future and after-acquired assets, and circulating funds or pools of assets (for example, “all accounts” or “all inventory”). Indeed, to the extent the underlying secured transactions law permits charges on all of the movable assets of the debtor, there is no reason to require even generic descriptions of the collateral. A simple one-line description—“all present and after-acquired property of the debtor”—provides adequate and accurate guidance to third party searchers: clearly everything in the debtor's possession or control is potentially subject to the registered charge.

171. Although most modern movables registry systems authorize the use of generic descriptions, different approaches are taken on the issue of whether the description must define the exact scope of the collateral actually covered by the charge. In some systems, the registrant is required merely to indicate the generic nature of the charged assets, for example; “tangible movables”, or “automobiles” even if the actual charge only covers a specific thing within that category; for example, a single automobile. In others, the registered description must reveal the

²⁷ This solution has been adopted by most of the Canadian Personal Property Security Acts. See, for example, section 35(7) of the Saskatchewan *Personal Property Security Act*, 1993.

²⁸ Generic descriptors of this kind may be used under most Canadian systems. See, e.g., section 12 of the British Columbia Personal Property Registry Regulations, Reg. 279/90 reproduced at: www.qp.gov.bc.ca.

particular kind and quantity of collateral subject to the charge; for example, “2 Ford Ranger trucks, 2002 Model.”

172. On the one hand, a less precise description requirement reduces the registration burden for secured creditors and the risk of description errors. On the other hand, it has limited disclosure value for third persons. In order to ascertain the precise scope of the charge, searchers must obtain details from the secured creditor directly or through the debtor.²⁹ Moreover, in systems that permit a single registration to cover successive agreements,³⁰ third party searchers will need to secure a waiver of priority from the secured creditor who has effected the registration in order to be protected against the risk that the parties will later enter into a more expansive security arrangement, even if at the time of the search, the existing charge agreement does not cover the specific assets of interest to the searcher.

G. Effect of Errors or Omissions in Registered Particulars

173. As explained in Chapter IV of the Guide, notices in a movables registry are indexed according to specified registration-search criteria set out in the notice in order to facilitate retrieval by searchers. In general, this is the debtor's name or some other type of unique debtor identifier. However, some systems adopt a collateral identifier—e.g., serial number—as an alternative or supplementary criteria for limited categories of collateral.

174. What is or should be the legal impact on the effectiveness of a registration if the secured creditor fails to submit the registration criterion or criteria in accordance with the applicable registry rules.³¹ The error or omission might involve an error in the spelling of the debtor's name or in the transcription of his or her identifying number, or, in the case of a collateral identifier, an error in the serial number. Is perfect accuracy necessary, or is there some tolerance for error?

175. Most modern movables registry regimes focus, appropriately, on the impact that the particular error or omission has on the practical retrievability of registered notices by third party searchers. Under this approach, an error or omission in the registration criteria submitted results in an invalid registration only if the error or omission is seriously misleading.³²

176. The test as to what is seriously misleading is objective. The extent to which an actual searching party has been misled or has suffered loss because of the error or omission is irrelevant. What matters is whether the error or omission likely would have misled a reasonable, hypothetical person searching the registry. In cases of doubt in the application of this test, the system assumes that the parties will have recourse to some judicial or arbitral body for a definitive ruling.

177. Under the seriously misleading test, a registered notice will be treated as invalid or a nullity if a searcher using the prescribed registration-search criterion could not reasonably discover the notice. If the system is paper based, a slight error in spelling or numbering is unlikely to mean that a reasonable searcher would not have discovered the charge.

178. However, the situation with respect to an electronic registry is a little more complicated. Everything depends on how the search software is programmed. If only exact matches to the

²⁹ On access to further off-record information about a registered charge, see the discussion in Chapter III of the Guide.

³⁰ On this issue, see the discussion in Chapter V of the Guide.

³¹ On the need for the Registry regulations to provide explicit guidance on this point, see Chapter IV of the Guide.

³² For example, see sections 149-151 of the *New Zealand Personal Property Securities Act, 1999*, reproduced in Appendix B.

search criteria entered will be returned, then even the slightest of errors on the part of the registrant will mean that the registered notice is a nullity.

179. In some regimes, policy makers have concluded that a system programmed to disclose only "exact matches" is too unforgiving from the secured creditor's perspective. The solution arrived at was for registry designers to adopt a computer search program that results in the retrieval of registrations that exactly match the registration-search criterion used by a searching person, and any registrations that are "similar matches" according to the coding system incorporated in the program software.³³ The determination of what constitutes a seriously misleading error in a system of this kind depends on the form and number of similar matches disclosed when the correct search criterion is used. The fact that a defective registration is disclosed as a similar match on a search using the correct registration-search criterion does not invariably mean that the registration is valid despite the error. This depends on the determination of whether a reasonable searcher would recognize that the registration, disclosed in the result only as a similar match, related to the collateral or debtor identified by the correct search criterion.

180. In considering whether to adopt a similarly flexible search programme, countries should beware of simply purchasing off the shelf software. The appropriateness and scope of similar matches that will be disclosed depends on customizing the program to accommodate local similar name variations and spellings.

VI. MOVABLES REGISTRY OPERATIONS: REGISTRY ADMINISTRATION

A. The Balance Between Transactional Efficiency and the Reliability and Security of Registry Data

181. The model for modern movables registries is one that efficiently and accurately records registration information submitted to the registry by secured creditors, that protects the information from unauthorized change, loss or distortion and that faithfully replicates it at the request of persons who request searches. However, as noted elsewhere in this Guide, it is not the role of a registry to guarantee that registration information submitted by secured parties is accurate. The operators of a movables registry have no capacity to determine whether information submitted does or does not reflect the nature and extent of a legal relationship between the secured creditor and the debtor named in the registration information.

³³ For example, under the system in force in the Canadian province of Saskatchewan, a search using the debtor name John Andrew Smith would reveal as similar matches the following names: Jon Smith; John A. Smith; John Adam Smythe. The program keys "smith" and produces a code SNAT. Other last names similar to "smith" such as "smythe", "schmidt", "schmutz" and "schmutt" are keyed to produce the same code. Consequently, these variations can be revealed as "similar matches" when "smith" is used as the search criterion. However, further refinement is required in order to avoid providing long lists of exact and similar matches that would result if only SNAT is used to retrieve registrations. It is for this reason that, after identifying all names that code to SNAT, the program then selects all SNAT registrations that have the first letters of the first and second given names set out in the search criterion. If there is no second given name, it selects all SNAT registrations with the first letter of the given name that corresponds to the first letter of the first name in the search criterion. As a result, when the search criterion is John Adam Smith, the following registration is revealed as a similar match: Jack Smith. A different search result is obtained if the first and second given names in the registration are the reverse of the first and second given names of the search criterion. Consequently, a search using John Adam Smith will not reveal as an exact or as a similar match Adam John Smith. This is so, since the program selects from the SNAT registrations those in which the first name starts with "J".

182. Under the model, secured creditors can assume that their interests will not be negatively affected by anything that happens at the registry, that the information they submit cannot be amended or deleted without their consent or will not be lost or distorted in the registry process. Third parties who are acquiring interests in property of debtors can assume that the information they obtain in a registry search is a replication of the information submitted by the secured parties. They can also assume that when a search discloses no registration information relating to a named person, there are no charges against the movable property of that person to which their interests will be subject.

183. Yet all secured financing transactions involve risk and all secured creditors must engage in both economic and legal risk assessment. An important aspect of legal risk assessment entails obtaining information bearing on the risk including the existence or potential existence of interests in the property offered as collateral held by other persons that will have priority over any interest in the collateral the secured creditor will obtain under the transaction. As already noted in Chapter II of the Guide, it is the primary role of a registry to assist in this aspect of risk assessment. Consequently, there is a direct correlation between the availability of risk assessment information and the efficiency with which secured financing transactions can be carried out.

184. There are several factors that influence the efficacy of a registry. Registration data may be lost or distorted through the actions of persons acting fraudulently or thorough errors or omissions on the part of registry staff. Carelessness on the part of registry staff may result in failure to disclose in a search result information contained in the registry. The equipment and software of a computerized registry may of bad design or may malfunction resulting in failure of a registry function.

185. Control or elimination of all factors that negatively affect the efficacy of a registry is not possible. However, measures can be taken to reduce their effect on users of registry services. Many of these measures can be built into a new system when it is designed. However, some of them involve the use of technology not readily available in all countries while others involve the assumption of potentially costly liability that cannot be assumed by all governments or system operators.

B. Controlling Access to the Registry Record: Security Issues

186. The continued reliability and ultimately the credibility of a movables registry depend on preserving the integrity and security of the information in the registry record. Consequently, system designers must address ways of managing the risk of tampering by registry clientele.

187. Although the registry records must be accessible if the system is to fulfil its public disclosure function, it is not necessary to use the same security approach for all purposes for which access may be desired. Provided the data is protected from manipulation, there is no reason why special security measures should be required to gain access to the database for purposes of searching. Indeed, except to the extent necessary to verify payment of the search fees, there is no particular reason for the system to even require identity verification from searchers.

188. Verifying that the data submitted to the registry has been accurately entered into the database is not a significant problem where an electronic system is involved. However, if the system is paper-based, some level of ongoing human supervision of users will be needed. This burden can be lightened through the creation of a back-up paper record for comparison purposes in case of later allegations of failure on the part of the registry to accurately record the

data. To avoid extensive administrative and storage resources, the back up record could be held in a photo-reduced form. Alternatively, consideration might be given to scanning the paper notices into an electronic database, a solution that would facilitate later transition from a paper to an electronic system.

189. There are security problems associated with unrestricted access to the database for the purpose of effecting registrations or for amending or discharging registrations. The entry of a false or unauthorized notice of a charge may prejudicially affect the perceived creditworthiness of the person named as a debtor. Access for the purposes of amending or discharging an initial registration creates security concerns for the secured creditor since the amendment or discharge may prejudice the effectiveness and priority status of its charge against third parties.

190. To protect debtors and secured creditors against these risks, some systems require would-be registrants to pass stringent identity verification tests, or, to pass through a human or electronic “firewall” before gaining access to the database.

191. In other systems, however, anybody can register, amend and even discharge a registration so long as prior arrangements are made for access to the record using a special identification code issued by the registry.³⁴ In an open access system of this latter kind, the registry protects debtors and secured creditors against the risk of unauthorized entries on an ex post facto basis. This is done by requiring notice of all registrations and changes to registrations to be sent to them forthwith, and by establishing a summary procedure to enable prompt correction of the record.

192. Preventive steps must also be taken against the risk of physical destruction of the registry record by fire or other natural disaster. If the record is in electronic form, the usual solution is to program the system to generate an automatic electronic copy of every registration that is then transmitted to a duplicate back up database physically located in a different place. The creation of a back-up paper record necessarily consumes more extensive administrative and storage resources, although this burden can be reduced, as noted earlier, through microfiche or scanning.

C. Liability of the Registry

193. Legal rights and economic interests of persons are directly affected by the operation of a movables registry. An important issue is the extent, if any, to which the registry is legally responsible for loss suffered by users of the system due to fraud on the part of other users, administrative errors by registry employees, design defects, malfunction of the system or *force majeure* affecting its operation. Different approaches have been taken to this issue.

194. There is universal agreement among registry designers that the registry should not be liable for loss resulting from factors outside the control of its operator. This includes fraudulent or negligent conduct on the part of other users of the system. As explained in Chapter III the Guide, registration in a movables registry does not guarantee the reliability of registration data. What is submitted to the registry by a secured creditor is what ends up being recorded in the registry database. It is the responsibility of the persons who use the system to determine whether that information accurately reflects an extant charge between the alleged secured creditor and the debtor. It is for this reason that the underlying legal regime usually provides a

³⁴ For example, see *British Columbia Personal Property Registry Regulations*, Reg. 279/90, Div. 12.1 reproduced at: www.qp.gov.bc.ca.

legal procedure to enable searchers to gain access to more detailed information about the actual current status of a registered notice as discussed in paras. 93-95.

195. Nor can the registry guarantee that information in the registry database will not be affected by fraudulent conduct on the part of unauthorized persons. It is administratively impossible for a registrar to ensure that everyone who submits a discharge of or amendment to a registration has the requisite legal authority. All that can be reasonably expected is for the system to adopt mechanisms and procedures, of the kind described in Chapter V, designed to reduce the risk of unauthorized changes in or discharges of registrations.

196. An important policy determination must be made when designing a modern registry system as to the extent, if any, that the user will be compensated for loss caused by operational errors or omissions and for malfunctions of the system software or hardware. One approach is to impose on the users of the system the obligation to self-insure against system malfunctions or errors made by registry employees. Underlying this approach is the conclusion that the cost of imposing liability on the registry's operator in order to protect users against loss resulting from errors or omissions in or malfunctions of the system is unacceptably high given the large amounts of money that are involved in many modern secured transactions. This approach is acceptable where a well-designed and managed registry system is involved. The absence of indemnification against loss caused by malfunctions of the system is not a significant concern when problems occur only rarely. The infrequency of such malfunctions reduces user risk to an acceptable level. Reliance on the efficacy of the system is only marginally affected.

197. The competing approach is to give users the assurance that if the system does not operate as intended, they will be compensated by the operator of the registry for their losses resulting directly from the failure of the system.³⁵ This approach reduces the transactional cost and time involved in engaging in secured transactions since the parties need not provide for self-insurance through supplementary "due diligence" measures.

198. An intermediate approach is to impose on the registry's operator liability for errors or omissions in the operation of or malfunction of the system, but to limit the amount of recovery for any single loss.³⁶ Under this approach, users must be prepared to self-insure to the extent that the amount involved in the transaction exceeds the recovery limits.

199. A number of factors should be taken into account in determining which of these approaches should be adopted.

³⁵ Article 28 of the Convention on International Interests in Mobile Equipment, 2001, set out in Appendix G, provides that the operator of the International Registry shall not be liable for malfunctions caused by an event of an inevitable and irresistible nature that could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those related to back-up and systems security and networking.

³⁶ This is the approach employed by several Canadian provinces. See, for example, section 52-54 of the Saskatchewan *Personal Property Security Act, 1993* and section 25.1 of the Saskatchewan Personal Property Security Regulations. This legislation is reproduced at: www.qp.gov.sk.ca. A person who suffers loss or damage as a result of reliance on a printed search result that contains an error or omission caused by the registry or loss due to failure on the part of the registry to register a printed financing statement is entitled to recover compensation for the loss. However, the amount recoverable is limited to Can\$300,000 (US\$195,000) for a single claim and Can\$2,400,000 (US\$1,560,000) for a group claim.

Box VI-1: Registry Liability Factors

The design of the system: A system that entails human intervention in the handling of registry data or verification of system users involves a significant risk of error on the part of registry employees. A direct access electronic system that does not involve any intervention by registry employees in effecting a registration, transcribing registry data to search certificates or verifying user identity reduces the possibility of error by registry personnel in the entry of data into the database.

The availability of user activated protection measures: The incidence of loss resulting from an error or omission in the registration of data can be dramatically reduced if a secured party who has submitted registration data to the registry is given a written verification notice of the existence and content of the registration immediately after it has been effected.³⁷ The same assurance can be obtained if the registrant is enabled to conduct an immediate search of the registry to determine its registration has been effected.

The limits of liability: As noted above, the extent of the operator's exposure to liability can be limited to a maximum monetary amount. This will facilitate the operator's assessment of its risk associated with operational errors or omissions, and of the potential cost that may be involved in providing protection against loss to users of the system.

The persons protected: If liability is confined to loss suffered by users of the system and not extended to anyone who happens to rely on registry data, however acquired, the potential for multiple claims against the system is dramatically reduced.

Proof of error or omission: Where registration data are transmitted to the registry in hardcopy form, it is easy to verify a claim on the part of a user that an error has been made by registry personnel in dealing with that data. Where data are transmitted electronically this is more difficult, since no hardcopy evidence exists of the form in which the data were transmitted. Under these circumstances, the number of unsubstantiated claims will be small if the user is required to prove that the error or omission in registration was not caused by the user or by a factor outside the control of the registry's operator. This assumes the availability of claims determiners, such as judges or arbitrators, with knowledge of the secured transactions regime and registry system.

Limitation periods of claims: The costs associated with imposing liability on the registry's operator for errors or omissions in the operation of the system are affected by the limitation period during which claims must be brought. The prescription of a short period of time following the occurrence of the error or omission within which a claim must be made reduces the level of costs likely to be incurred by the operator.

200. It should not be assumed that, because guarantees against errors or omissions in the operation of a registry cannot be given, a registry is of little value to its users. Countries that have very little experience in the operation of a modern registry, little financial capacity to insure against large losses by registry users or limited arbitral facilities to deal with claims by aggrieved users may well conclude that, at least initially, users of their registry systems should be required to self-insure against loss suffered as a result of errors or omissions in the operation of their systems. An aspect of self-insurance by users is the necessity to take supplementary steps to determine whether information supplied by the registry (including indication that no charge exists against property of a person) is accurate. In this context, the registry is only one measure that will be required in order to assess the legal risk associated with a particular transaction. As registry expertise is developed through experience gained by registry staff, users will be able to place greater reliance the services the registry provides. A concomitant reduction in other due diligence measures will then be possible.

³⁷ For example, see section 145 of the *New Zealand Personal Property Securities Act, 1999*, reproduced in Appendix B.

D. The Role of Government in Creating and Operating Registries

201. By far the largest number of movables registries in the world are created under legislation drafted by government experts or consultants and operated by government agencies. In some cases, the agency is a subdivision of a government department, such as a department of justice, and in some cases the agency is a government corporation with considerable independence with respect to policy making and financing.

202. There is an important reason why most movables registries remain under the direct control of government. A movables registry is the quintessential monopoly. There can be no competitors. It is effective only if all secured creditors and debtors use one system for charges on movables. It is part of an elaborate legal structure that affects both legal and economic rights. There is reluctance on the part of legislators to place reliance on private commercial organizations to ensure that these rights are protected.

203. The experience in countries like Canada is that the best results are obtained when the registry is operated by a quasi-independent government organization.³⁸ Such an organization is more likely to attract or develop the expertise required in a modern registry. Employees are less likely to be civil servants who can be moved from one government department to another. Such an organization is more likely to be sensitive to the importance of serving its customers since its revenues will depend upon the volume of use of its services. It is also best able to match the level of public service it offers to its income. Generally, modern government administration does not seek to match service and revenue. Excess revenues are generally taken for other government functions and not reinvested in better services.

E. Privately-operated Registries and Public-Private Arrangements

204. Proposals for privately operated registries have been considered in several jurisdictions. The advantage of this approach is that the operator will provide the capital to establish the system and the expertise to operate it. However, for reasons noted in the preceding paragraph, most movables registries remain under the direct control of government. In addition, private organizations find it difficult to obtain independent sureties to guarantee against insolvency or liability to users for errors or omissions in the operation of the system.

205. However, it is possible to build various degrees of privatization into a modern movables registry system without surrendering control of it to a private organization. Several Canadian provinces³⁹ established their registries by contracting with a private organization for the construction and day-to-day maintenance and security of the registry database. The government remains the registrar and retains complete control of the system. These systems are totally electronic.

206. It is also feasible to permit registrations and searches to be effected through registry agents who assume responsibility for entering the registration data supplied by the users into the registry database. This role can be delegated to a particular professional group such as notaries or to licensed private firms that meet certain financial and facility requirements established by law. Alternatively, the system may allow any private sector firm that has a contractual arrangement with the registry operator to set up an agency business supplying

³⁸ For example, the personal property registry of the Canadian province of Saskatchewan is operated by a Crown Corporation, Information Services Corporation of Saskatchewan.

³⁹ New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, Northwest Territories and Nunavut Territory. These jurisdictions operate their movables registries under a contract with UNISYS Canada Ltd.

registration and searching services to the public. Which choice or combination of choices is made depends on the level of security and service reliability considered optimal in the jurisdiction.

F. Financing the Start-up and Operational Costs of the Registry

207. An efficient, modern, movables registry does not need any public subsidy other than during the start-up period when the number of registry transactions is small. Initial capital investment and annual operating costs can be recovered from income generated from the provision of registry services.

208. The box that follows highlights the 3 factors that condition the financial self-sufficiency of a registry.

Box VI-2: Movables Registry Financial Self-Sufficiency Factors
<p>Computerization: The efficiency of a registry is directly proportional to the extent to which its operations can be computerized. Systems that permit registry data to be transmitted to the registry in hard-copy format are more costly because they involve manual handling and data entry. The unit cost of a step affecting a registration is inversely proportion to the volume of such steps only when the steps are handled through computerization. This presumes that computers are accessible to a significant portion of the community of would-be debtors and creditors.</p> <p>Fee Structures: Fees for registry services should be established at a level such that cost is not a deterrent to use of the registry. High fees induce secured creditors to self-insure by taking the risk that no priority issue will arise. This risk is reflected in the cost of the transaction and must be borne by the either or both parties. The goal of a registry system should be to provide inexpensive “insurance” against this risk thus reducing the cost of credit transactions.</p> <p>Types of Transactions Registered: The volume of fee generating services a registry provides is a very important determinant of the financial viability of the registry. Low volumes require high fees, which in turn discourage use of the system. High volumes permit low fees and remove a cost disincentive for users. Of particular importance is the question of whether the system applies to charges on motor vehicles. In some existing systems, motor vehicle registrations account for at least 65% of registry volumes. Without these registrations, registration fees would be higher or, at the very least, the considerable “profit” they generate by the registry for the governments operating these systems would not be realized.</p>

209. The box in the following page are recent data, provide by four Canadian registries, relating to the operational year 2001/02.⁴⁰

⁴⁰ See, *Proceedings of the Canadian Conference on Personal Property Security Law, 2002*, Provincial Reports (unpublished).

Box VI-3: Financial Data on Canadian Registries

Registry A: This registry functions in a province having a population of approximately 2.5 million people. It has a diversified economy and is one of the most prosperous regions of Canada because of its natural resources. The system provides for registration of security interests (charges), long-term leases and title retention sales agreements involving all types of movable property, including motor vehicles. It permits both electronic and hardcopy registrations. A government department operates the registry, but most registrations are effected by private service providers.

Number of Employees: 2

Number of Registrations (including amendments, renewals and discharges): 856, 737

Number of Searches: 748, 349

Gross Revenues: Can\$4,656,141 (US\$3,026, 491)

Registry B: This Registry functions in a province having a population of approximately 8 million people. It has a diversified economy and is one of the most prosperous regions of Canada. The system provides for registration of security interests (charges) and title retention sales agreements involving all types of movable property, including motor vehicles, but does not include registration of leases. It permits both electronic and hardcopy registrations. The registry is operated by a government department and but most registrations are effected through a network of government offices.

Number of Employees: 32

Number of Searches: 781,620

Gross Revenues: Can\$40,900,623 (US\$26,585,404)

Box VI-4: Financial Data on Canadian Registries

Registry C: This registry functions in a province having a population of approximately 750,000. It is one of the less prosperous regions of Canada. The system provides for registration of security interests (charges), long-term leases and title retention sales agreements involving all types of movable property, including motor vehicles. It permits only electronic registration. A government corporation operates the registry in partnership with a private company.

Number of Employees: 1.5

Number of Registrations (including amendments, renewals and discharges): 124,127

Number of Searches: 39,296

Gross Revenues: Can \$2,925,666 (US\$1,901,682)

Registry D: This registry functions in a province having a population of approximately 1 million people. Its economy is based on agricultural production and resource exploitation. The system provides for registration of security interests (charges), long-term leases and title retention sales agreements involving all types of movable property, including motor vehicles. It permits both electronic and hardcopy registrations. A government corporation operates the registry, but most registrations are effected by private service providers.

Number of Employees: 7

Number of Registrations (including amendments, renewals and discharges): 256,590

Number of Searches: 176,330

Gross Revenues: Can \$4,777,277 (US\$3,101,980)

210. While detailed data are not available, it is clear that the operators of all of the registries that operate on a cost recovery basis, other than Registry A, realize a very substantial net income from fees. Note that the gross revenue of Registry D is greater than the gross revenue

of Registry A even though the volume of registrations and searches for Registry D is less than 30% of that of Registry A.

VII. TRANSACTIONAL SCOPE OF A MOVABLES REGISTRY

A. The Range of Transactions Included

211. An aspect of the design of a movables registry is the determination as to the types of transactions that are to be included in its scope. Transactions involving specific types of property may be excluded because of their specialized nature and the types of property involved. Most countries have stand-alone registries for ship mortgages or charges on aircraft. Where there exists an ownership registry for specific types of movable property, it is often better to require registration of charges against that property in the ownership registry. Reference to these types of registries is made in para. 241. Transactions may be excluded because there are other mechanisms through which charges on the property affected are disclosed to third parties. Countries that have paper certificate of title systems for motor vehicles frequently provide that charges on vehicles are to be recorded on the paper titles. Another reason for excluding certain types of transactions from registration requirements is that they involve small amounts of money. The costs involved in registering interests arising under these transactions exceed the benefits associated with registration. The risk to third parties of acquiring interests in property subject to a charge are not significant or can be addressed in another way.

212. It is common to include within the scope of a registry certain transactions that are functionally equivalent to charges against movable property. The reason for doing so is that a registry provides a system for giving public notice of the existence of interests in property thereby reducing the legal risk associated with transactions involving that property. These transactions are discussed in paras. 222 to 236.

B. Exclusion of Possessory Pledges

213. A movables registry reduces the legal risk inherent in nonpossessory charges thereby enabling debtors to utilize the full range of their movable assets as collateral. However, the possessory pledge remains a useful form of security for some types of collateral, for instance, luxury tangible items, negotiable instruments, share certificates and documents of title such as bill of lading.

214. Modern secured transactions regimes almost invariably excuse secured creditors who take possessory security from having to register in the movables registry. Since the debtor no longer has possession or control of the collateral, unauthorised dispositions of the collateral become impracticable, and creditors and other third parties cannot in any event complain about being misled by the their reliance on the debtor's possession.

215. Although the effectiveness of possessory pledge transactions need not depend on registration, they should not be excluded from the substantive scope of a modern secured financing law. To ensure a complete and coherent regulatory framework, substantive guidelines are needed at the level of enforcement, and, most importantly for present purposes, priority ordering.

216. When, for example, a priority contest arises between a secured creditor who has registered a nonpossessory charge and one who has taken a possessory pledge in the same item of collateral, the most logical solution, and the one that most satisfactorily protects the interests of both creditors, is to order priority according to the order of registration and the taking of possession. In other words, the claim of the creditor that was first to either register or take possession of the collateral has priority. The operation of such a rule is illustrated by the scenario that follows.

Box VII-1
Scenario 11: Ordering Priorities between a Possessory Pledge and a Registered Nonpossessory Charge
On 1 June, Secured Creditor 1 acquires a charge in certain assets owned by Debtor and immediately takes possession of the collateral.
By 1 July, Debtor is in need of further financing and applies to Secured Creditor 2 for a loan secured by the assets already pledged to Secured Creditor 1.
After verifying that there are no other registered charges against the same assets, Secured Creditor 2 agrees to extend credit and promptly registers notice of its charge.
As part of its risk assessment exercise, a secured creditor should verify the actual status of the assets offered by a debtor as security. Merely checking to see that there are no competing registered charges is insufficient. Had Secured Creditor 2 demanded verification of the existence of the collateral, it would have learned that Debtor no longer had a possession and would have realized that the Debtor's title might be subject to a competing encumbrance or other claim by the person now in possession.

217. Possession by a secured party does not guarantee priority. In the converse situation where the debtor creates a nonpossessory charge in favor of Secured Creditor 1, who registers promptly, and then purports to grant a possessory pledge in the same assets in favor of Secured Creditor 2, priority should be given to Secured Creditor 1. As part of any prudent risk assessment exercise, Secured Creditor 2 should conduct a search of the movables registry rather than simply relying on Debtor's possession.

218. Registration and possession should not be equivalent where the collateral consists of money or a negotiable document or instrument. To avoid interference with commercial negotiability, priority in such cases should normally be given to the secured creditor who first takes possession of the collateral in the ordinary course of business whether or not a prior charge was registered.

C. Substance over Form in Characterizing Nonpossessory Charges

219. When defining the scope of a movables registry, designers should avoid a purely formalistic approach under which transactions that in substance, but not necessarily in form, constitute a nonpossessory charge would nonetheless fall outside the applicable registration and priority-related rules. If this is allowed to happen, the risk-reduction and priority-ordering benefits of the registry system will be seriously and unnecessarily limited.

220. Where, for example, a debtor purports to grant a possessory "pledge" in specific collateral in favor of a creditor, but retains actual possession or control as "agent" of the creditor, the so-called pledge raises the same publicity concerns for third parties as a nonpossessory charge and should be subject to the same registration and priority rules. Otherwise, existing

creditors, as well as prospective buyers and secured creditors, have no means of knowing which assets in a debtor's possession may in fact have been pledged.

221. Similarly, where the debtor conveys title to an asset to a creditor under a “sale” or “trust”, but retains possession on the understanding that if the debtor's credit obligation is satisfied the sale or trust is to be considered resolved, once again, notwithstanding the formal label applied to these transactions, they are in substance indistinguishable from a nonpossessory charge and should be regulated according to the same set of registration and priority rules.

D. Functional Equivalents: Title Retention Sales, Financial Leases, and Similar Functional Equivalents

222. Even in legal systems that adopt a substantive approach to characterization, the concept of a charge for the purpose of registration and priority may be limited to collateral owned by the debtor. Security achieved by reservation of title by the creditor, for instance, title retention sales and leases or hire-purchase agreements, are exempted.

223. These exclusions are commercially unjustifiable since such transactions raise the same publicity concerns as conventional nonpossessory charges. Unless these other transactions are brought with the scope of a registry-based priority regime, third party searchers cannot rely on a search of the registry records to determine which assets in the debtor's possession are in fact subject to a prior creditor's ownership. This is considered in the scenario below.

Box VII-2
Scenario 12: Increased Legal Risk Posed by Exclusion of Title-Reservation Sale and Lease Arrangements from a Movables registry
<p>On 1 June, Debtor takes delivery of equipment for use in his business from Seller. Under the terms of the sale agreement, Seller is to retain ownership of the equipment until the purchase price is paid in full.</p>
<p>On 15 June, Debtor takes delivery of a second item of equipment for use in his business from Lessor for a lease term of 3 years.</p>
<p>On 1 July, Debtor is in need of additional financing for his business and obtains a loan from Secured Creditor. To secure repayment, Secured Creditor takes a charge in the two items of equipment that were supplied to Debtor by Seller and Lessor. Debtor fails to tell Secured Creditor that he does not have title to these items.</p>
<p>Debtor's business falls into financial difficulty and Debtor defaults in his payment obligations to Secured Creditor, Seller, and Lessor. When Secured Creditor attempts to enforce its charge, it discovers that Seller and Lessor have already repossessed and resold their equipment. When Secured Creditor complains, Seller and Lessor point out that Debtor had no right to create a charge in favor of Secured Creditor in equipment that Debtor did not own.</p>

224. Because secured creditors in the position of Secured Creditor in this scenario have no objectively reliable means of determining whether assets in a debtor's possession are subject to a supplier's retention of title agreement, they will need to factor this additional risk into their decision to extend credit. Prospective buyers, as well as judgment creditors and the debtor's insolvency administrator, suffer from a similar information deficit.

225. A secured transactions regime that requires disclosure of title-retention sales and leases by public registration offers an efficient and simple solution to the problem.⁴¹ By making registration a precondition to the effectiveness of the retention of title against third parties, third party creditors prospective buyers and charge holders can confidently rely on a search of the registry. Retention of title creditors are not, however, approximated to secured creditors for all purposes. In particular, they form an exception to the first-to-register rule of priority among competing secured creditors. In the scenario just considered, unqualified application of a first-to-register rule would mean that Secured Creditor would have the first right to payment of the value of the equipment supplied by Seller and Lessor. This is generally considered unfair since Debtor would not have acquired this asset without the credit financing supplied by Seller and Lessor. Moreover, such a rule would chill the credit market for instalment selling and leasing.

226. In fact, virtually every legal regime protects Seller and Lessor in this scenario. Sometime this is done through the creation of a special exception to the first to register rule in favor of creditors who finance the debtor's acquisition of the very collateral in which security is taken, whether by way of sale, lease, or charge. A description of this approach is contained in paras. 49 to 55.

E. True Long-Term Leases

227. There is a sound commercial basis for subjecting all long-term leases of movables (e.g., leases that run in excess of one year) to the same registration and priority rules that apply to title retention sales and financing leases. Even when a lease does not operate as the functional equivalent of a charge or title retention sale, the separation of ownership and possession raises equivalent publicity concerns for third parties dealing with the lessee in possession.

228. However, true leases should be excluded from the default enforcement rules of the secured transactions law associated with the movables registry; that is, the legal rules determining a charge-holder's right to have collateral seized and sold to satisfy the obligation secured. The enforcement regime is designed to protect the interest of the debtor and subordinate creditors in the debtor's residual ownership of the charged property. That policy objective is clearly inapplicable in the case of a true lease since the lessor does not merely own the leased asset in a technical formal sense but is meant to retain the full benefit of the economic incidents associated with residual ownership.

F. Assignments of Monetary Receivables

229. The monetary claims owing to an enterprise, for instance, its trade receivables, are a common form of collateral in secured financing transactions. However, instead of charging its receivables, a business may instead elect to raise capital by selling its receivables outright at a discount. The fact that the enterprise no longer "owns" its accounts may not be evident to third parties, including potential secured creditors, especially if the assignor continues to collect the accounts as agent for the buyer. This is considered in the scenario below.

⁴¹ For example, see section 17 of the New Zealand Personal Property Securities Act, reproduced in Appendix B.

Box VII-3**Scenario 13: Increased Risk if Assignments Excluded from Movables Registry**

On 1 June, Debtor sells its present and future accounts receivable to Assignee, with payment to be made on an ongoing basis as the accounts arise. The parties agree that that Debtor will continue to collect the accounts as agent for the Assignee, and then remit the proceeds of collection to Assignee.

On 1 July, Debtor grants a charge to Bank in all its present and after acquired movable property, including claims.

Debtor falls into financial difficulties and defaults in its payment obligations to both Assignee and Bank. When Bank attempts to enforce its charge by collecting on the accounts owed to Debtor, it finds out for the first time about the prior assignment to Assignee.

230. Application of the registration and priority rules applicable to charges to assignments of monetary receivables enables third parties, including prospective secured creditors and competing assignees, to rely on the absence of any prior registration to reliably assess the priority of their own interest. This is particularly valuable in the securitization context because it ensures that special purpose vehicles' and investors' claims against transferred financial assets are superior to any third-party claims. If a company seeking financing by way of securitization is located in a jurisdiction that does not have a movables registry to disclose both assignments and charges, investors will instead have to rely on the company's representations that the securitized assets have not already been charged or sold. This greatly increases the legal risk posed by debtor fraud or carelessness.

G. Commercial Consignments

231. Depending on the extant commercial practices of a particular country, other nonpossessory transactions may raise equivalent publicity concerns even though they, too, are not secured transactions even in a functional sense.

232. Where, for example, movables are consigned to a commercial agent for sale, in the absence of registration, creditors and other third parties dealing with the consignee (agent) have no means of knowing that the inventory does not belong to their apparent seller. The only exception to this is where it is widely known that the particular agent deals only in consigned goods, such as in the case of auctioneers and art dealers.

233. Commercial consignments are merely offered as an example. Much depends on commercial practices in particular countries. The general objective remains the same. The idea is to capture within the registry system commercial dealings in movable assets that are apt to create difficulties for third parties in determining whether the person in possession or control of the asset holds title.

234. Nonpossessory interests created under movables assignments, consignments, and equivalent transactions should be included in a Registry system only for purposes of setting priorities. As in the case of true leases, these transactions should be excluded from the default enforcement rules of the secured transactions law associated with the registry. A secured transactions enforcement regime is designed to protect the interest of the debtor and subordinate creditors in the debtor's residual ownership of the charged property. That policy objective is clearly inapplicable in the case of nonsecurity transactions, since the assignee, lessor or consignor, as the case may be, not only owns the charged property outright in the

formal sense, but is also meant to retain the full benefit of the economic incidents associated with ownership.

H. Judgment Liens and Other Security Rights Created by Law

235. A number of regimes also permit a judgment creditor to register a notice of judgment for movables in the movables registry, with registration creating the priority equivalent of a general charge against the judgment debtor's movable assets.⁴² This approach indirectly promotes the prompt satisfaction of judgment debt without the expense and burden of having to pursue active judgment enforcement measures. Once publicized by registration, the judgment debtor cannot easily dispose of its assets to third parties, or use them as the object of consensual security, without first paying the judgment debt and terminating the prior-ranking registered judgment creditor's claim.

236. Whether the scope of the movables registry should extend to other types of nonpossessory security created by operation of local law—for instance, tax or vendor or employee wages liens—depends on the public policy of each country. If local law gives the relevant type of security super-priority over even prior registered charges, there may be little point in requiring registration since prior secured creditors will be subordinated in any event. Nevertheless, registration would at least contribute to the more orderly enforcement of debt by judgment creditors and insolvency administrators.

I. Linkage to Immovable Registries

237. It is common for a charge agreement to cover the debtor's immovable as well as movable assets. This raises the question of whether it is feasible to design a system in which registration of interests in immovables and movables are combined so that only one registration would be required.

238. While some of the registry issues that arise in the context of charges on movables are also associated with the registration of mortgages and charges on land, any attempt to have a common registry structure will be met with considerable difficulties. The structure and functions of the two types of registries usually differ in important respects. The principal registration-search criterion in an immovables registry is the unique identifier attached to each specific parcel of land. In a pure movables registry, a debtor identifier is the only universally used criterion (collateral identifiers are used, if at all, only for limited categories of tangible high-value assets). Furthermore, an immovables registry is designed to disclose the current state of title to the relevant parcel, as well as any mortgage or charge on that title, whereas title is not addressed in a pure movables registry. The use of generic after-acquired collateral descriptions that is an important feature of registration in a modern movables registry is not possible in connection with registrations in an immovables registry.

239. This is not to say that it would be impossible to establish a linkage between the two systems. If the land registry incorporates a name index, in addition to one indexed by reference to individual land parcels, it would be possible to conduct searches in both systems. On the other hand, there might be a natural reluctance on the part of the immovables registry administrators to give binding effect to information registered only by name without some means of generating a cross-reference to the exact parcels of land affected.

⁴² For example, see Sections 2.2 to 2.6 of the New Brunswick Creditors' Relief Act, reproduced at: <http://www.gnb.ca/justice>.

240. One linked issue which ideally should be addressed in the reform process is the question of taking a movables charge in assets that sit at the borderline between land and movables: notably, movables affixed to a building or structure without losing their identity, and growing crops intended for harvest. Ideally, debtors should be entitled to enjoy the flexibility of movables secured transaction law to grant an effective security in this form of collateral. Yet the law must also avoid prejudice to the underlying land interests. This is usually accomplished through a system of dual registration, in which notice of the movables charge on the fixtures or crops must be cross-indexed in the land registry to take effect as against those dealing with the land.⁴³

J. Charge Transactions Subject to Specialist Movable Registries

241. Similar considerations create difficulties in co-ordinating or integrating registrations as between a general movables registry and the kind of asset-specific title registries that a number of jurisdictions have established for particularly high-value movables such as boats, aircraft, intellectual property, and in some cases even motor vehicles. For specific tangible assets, these difficulties are surmountable if the general movables registry is designed to permit supplementary registration and searching by reference to a unique identifier for the relevant asset, assuming that the same numerical or other identifier constitutes the registration-search criterion in both systems.

242. Whatever approach is taken, a comprehensive secured transactions regime must expressly stipulate the extent to which registration in an asset specific title registry pre-empts registration in the general movables registry, and the two priority regimes must be coordinated. For example, the law could make registration in the specialist title registry a precondition to the effectiveness of a charge against buyers and competing secured creditors who register against the specific title, but provide that registration in the general movables registry is sufficient to protect the charge against unsecured creditors or the debtor's insolvency administrator.

243. The scope of national movables registries will be limited in countries that ratify the *Convention on International Interests in Mobile Equipment*, 2001 and associated *Protocol on Matters Specific to Aircraft Equipment*.⁴⁴ They provide a body of international substantive law, including a priority regime based on a central international registry system, regulating four types of commercial financing transactions involving large aircraft airframes and large aircraft engines:⁴⁵ transfers of ownership,⁴⁶ security agreements, and leases and title retention sales agreements. The Convention applies as well to assignments of these types of transactions and their associated rights. In countries that ratify the Convention, the national charge registration

⁴³ For example, see sections 36 and 38 of the *The Saskatchewan Personal Property Security Act*, 1993. This legislation is reproduced at: www.qp.gov.sk.ca.

⁴⁴ See, generally, www.unidroit.org.

⁴⁵ The Convention has been designed to accommodate protocols relating to other types of equipment. Article 2(3) of the Convention lists 3 categories of equipment to which it will apply: aircraft objects (airframes, aircraft engines and helicopters), railway rolling stock and space assets. Resolution No.3 of the Final Act of the Diplomatic Conference provides for early completion of protocols dealing with railway rolling stock and space assets and expedited procedures leading up to diplomatic conferences at which they would be adopted. Article 51 provides for the development of additional protocols dealing with other types of high-value mobile equipment.

⁴⁶ The Convention itself does not address transfer of ownership of aircraft objects. However, the effect of Article III of the Aircraft Protocol and Article 41 of the Convention is to bring within the priority and registration provisions of the Convention sales of aircraft and aircraft engines. While this feature will not provide a title registration system for these items, it will have this effect with respect to aircraft and engines purchased from manufacturers after the Convention and Protocol come into effect. A potential buyer will be able to search the "chain of ownership" from the manufacturer to the seller. A person who buys on the strength of this information will take free from an intervening transfer of ownership that has not been registered.

and priority law will be largely pre-empted to the extent of these types of transactions and collateral.

244. As of the date of publication of this Guide, the *Convention on International Interests in Mobile Equipment*, 2001 and associated *Protocol on Matters Specific to Aircraft Equipment* have not yet come into effect. The international registry for interests in airframes and aircraft engines has yet to be established. Available information indicates that the instruments will come into effect in 2003.

245. The international registry will be a single central registry for interests created under transactions by debtors, lessees, and buyers located in states that ratify the Convention and Protocol. It will be a completely electronic registry with registration and searches based principally on the manufacturers' serial number of airframes and engines.

246. Priority among international interests (i.e., the interests of secured creditors, lessors and title retention sellers) will be based on a simple first-to-register rule. Unregistered interests will be subordinated to registered interests or to the interests of buyers. Special provision is made for the recognition of national nonconsensual liens and charges that affect aircraft.

247. The registration and priority rules of the Convention and Protocol will apply even though all aspects of a transaction are situated within a single country. The factor that invokes the system is the location of the debtor in a contracting state. Secured creditors, lessors and title retention sellers need not be located in or carry on business in a contracting state in order to have the benefits of the international system created by the Convention and Protocol. They will be able to have all of the advantages of the registry and enforcement system provided in the instruments.

248. The principal benefits of the Convention and Protocol will accrue to national governments that operate airlines and private aircraft operators who must obtain international financing for the acquisition of aircraft. It is expected that the Convention and Protocol will bring to international aircraft financing many of the benefits that an electronic movable registry of the kind described in this Guide provides for domestic financing transactions. The reduction in legal risk that the registration system and priority rules of the Convention and Protocol will provide will be as strong an inducement for countries to become contracting states. Reduced risk will be reflected in greater ability to get aircraft financing and in lower credit costs.

VIII. TERRITORIAL SCOPE OF A MOVABLES REGISTRY

A. Introduction

249. In an increasingly international business and financial world, it is common for a secured transaction to involve assets or parties located in different jurisdictions. This gives rise to the need to determine the law governing various aspects of these transactions, including the law governing registration of charges created by them. This need also arises in another context. In some federal states, secured transactions are governed by the law of a subdivision of the state with the result that there may be as many separate legal regimes dealing with registration of charges as there are such subdivisions. Most modern secured transactions regimes provide express guidance (choice of law rules) on the law applicable to the significant legal issues

involved in a secured transaction.⁴⁷ This includes guidance as to the law governing registration and any alternative publicity requirement (such as possession of the collateral), and the priority effect of registration or failure to register.

250. The choice of law rule for registration also functions to determine the territorial scope of the registry of the enacting jurisdiction with the result that registration in a single jurisdiction may be accepted as sufficient in other jurisdictions. Provided all jurisdictions agree on a common approach, secured creditors are thereby relieved from the burden of making multiple registrations with respect to transactions that are connected to more than one jurisdiction.

251. Although complete consensus has not yet been achieved, agreement on the general approach appears to be growing rapidly. The details of this approach are discussed below.

B. The Contexts within which Choice of Registration Law Issues Arise

252. Choice of law issues arise most frequently in two different contexts. One of these is international and other is national. In an international context, the issue is the extent to which registration of charges of one state will be recognized and applied in another state. In a national context the issue will arise principally where a country has a federal constitution which gives to political subdivisions, (provinces or other forms of subnationals) legal jurisdiction over laws relating to secured transactions and other agreements that fall within the scope of a movables registry. Somewhat similar issues can arise where the law of a country provides for regional registries for charges on movables and mandates registration in a specified regional registries determined by the location of the collateral or the location of the debtor.

253. The need to have a system for determine the appropriate law arises in situations similar to the following. Assume that a court of State A is asked to deal with a priority dispute between the holder of a charge on a truck created under the law of State B that is in conflict with a charge on the truck created in State A after it was brought into State A. While issues of validity and enforcement arise, for the purpose of this Guide the focus is on registration requirements. The State B security interest was registered in a movables registry in State B but was not registered in the movables registry of State A. The law of State A governing registration should tell the courts of State A whether or not, and, if so, to what extent, it should recognize the effectiveness in State A of the registration in State B.

254. A similar problem could arise where a debtor who is resident in State A gives a charge on his receivables (accounts) to secured creditor 1 who also resides in State A. Some of the accounts are owed by account debtors in States B and C. The charge is registered in State A. Assume that the debtor thereafter gives a charge on the accounts to secured creditor 2 who resides in State B. This charge is registered in State B but not State A. Neither charge is registered in State C. The priority dispute between secured creditor 1 and secured creditor 2 arises in a court in State B. The law of State B should tell the court whether or not, and, if so, the extent to which the registration in State A must be treated by the courts of State B as giving priority to secured creditor 1 over secured creditor 2.

255. A similar issue can arise in a country which has political subdivisions in which their own law will govern registration. Then, such law should provide guidance as to whether, and, if so, to what extent, registration in one subdivision is sufficient to comply with the laws of another subdivision.

⁴⁷ See sections 26-33 of the *New Zealand Personal Property Securities Act*, Appendix B.

C. Tangible Collateral

256. There is widespread agreement that, as a general rule, the law of the location of the collateral should govern the registration requirements (as well as questions of validity and priority) relating to a charge in a tangible item of movable property.⁴⁸ Modern statutory regimes also provide guidance on the impact of a relocation of the collateral after the charge is created. As a general rule, the law of the original location governs so long as the collateral remains there, but the law of the new location governs the legal effects of dealings with respect to the collateral that take place after the re-location. A number of modern regimes further provide that a charge that was registered validly according to the law of the original location will be treated as continuously registered for priority purposes so long as the registration is "renewed" at the new location within a specified time limit.⁴⁹ This rule provides temporary protection to secured creditors from a possible loss of priority as a result of the debtor's unauthorised removal of the collateral to a new jurisdiction.

257. A special exception is often provided for cases where the parties understand from the outset that the collateral will be moved to a new jurisdiction.⁵⁰ Provided the collateral actually reaches the intended destination within a specified time period after the charge is created, the charge may be constituted and registered in accordance with the law of the destination country. This rule is designed to relieve secured creditors, particularly in the context of cross-border credit sales transactions, from the burden of registering in both jurisdictions. The reliability of the first registry is not impaired since there is minimal risk that third parties will acquire an interest in the collateral before it crosses the border to its permanent destination.

D. Intangible Collateral

258. There is growing acceptance of the rule that, as a starting presumption, the law of the location of the debtor should govern the validity, registration and priority status of a charge in intangible property.⁵¹ This approach is seen as particularly appropriate in the context of accounts receivable financing since it leads to a common registration and priority regime for a charge covering the global receivables owed to a debtor business.⁵²

259. The law of the location of the debtor is also seen as the most appropriate choice of law approach for charges in so-called "mobile goods", such as road vehicles and railway rolling stock that are normally used in more than one jurisdiction.⁵³ The reference to a single governing law dramatically reduces the registration and searching burden for goods of this kind.

260. Different approaches are taken to the issue of the law applicable to money and negotiable documentary intangibles such as checks and bills of lading. In some jurisdictions, the law of the location of the relevant document governs. Others distinguish between possessory and nonpossessory charges, with the former governed by the law of the *situs* (location) of the

⁴⁸ See sections 26-27 of the New Zealand Personal Property Securities Act 26-27 in Appendix B.

⁴⁹ For example, see section 5 of *The Saskatchewan Personal Property Security Act*, 1993, c. P-6.1. This legislation is reproduced at: www.qp.gov.sk.ca.

⁵⁰ For example, see section 6 of *The Saskatchewan Personal Property Security Act*, 1993, c. P-6.1. This legislation is reproduced at: www.qp.gov.sk.ca.

⁵¹ For example, see section 30 of the *New Zealand Personal Property Securities Act* in Appendix B and *The Saskatchewan Personal Property Security Act*, 1993, c. P-6.1, s. 7.

⁵² This is the rule codified in the *United Nations Convention on the Assignment of Receivables in International Trade*. See, www.uncitral.org.

⁵³ For example, see section 7 of *The Saskatchewan Personal Property Security Act*, 1993, c. P-6.1. This legislation is reproduced at: www.qp.gov.sk.ca.

document, and the latter by the law of the location of the debtor. The difference between the two approaches is minimal since there is general agreement that the law of the *situs* should control in a priority contest between a possessory interest and a nonpossessory charge.

261. The place where the debtor is located is defined in various ways for business entities that have operations in more than one country. Most regimes use a *de facto* centre of business test: the debtor is deemed to be located at its chief executive office; that is, at its place of central administration.⁵⁴ However, some legal systems use a *de jure* test: the debtor is deemed located at the address of its statutory head office. Article 5(h) of the *United Nations Convention on the Assignment of Receivables in International Trade* has endorsed the former approach, on the theory that it better avoids a manipulation of the governing law to the potential prejudice of the debtor's creditors and insolvency administrator.

E. Federal and Regional Registries

262. In federal states in which jurisdiction over the law governing movables registries is held by the provinces, states or other territorial units, the choice of law approaches summarised above also apply to resolve choice of law issues as between them. However, there is nothing to prevent the various jurisdictions in a federal state from agreeing to have a common registry. This could be constructed with a single nation-wide database, thereby eliminating internal conflict of laws problems. However, this may be politically sensitive. A feasible alternative, for which there is Canadian precedent, would be to preserve separate registry databases for each territorial unit within the country, but construct a common operating system and a common gateway into that system. In Canada, a single private operator is under contract to maintain the registry databases for the governments of the four Atlantic provinces and two federal territories and offers on-line access to all six registry databases through a central on-line portal.⁵⁵ A similar approach would also be feasible at a regional level, at least among countries able to agree on the basic design and operating features of the registry system, including required registration data. Differences in language are not by themselves obstacles to this solution provided there are clear legal rules on the language to be used for registration.

IX. CONCLUSION

263. Legislators in many jurisdictions in the world recognize that secured transactions law is essential to the development of their economies. These laws provide a mechanism through which secured creditors can reduce the risk associated with granting loans or credit to businesses and consumers by taking charges on assets of their debtors. It is not commercially realistic or practically possible in most situations for secured creditors to take possession of the assets offered by debtors as security. Consequently, modern systems universally provide for nonpossessory charges on these assets. However, in order to protect third persons from deception by the debtors in possession of assets subject to such charges, these systems of law require credit grantors to register notices of their charges in public movables registries.

⁵⁴ For example, see section 33 of the New Zealand *Personal Property Securities Act* in Appendix B.; *The Saskatchewan Personal Property Security Act*, 1993, c. P-6.1, s. 7. This legislation is reproduced at: www.qp.gov.sk.ca.

⁵⁵ For further information, see: www.acol.ca.

264. Movables registries for charges on movables have existed in some jurisdictions for many years. However, important innovations in the design and operation of registries have been implemented during the last 30 years, with the result that a modern movables registry can be very efficient and cost effective for its users. The most important development in this respect has been the use of computerization and electronic communications in registry operations.

265. The most efficient and cost effective registries are almost completely electronic. Registrations, amendments to and discharges of registrations and searches of the registry are carried out through electronic communication, using the Internet, between remote computer terminals operated by secured creditors or private service providers and the registry database. Time delays are so small as to be insignificant. There is very little human intervention in the process with the result that the scope for human error in dealing with registration data is very small or nonexistent. Since these systems are very reliable, the issue of loss by users as a result of malfunctions in the system is of minor significance.

266. However, it may not be feasible to attempt to implement a totally electronic system of this kind in every jurisdiction that requires a movables registry. Conditions prevailing in a jurisdiction may dictate a design that is less reliant on computer technology and electronic communications. Such a system can effectively address the need for public disclosure of charges on movables, and in so doing, stimulate the lending activity that supports economic growth. Indeed, some of the jurisdictions, such as the provinces of Canada that now have electronic systems, successfully employed manual, paper based systems for most of the last century. Manual paper based systems that provide for registration through the delivery to a registry of registration notices containing essential features of charge agreements or potential charge agreements can work well so long as volumes of registration are low. This is likely to be the case for a few years after a movables registry system is first adopted in a country. Furthermore, as noted earlier in this Guide, experience in Canadian provinces demonstrates that the transition from a paper-based system (even one that provide for the registration of copies of charge agreements) to an electronic system can be accomplished with little disruption or difficulty.

267. The design of a movables registry involves consideration of a wide range of legal and logistical issues. The way in which these issues are addressed will be affected by conditions existing in the jurisdiction in which the registry is to operate. However, modern movables registries have some universal design features.

268. As noted above, the use of computer technology is likely to be an important consideration where the volume of registrations rises to levels found in a developed economy. A modern movables registry should provide for notice registration. Generally, registration notices contain very basic information concerning the relationship or potential relationship between the secured creditor and debtor. Notice registration can be effectively used in both a paper-based, manual system and an electronic system.

269. A modern system should employ a clearly defined registration-search criterion. This is the factor that is used to index and retrieve registration data. The debtor's name or its equivalent is generally employed for this purpose. The effectiveness of a system can be enhanced if collateral identifiers, such as serial numbers, are used as a registration-search criterion in cases where high value movables, such as motor vehicles or other equipment, are taken as collateral.

270. Many modern systems employ approaches that, while not essential to the proper functioning of a registry system, provide enhanced flexibility for secured creditors. These include the ability to effect a registration before an agreement exists between the secured creditor and

the chargor. They recognize that a single registration can relate to more than one charge or charge agreement and to any amount of credit granted by the secured party to the debtor after the registration has been effected. The potential for abuse of these facilities is addressed through special features which permit a debtor to force the secured party to change a registration to accurately reflect the terms of their of the charge agreement between them.

271. Since both legal and commercial rights are affected by the operation of a movables registry, the issue of liability of the registry (i.e., that of the governmental or private agencies operating it) should be addressed. The approach that is adopted will be conditioned by the design of the registry. Experience has demonstrated that systems can be designed with safeguards that reduce the potential for errors or omissions in the operation of the system to a negligible level. The central feature of this design is minimization or elimination of human involvement in the handling of registry data (a completely electronic, open-access registry). When the potential for loss to users of the system is very low, it is possible to offer very generous compensation for the very few users who are affected by a malfunction of the system.

272. It must be recognized, however, that, particularly in a country that has little or no experience with movables registries and that decides to begin with manual paper-based system, state guarantees against errors or omissions in the operation of the registry may be unrealistic. In this context, users of the system must be prepared to provide self-insurance through due diligence measures.

273. While the optimal approach is to have a single movables registry for all charges on movable property, this may be unrealistic in most jurisdictions. It may be inappropriate to require that charges on property such as motor vehicles or intellectual property rights be registered in a movables registry when title registries (or their equivalent) for interests in this property exist. In such cases, coordination of registration requirements will be important.

274. The constitutional design or geography of some states may necessitate provincial or regional movables registries. Experience has demonstrated that regional registry systems can be efficient if no doubt exists as to where a charge must be registered and, in case where this is practicable given the nature of the collateral, registration in one registry is recognized as effective in all other registries.

275. Modern, efficient movables registry systems operating as part of modern secured transactions regimes will play an increasingly important role in the growth of national and international economic activity. Before the end of 2003, the International Civil Aviation Organization will establish the first international registry for charges, title retention agreements and equipment leases involving aircraft pursuant to *The Convention on International Interests in Mobile Equipment*, 2001 and associated *Protocol on Matters Specific to Aircraft Equipment*. This registry will embody most of the features of a modern, electronic movables registry described in this Guide. The design of this registry can provide a pattern for future national and international movable registries.

APPENDIX A

DEFINITIONS OF TECHNICAL TERMS

1. The following paragraph offers an explanation of terms used to describe the basic features of a secured financing system that relate to registration. These terms do not all come from any single legal system. They have been selected principally for their descriptive value. Their role is to describe generic concepts and structures.

Account (Receivable)

2. The terms “account” and “receivable” refer to a debt obligation (usually of short duration) owed by one person (account debtor) to another person. Most systems of law recognize that a debt can be transferred or be collateral under a secured financing arrangement. Consequently, it is very common for businesses that generate accounts by granting short term credit to their customers to sell their accounts to financing organizations (factors) that purchase accounts or to grant charges on their accounts to secure loans from banks or other financing organizations.

Charge

3. The generic term “charge” is used in this Guide to refer to any encumbrance against a debtor’s movable property granted by the debtor in order to secure an obligation (ordinarily a debt) owed by him or her. An interest in the same property acquired from the debtor by a third person would presumptively be subject, under applicable property law, to a pre-existing “charge”. In other words, the third person could not ordinarily acquire that part of the debtor’s property that is affected by an existing “charge” free of the claim of the charge holder.

4. As explained later in the Guide, movables registries are also used in some jurisdictions to provide public disclosure of the ownership interests of lessors, sellers and consignors of movable property who retain title to the property after its delivery to lessees, buyers and consignors, as well as of nonconsensual liens such as tax and judgment enforcement liens. In a regime that elects to adopt this broad approach, the term ‘charge’ in this Guide should be read to include these types of title-based security rights or interests in movable property.

Collateral

5. As used in this Guide, the term “collateral” refers to the movable property on which a charge is created as security for an extension of sale or loan credit or any other obligation (ordinarily, a monetary obligation). In essence, the purpose of the charge is to give to the secured creditor an alternative source of repayment of the loan or credit granted in the event of default by the debtor (the recipient of the loan or grant of credit). The secured creditor is entitled to have specified property of the debtor (the collateral) seized and sold, thereby generating funds to satisfy the outstanding debt or obligation.

Consignment

6. A “consignment” is an arrangement under which a person (consignor) who owns property gives possession of that property to another person (consignee) and authorizes that person to sell it. Ownership of the property does not transfer to the consignee. It remains with the consignor until the property is sold. It then transfers to the buyer from the consignee.

Generally, the consignee is an agent of the consignor and must account to the consignor for the proceeds of the sale.

Debtor

7. This Guide uses the term “debtor” to denote both the person who owes the obligation (or debt) secured by a charge and the person who owns the collateral and grants the charge to secure the obligation. As a practical matter, the person who owes the obligation that is secured is usually the person who grants the charge. However, the person who owes the obligation and the grantor of the charge are not necessarily the same person in all cases. Most legal systems recognize and support the common commercial practice of permitting a debt owed by one person to be secured by a charge granted by another person in his or her property. This operates as a form of guarantee given by the owner of the property charged to the secured creditor (that is, the holder of the charge). The charge secures satisfaction of the debt owed, even though that debt is owed by a person other than the person who has given the charge. Under this arrangement, the owner of the collateral is differentiated from the debtor who received the loan or grant of credit. For example, it is common for the owners of a company that has few assets to be required to grant security in their individual personal assets to supplement security granted by the company to secure a loan. The company as borrower is a distinct legal entity from the owners of the company who grant charges on their personally owned property. However, either or both the company and the owners of the company in such an instance may be referred to as a “debtor” for purposes of the secured transactions law, and its supporting registry.

Financing Lease

8. The term “financing lease” is used in this Guide to refer to a transaction in the form of a lease of movable property that functions as a secured financing arrangement. Generally, the effect of a financing lease is that the lessee pays the equivalent of the purchase price of the leased property (plus a credit charge) and acquires most of the rights of ownership. Financial leases come in many forms. The following factors indicate a financing lease:

- the period of the lease is substantially equal to or greater than the period during which the property is suitable for the purposes for which it was designed and the period cannot be terminated at the election of the lessee;
- upon the expiry of the one or more initial periods, the lessee is bound to renew the lease for the balance of the period during which the property is suitable for the purposes for which it was designed or is obligated to purchase the property;
- at the expiry of one or more initial periods, the lessee has the option to renew the lease for the balance of the period during which the property is suitable for the purposes for which it was designed for no additional value or for a value that is significantly below the market lease rate for the property at the time the option is exercised, unless the market lease rate is greater than the amount payable by the lessee under the option because of changes in the market for the property that could not reasonably have been contemplated by the parties at the time of execution of the lease;

- at the expiry of one or more initial periods, the lessee has the option to become the owner of the property for no additional consideration or for a consideration that is significantly below the fair market value for the property at the time the option is exercised, unless the fair market value is greater than the amount payable by the lessee under the option because of changes in the market for the property that could not reasonably have been contemplated by the parties at the time of execution of the lease;
- prior to execution of the lease, the property was owned and used by the lessee and thereafter sold to the lessor;
- at the expiry of one or more initial periods the leased property is to be sold and the lessee, whether or not entitled to be paid a surplus, is obligated to pay to the lessor a deficiency, when the deficiency or surplus is calculated by comparing the amount recovered from the sale and an amount specified in the contract.

Immovable Property

9. The term “Immovable property” is used in this Guide to refer to land. The term also includes structures and items attached to land.

Title Retention Sales Contract

10. As used in this Guide, the term “title retention sales contract” refers to a sale of tangible movables (goods) under which the buyer obtains possession of the goods but seller retains ownership until the buyer discharges all his or her obligations under the contract (payment of purchase price and any credit charges). The function of a title retention sales contract is to facilitate the sale of goods but at the same time provide to the seller security (in the form of retained ownership) for the obligations of the buyer under the contract.

Lease

11. For the purposes of this Guide, the term “lease” is a contract under which one person (lessor) grants a temporary right to possession of his or her movable property to another person (lessee). At the end of the term of the lease, the property must be returned to the lessor. A lease should be distinguished from a “financing lease” defined above.

Lien

12. The term “lien” is used in this Guide to refer to three types of interests. One of these is an encumbrance against property of a debtor that arises by operation of law. For example, in many countries, when a person fails to pay taxes owing to the state, the law provides that that person’s property is encumbered with a lien to secure payment of the taxes. The state has the power under the lien to seize and sell sufficient property to discharge the tax obligation. In some cases, the lien gives to the state priority over any prior or subsequent charge or interest in the defaulting taxpayer’s property.

13. A second type of lien is one that affects specific property and arises by operation of law in favor of a repairer, storer or transporter of the property.

14. The term is also used in the Guide to refer to an interest that creditors obtain under some legal systems once they obtain court judgments ordering an debtor to pay an amount of money. A judgment lien may give priority to the creditor over subsequent interests in the debtor's property.

Movable Property

15. The term “movable property” or “movables” is used in this Guide to refer to property traditionally classified in common law legal systems as “personal property”. The term movables as used here is best explained as encompassing all property rights recognized by a legal system other than rights in immovable property in the narrow sense of land and any buildings or other structures meant to be permanently affixed to that land. It is presumed to include:

- tangible “goods” (corporeal movables): for example, cars, furniture, cash currency;
- documents representing valuable rights: for example, checks, documents of title such as bills of lading, investment security certificates;
- pure intangible (incorporeal) rights: for example, intellectual property such as copyrights or patents of invention, the accounts receivable owed to a business by its customers, or, indeed, any other “claim” held by a person against somebody else; for example, a right to take legal action against a person.

16. Some assets sit at the juncture of movable and immovable property. The most commonly encountered examples are:

- fixtures or accessions to land; that is, tangible movables that are affixed to land in such a manner that they are considered by the particular legal system to have been transformed from movable to immovable property. In effect, they are viewed as part of the land. Typical examples are a heating system for a building, or heavy machinery in a purpose-built industrial plant;
- growing crops that are intended ultimately to be harvested and thereby transformed from immovables (as part of the land upon which they are growing) into movables;
- rights to payment that are connected to an interest in land; for example, the stream of rental payments due under a lease of land.

17. In this Guide, it is assumed that the term movable includes these kinds of borderline assets in the sense that a charge taken in them would be registerable in the movables registry. However, it is common for modern secured transactions regimes to require registration of charges on this type of property in both a movables charges registry and a land registry to ensure that the rights of the charge-holders do not prejudice those who rely on a search of the land registry to disclose interests in property that is considered part of the land.

Pledge

18. The term “pledge” as used in both common law and civil law systems traditionally referred to an arrangement under which a debtor transferred possession of movable property to a creditor to be held as security for performance of an obligation of the debtor. If the debtor

defaulted, the creditor was entitled to sell the property and apply the proceeds toward discharge of the obligation.

19. The term “nonpossessory pledge” or “pledge without disposition” is used in some systems (almost exclusively civil law systems) to refer to a form of security agreement under which the debtor retains possession of his or her property but grants to the creditor the power to seize the property (either with or without court order) and sell it in the event of nonperformance by the debtor.

20. References to this Guide to a possessory charge can be read as a reference to a possessory pledge.

Secured Creditor

21. In this Guide the term “secured creditor” is used to describe two types of creditors: (i) those, such as banks and government lending agencies, that grant loans to debtors and that secure repayment of those loans with charges on their debtors’ property; and (ii) those that extend credit in the form of deferred payment of the price of movable property being purchased by debtors. In the latter case, the extension of credit is secured by the secured creditor retaining title to the property purchased or by taking a charge in that property (and, perhaps, other property) from the debtor. In some circumstances, the term can be used to refer to lessors and consignors of movable property.

Secured Credit

22. The term “secured credit” is used to refer to any transaction, whether in the form of a loan or a contract providing for deferred payment, that creates a charge on the property of the debtor or involves retention of ownership by a seller under a title retention sales contract, a consignor under a consignment agreement or a lessor under a financing lease.

APPENDIX B

EXCERPTS FROM THE NEW ZEALAND PERSONAL PROPERTY SECURITIES ACT, 1999

as amended

(Headings are not part of the Act but have been included to facilitate readers. The references to Canadian Acts are found in the published version of the Act)

Types of Transactions Governed By The Act

17. Meaning of "security interest"—

(1) In this Act, unless the context otherwise requires, the term "security interest"—

(a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—

- (i) The form of the transaction; and
- (ii) The identity of the person who has title to the collateral; and

(b) Includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).

(2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.

(3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

Choice of Law Provisions – Where to Register

26. When New Zealand law applies—

(1) Except as otherwise provided in this Act, the validity, perfection, and the effect of perfection or nonperfection of a security interest in goods or a possessory security interest in chattel paper, an investment security, money, a negotiable document of title, or a negotiable instrument, is governed by the law of New Zealand if,—

(a) At the time the security interest attaches to the collateral, the collateral is situated in New Zealand; or

(b) At the time the security interest attaches to the collateral, the collateral is situated outside New Zealand but the secured party has knowledge that it is intended to move the collateral to New Zealand; or

(c) The security agreement provides that New Zealand law is the law governing the transaction; or

(d) In any other case, New Zealand law applies.

(2) For the purposes of subsection (1), an investment security that is not in the form of a security certificate is situated where the records of the clearing house or securities depository are kept.

Cf. Personal Property Security Act 1993, s. 5 (1), (2) (Saskatchewan)

27. Continuity of perfection where goods are moved to New Zealand—

(1) A security interest in goods that is perfected under the law of the jurisdiction in which the goods are situated when the security interest attached and before the goods are brought into New Zealand continues to be perfected in New Zealand if it is perfected in New Zealand by the earliest of the following:

(a) Not later than 60 days after the day on which the goods are brought into New Zealand; or

(b) Not later than 15 days after the day on which the secured party has knowledge that the goods have been brought into New Zealand; or

(c) Before perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached.

(2) A security interest that is not perfected as provided in subsection (1) may be otherwise perfected in New Zealand under this Act.

Cf. Personal Property Security Act 1993, s. 5 (3), (4) (Saskatchewan)

28. Temporary perfection of security interest in collateral moved to New Zealand in other cases—

(1) A security interest in collateral that is moved to New Zealand is temporarily perfected by registration until the expiration of 30 working days after the day on which the collateral was moved to New Zealand, if the security interest was not perfected under the law of the jurisdiction in which the collateral was situated when the security interest attached.

(2) If a security interest referred to in section 26 is not perfected under the law of the jurisdiction in which the collateral was situated when the security interest attached and before the collateral was brought into New Zealand, it may be perfected under this Act.

Cf. Personal Property Security Act 1993, s. 5 (5) (Saskatchewan)

29. Location of debtor for purposes of sections 30 to 33—

For the purposes of sections 30 to 33—

(a) A debtor that is a body corporate is located in the country of incorporation; and

(b) A debtor that is not a body corporate is located at---

- (i) The debtor's place of business; or
- (ii) The debtor's principal place of business (if the debtor has more than 1 place of business); or
- (iii) The debtor's principal residence (if the debtor has no place of business).

30. Validity, perfection, etc, of security interests in intangibles, movable equipment, etc.—

The validity, perfection, and effect of perfection or non-perfection of a security interest is governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located when the security interest attaches, if the security interest is—

(a) A security interest in an intangible:

(b) A security interest in goods that are of a kind that are normally used in more than 1 jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others:

(c) A nonpossessory security interest in chattel paper, an investment security, a negotiable document of title, money, or a negotiable instrument.

Cf. Personal Property Security Act 1993, s. 7 (2) (Saskatchewan)

31. Position where debtor relocates to another jurisdiction, etc—

If a debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a security interest perfected in accordance with the law applicable, as provided in section 30, continues to be perfected in New Zealand if it is perfected in the other jurisdiction by the earliest of the following:

(a) Not later than 60 days after the day on which the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction; or

(b) Not later than 15 days after the day on which the secured party has knowledge that the debtor has relocated or transferred an interest in the collateral to a person located in the other jurisdiction; or

(c) Prior to the day on which perfection ceases under the law of the first jurisdiction.

Cf. Personal Property Security Act 1993, s. 7 (3) (Saskatchewan)

32. Position where no public record, etc, of perfection of security interest—

(1) If the law governing the perfection of a security interest referred to in section 30 or section 31 does not provide for public registration or recording of the security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to---

(a) An interest in an account receivable that is payable in New Zealand; or

(b) An interest in goods, an investment security, a negotiable instrument, a negotiable document of title, money, or chattel paper, acquired when the collateral was situated in New Zealand.

(2) Subsection (1) does not apply if the security interest is perfected under this Act before the interest referred to in paragraph (a) of that subsection or paragraph (b) of that subsection arises.

(3) A security interest to which subsection (1) applies may be perfected under this Act.

Cf. Personal Property Security Act 1993, s. 7 (4), (5) (Saskatchewan)

33. Validity, perfection, etc, of security interest in minerals—

(1) Despite section 30, the validity, perfection, and the effect of perfection or nonperfection of a security interest in minerals, or in an account receivable resulting from the sale of the minerals at the minehead, is governed by the law of the jurisdiction in which the minehead is located if the security interest---

(a) Is provided for in a security agreement signed, or assented to by letter, telegram, cable, telex message, facsimile, electronic mail, or other similar means of communication, before the minerals are extracted; and

(b) Attaches to the minerals on extraction or attaches to an account receivable on the sale of the minerals.

(2) For the purposes of subsection (1),—

"Minehead" includes a wellhead:

"Minerals" include petroleum and gas.

Cf. Personal Property Security Act 1993, s. 7 (6), (7) (Saskatchewan)

Protection of Buyers or Lessees of Goods

53. Buyer or lessee of goods sold or leased in ordinary course of business takes goods free of certain security interests—

(1) A buyer of goods sold in the ordinary course of business of the seller, and a lessee of goods leased in the ordinary course of business of the lessor, takes the goods

free of a security interest that is given by the seller or lessor or that arises under section 45, unless the buyer or lessee knows that the sale or the lease constitutes a breach of the security agreement under which the security interest was created.

(2) This section prevails over section 3 of the Mercantile Law Act 1908 and section 27 of the Sale of Goods Act 1908 where this section applies and either or both of those sections apply.

Cf. Personal Property Security Act 1993, s. 30 (2) (Saskatchewan)

54. Buyer or lessee of consumer goods of certain value takes goods free of security interest—

(1) A buyer or lessee of goods that are acquired as consumer goods takes the consumer goods free of any security interest, if—

(a) The value of the consumer goods did not exceed \$2,000 at the time the security interest in the goods attached, or, if there is more than 1 security interest in those goods, at the time the security interest with priority over all other security interests attached; and

(b) The buyer or lessee—

- (i) Gave new value for the interest acquired; and
- (ii) Bought or leased the goods without knowledge of the security interest.

(2) The Governor-General may, from time to time, by Order in Council, alter the amount specified in subsection (1).

Cf. Personal Property Security Act 1993, s. 30 (3), (4) (Saskatchewan).

58. Buyer or lessee of motor vehicle sold by dealer takes motor vehicle free of security interests—

A buyer or lessee of a motor vehicle who acquires the motor vehicle for value takes the motor vehicle free of any security interest in the motor vehicle if—

(a) The buyer or lessee is a consumer who acquires the motor vehicle from a dealer; and

(b) The security interest was not created or provided for in a transaction to which the buyer or lessee is a party; and

(c) The security interest was not disclosed to the buyer or lessee in writing.

Protection of Persons to Whom Money, Negotiable Instruments or Negotiable Securities are Transferred

94. When holder of money takes money free of perfected security interest in money—

A holder of money takes the money free of a perfected security interest if the holder—

- (a) Acquired the money without knowledge of the security interest; or
- (b) Is a holder for value, whether or not the holder knew of the security interest at the time the holder acquired the money.

Cf. Personal Property Security Act 1993, s. 31 (1) (Saskatchewan)

96. Priority of purchaser of negotiable instrument—

(1) The interest of a purchaser of a negotiable instrument has priority over a perfected security interest in the negotiable instrument if the purchaser—

- (a) Gave value for the negotiable instrument; and
- (b) Acquired the negotiable instrument without knowledge of the security interest; and
- (c) Took possession of the negotiable instrument.

(2) For the purposes of subsection (1), the purchaser of a negotiable instrument who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction is a breach of the security agreement to which the security interest relates.

Cf. Personal Property Security Act 1993, s. 31 (4), (6)

97. Priority of purchaser of investment security—

(1) The interest of a purchaser of an investment security has priority over a perfected security interest in the investment security if the purchaser—

- (a) Gave value for the investment security; and
- (b) Acquired the investment security without knowledge of the security interest; and
- (c) Took possession of the investment security.

(2) For the purposes of subsection (1), the purchaser of an investment security who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction is a breach of the security agreement to which the security interest relates.

Cf. Personal Property Security Act 1989, s. 31 (4), (6) (Saskatchewan)

Essential Characteristics of the Personal Property Registry

139. Personal property securities register—

- (1) The Registrar must ensure that a register of personal property security interests known as the personal property securities register is kept in New Zealand.
- (2) The register is to be—
 - (a) An electronic register; and
 - (b) Maintained for the purposes of registrations under this Act; and
 - (c) Operated at all times, unless—
 - (i) The Registrar suspends the operation of the register, in whole or in part, in accordance with section 138; or
 - (ii) Otherwise provided in the regulations.

Cf. Personal Property Security Act 1993, s. 42 (1) (New Brunswick).

Identification of Debtors and Secured Parties in a Registration

140. Contents of register—

The register contains the following data:

- (a) The name and address of the debtor and, if the debtor is an individual, the debtor's date of birth, or, if the debtor is an organization, the name of the organization and the name and address of the person acting on its behalf;
- (b) If the debtor is an organization that is incorporated, the unique number assigned to it on its incorporation;
- (c) The name and address of the secured party or, if the secured party is an organization, the name of the organization and the name and address of the person acting on its behalf;
- (d) A description of the collateral, including its serial number if required or authorized by this Act or by the regulations;
- (e) The date of prior registration, if prior registration law (as defined in section 193) applies in respect of the security interest;
- (f) Any other data specified in the regulations.

Who May Register

141. Person may register financing statement—

A person may register a financing statement in accordance with this Act and the regulations.

Cf. Personal Property Security Act 1993, s. 43 (1) (New Brunswick).

Data to be Included in a Financing Statement

142. Data required to register financing statement—

The following data must be contained in the financing statement in order to register it:

- (a) The name and address of the debtor or, if the debtor is an organization, the name of the organization and the name and address of the person acting on its behalf;
- (b) The debtor's date of birth (if the debtor is an individual);
- (c) If the debtor is an organization that is incorporated, the unique number assigned to it on its incorporation;
- (d) The name and address of the secured party or, if the secured party is an organization, the name of the organization and the name and address of the person acting on its behalf;
- (e) A description of the collateral, including its serial number if required or authorized by this Act or by the regulations;
- (f) The date of prior registration, if prior registration law (as defined in section 193) applies in respect of the security interest;
- (g) Any other data required by this Act or the regulations to be contained in the financing statement.

Requirements for Registration

143. When financing statement or financing change statement not to be registered—

A financing statement or financing change statement must not be registered if—

- (a) It is not submitted in the prescribed manner or in a form that enables the data to be entered directly by electronic means;
- (b) The prescribed fee has not been paid to the Registrar, unless arrangements for its payment have been made in accordance with the regulations.

Cf. Personal Property Security Act 1993, s. 43 (3) (Saskatchewan).

144. When financing statement or financing change statement registered—

A financing statement or financing change statement is registered at the time that a registration number, date, and time is assigned to it in the register.

145. Verification statement to be forwarded to person who registered financing statement, etc—

A verification statement must, as soon as reasonably practicable after a financing statement or financing change statement has been registered, be given to the person who registered the financing statement or financing change statement.

Pre-Agreement Registration Permitted

146. When financing statement may be registered—

A financing statement may be registered before or after—

- (a) A security agreement is made; or
- (b) A security interest has attached.

One Registration may Relate to More than One Agreement

147. Financing statement may relate to 1 or more security agreements—

A financing statement may relate to 1 or more security agreements.

Cf. Personal Property Security Act 1993, s. 43 (6) (New Brunswick).

Debtor to be Notified of Registration

148. When secured party to notify debtor about registration of financing statement—

The secured party who registered a financing statement or financing change statement must, not later than 15 working days after the day on which the verification statement was received, give to the debtor a copy of the verification statement in accordance with the regulations, unless that person has waived in writing the right to receive it.

When Registration is Invalid

149. Registration of financing statement invalid only if seriously misleading—

The validity of the registration of a financing statement is not affected by any defect, irregularity, omission, or error in the financing statement unless the defect, irregularity, omission, or error is seriously misleading.

Cf. Personal Property Security Act 1993, s. 43 (7) (New Brunswick).

150. When financing statement seriously misleading—

Without limiting the circumstances in which a registration is invalid, a registration is invalid if there is a seriously misleading defect, irregularity, omission, or error in—

(a) The name of any of the debtors required by section 142 to be included in the financing statement other than a debtor who does not own or have rights in the collateral; or

(b) The serial number of the collateral if the collateral is consumer goods, or equipment, of a kind that is required by the regulations to be described by serial number in a financing statement.

Cf. Personal Property Security Act 1993, s. 43 (8) (New Brunswick).

151. Proof that person actually misled not necessary—

In order to establish that a defect, irregularity, omission, or error is seriously misleading, it is not necessary to prove that any person was actually misled by it.

Cf. Personal Property Security Act 1993, s. 43 (9) (New Brunswick).

152. Validity of registration when description of part of collateral is omitted—

Failure to include a description of any item or kind of collateral in a financing statement does not affect the validity of the registration in respect of the description of other collateral included in the financing statement.

Duration of a Registration

153. Duration of registration of financing statement—

(1) Except as otherwise provided in this Act or in the regulations, a registration of a financing statement under this Act is effective until whichever is the earlier of—

(a) The expiration of the term specified in the financing statement; or

(b) The expiration of 5 years commencing on the date on which and at the time at which the financing statement was registered.

(2) Subsection (1) does not apply if the registration of the financing statement is discharged or removed before the expiration of the relevant period referred to in that subsection.

Discharge of Registration

161. Discharge of registration relating only to consumer goods—

If a registration relates exclusively to a security interest in consumer goods, the secured party must discharge the registration within 15 working days after all obligations under the security agreement creating the security interest are performed, unless the registration lapses before the expiration of that period.

Cf. Personal Property Security Act 1993, s. 50 (2) (New Brunswick).

Compulsory Discharge of Registration

162. When debtor, etc, may demand registration of financing change statement—

The debtor or any person with an interest in property that falls within the collateral description included in a registered financing statement may give a written demand to the secured party if—

- (a) All of the obligations under the security agreement to which the financing statement relates have been performed;
- (b) The secured party has agreed to release part or all of the collateral described in the collateral description included in the financing statement;
- (c) The collateral described in the collateral description included in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor;
- (d) No security agreement exists between the parties;
- (e) The security interest is extinguished in accordance with this Act.

Cf. Personal Property Security Act 1993, s. 50 (3) (New Brunswick)

163. Matters that may be required by demand—

A demand under section 162 may require the secured party to register, within 15 working days after the demand is given, a financing change statement—

- (a) Discharging the registration in a case within paragraph (a) or paragraph (d) or paragraph (e) of section 162; or
- (b) Amending or discharging the registration so as to reflect the terms of the agreement in a case within paragraph (b) of section 162; or
- (c) Amending the collateral description to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor in a case within paragraph (c) of section 162.

Cf. Personal Property Security Act 1993, s. 50 (4) (New Brunswick).

164. Application of sections 165 to 167 in cases not involving security trust deeds—

Sections 165 to 167 do not apply to the registration of a security interest provided for in a security trust deed if the registration discloses that the security agreement providing for the security interest is a security trust deed.

Cf. Personal Property Security Act 1993, s. 50 (8) (New Brunswick)

165. Procedure where noncompliance with demand and no court order in cases not involving security trust deed—

(1) The person giving the demand under section 162 may enter in the register the financing change statement referred to in section 163 if the secured party—

(a) Fails to comply with the demand within 15 working days after it is given; or

(b) Fails, within 15 working days after the demand is given, to give to that person a court order maintaining the registration.

(2) The Registrar must ensure that the secured party is given a notice stating that the financing change statement will be registered unless a court order maintaining the registration is served on the Registrar within 15 working days of the notice being given to the secured party.

(3) The notice referred to in subsection (2) must be given to the secured party as soon as reasonably practicable after the financing change statement is entered in the register.

Cf. Personal Property Security Act 1993, s. 50 (5) (New Brunswick).

166. Consequences of nonreceipt, and receipt, of court order in cases not involving security trust deed—

(1) If a court order maintaining the registration is served on the Registrar within 15 working days of the notice referred to in section 165 (2) being given to the secured party, the financing change statement will not be registered and may be removed from the register by the Registrar.

(2) The financing change statement will be registered in accordance with section 144, if a court order maintaining the registration is not given to the Registrar within 15 working days of the notice referred to in section 165 (2) being given to the secured party.

167. Secured party may obtain court order in cases not involving security trust deed—

(1) At any time before the financing change statement referred to in section 163 is registered, the Court may, on application by the secured party, and if the Court is satisfied that 1 or more of the grounds for making a demand under section 162 exist, order that the registration—

(a) Be maintained on any condition, and subject to sections 153 and 154, for any period of time; or

(b) Be discharged or amended

(2) The Court may make any other orders it thinks proper for the purpose of giving effect to an order under subsection (1).

(3) The Registrar must amend or discharge a registration of a financing statement in accordance with a court order made under subsection (1) as soon as reasonably practicable after receiving the order.

Cf. Personal Property Security Act 1993, s. 50 (7) (New Brunswick).

168. Procedure where non-compliance with demand and security trust deed involved—

(1) The Court may, on application by the person making the demand under section 162, and if the Court is satisfied that 1 or more of the grounds for making a demand under that section exist, make an order directing that the registration be amended or discharged if—

(a) The registration of a security interest discloses that the security agreement providing for the security interest is a security trust deed; and

(b) The secured party fails to comply with the demand within 15 working days after it is given.

(2) The Court may make any other orders it thinks proper for the purpose of giving effect to an order under subsection (1).

(3) The Registrar must amend or discharge a registration of a financing statement in accordance with a court order made under subsection (1) as soon as reasonably practicable after receiving the order.

Cf. Personal Property Security Act 1993, s. 50 (8), (9) (New Brunswick).

169. No fee for compliance with demand—

A secured party may not charge any fees for compliance with a demand given under section 162, unless the parties otherwise agree.

Information to be Supplied by Secured Party

177. Secured party to provide certain information relating to security interest—

(1) The debtor, a judgment creditor, a person with a security interest in personal property of the debtor, or an authorized representative of any of them, may request the secured party to send or make available to any specified person, at an address specified by the person making the request, any of the following:

(a) A copy of a security agreement that creates or provides for a security interest held by the secured party in the personal property of the debtor;

(b) A statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness;

(c) A written approval or correction of an itemized list of personal property indicating which items are personal property, unless the security interest is over all of the personal property of the debtor;

(d) A written approval or correction of the amount of indebtedness and of the terms of payment of the indebtedness.

(2) Subsection (1) does not apply if the information requested under that subsection must be, or has already been, made available under any other Act or rule of law, to the person who made the request.

Cf. Personal Property Security Act 1993, s. 18 (2) (Saskatchewan).

178. Time for complying with request—

A secured party who is required to comply with a request made under section 177 (1) must comply with the request within 10 working days of the receipt of the request, unless the secured party has been exempted under section 179.

Cf. Personal Property Security Act 1993, s. 18 (6) (Saskatchewan).

179. Exemption from complying with request—

The Court may, on application by a secured party, make an order exempting the secured party from complying with a request made under section 177 in whole or in part or extending the time for compliance if the Court is satisfied that, in the circumstances, it would be unreasonable for the secured party to comply with the request.

Cf. Personal Property Security Act 1996, s. 18 (13) (Saskatchewan).

180. Secured party may recover costs arising from request—

(1) A secured party, who is required under section 177 to provide certain information, may charge the person requesting the information reasonable costs for providing the information, unless the person who has requested the information is the debtor.

(2) A debtor who has requested information under section 177 is entitled to be supplied free of charge with that information.

181. Application to court for compliance with request—

The Court may, on application by the person who made a request under section 177, make an order requiring the secured party to comply with the request if, without reasonable excuse, the secured party failed to comply with the request.

Cf. Personal Property Security Act 1993, s. 18 (8) (Saskatchewan).

182. Consequences of not complying with court order—

If a person fails to comply with a court order made under section 181, the Court may, on the application of the person who made the request under section 177—

(a) Make an order—

- (i) Declaring that the security interest to which the request relates is to be treated as unperfected or extinguished; and
- (ii) Directing the Registrar to remove the registration of the security interest.

(b) Make such other orders as it thinks proper for the purpose of giving effect to an order under this section.

Cf. Personal Property Security Act 1993, s. 18 (12) (Saskatchewan).

183. Obligation to disclose successor in security interest when request made—

Where a person makes a request under section 177 and the person to whom the request was made no longer has an interest in the obligation or collateral, that person must send or make available to the person making the request the name and address of the immediate successor in interest and the latest successor in interest, if known.

APPENDIX C

CHECKLIST FOR THE DESIGN OF A MODERN MOVABLES REGISTRY

The following are the features of modern, efficient registry systems of the kind that have operated in Canada for a sufficient period of time to demonstrate their efficiency and functionality. Many of the features set out below are also contained in the registry created under the *New Zealand Personal Property Securities Act*, 1999. Possible alternative features are separately noted.

1. Registry Operation

Recommended:

A registry operated by a government department or a government corporation

Alternative

A registry under the control of a government department but managed under contract with a competent, solvent private organization capable of providing insurance against errors omissions in the operation of the system or system failure.

2. Notice Registration

Recommended:

A registration is effected when the following data are entered in to the database of the registry:

- the name and address of the secured creditor or potential secured creditor;
- the name (or other reliable identifier such as government issued identification number) and address of the person named as debtor in the registration;
- a description of the collateral or potential collateral (see below).

The secured creditor (or potential secured creditor) is under a legal obligation to facilitate searching parties obtaining the details of any charge agreement to which the registration relates through the debtor.

3. Methods of Effecting a Registration

Recommended:

A registration can be effected in either of the following ways:

- transmission of the registry data directly to the database of the registry when prior arrangements for this have been made with the registry;
- transmission of registry data in hardcopy form (delivery, telecopies or fax) to the registry. The data are entered into the registry database by registry staff.

Alternative:

Registration may be effected through a registry agent who has direct access to the database of the registry (assuming an electronic registry that is accessible from remote locations).

4. Advance Registration

Recommended:

A registration can be effected before a charge agreement has been executed between the person identified in the registration as the secured creditor and the person identified in the registration as the debtor. However, the latter person must consent to (or must be informed of) the registration.

Under the applicable law, subject to specified exceptions, the priority of a charge to which the registration relates dates from the time of the registration and not from the time the charge comes into existence.

Alternative:

A registration can be effected only after a charge agreement is executed. Priority of the charge dates from the time of registration and not from the time the charge is created.

5. Multiple-Agreement Registration

Recommended:

A single registration can relate to any number of separate agreements between the parties identified in the registration so long as the collateral description in the registration is sufficient to identify the collateral under each agreement.

Alternative:

A separate registration is required for each agreement creating a charge.

6. Time and Duration of a Registration

Recommended:

A registration is deemed to have been effected when it can be discovered through a search obtained by a third person.

The registration remains effective for the period specified by the secured creditor or prospective secured creditor, but can be discharged at the demand of the person named as debtor if it does not relate to an extant charge.

Alternative:

A registration remains effective for a period of time specified in regulations and must be renewed prior to the expiry of that period.

7. Collateral Description

Recommended:

All collateral other than specified, uniquely identifiable collateral, may be described either on a detailed item basis or in generic terms. Where the charge is on all present and future movable property of the debtor, an all-inclusive description may be used. Specified uniquely identifiable collateral must be described using the prescribed identifier (e.g., serial number or mandatory government-issued registration number) except where the collateral is inventory.

Alternative 1:

No collateral description is required.

Alternative 2:

No separate collateral description requirement for uniquely identifiable collateral.

8. Registration-Search Criteria

Recommended:

The registration-search criteria are: the debtor's name (or other reliable identifier, such as government-issued identification number) and the prescribed identifier in case of uniquely identifiable collateral and the debtor's name (or other reliable identifier such as government issued identification number).

Alternative:

The debtor's name is the sole registration-search criterion.

9. Errors in Registry Data

Recommended:

A registration is invalidated by an error or omission in the registration data when the registration data cannot be retrieve by using the correct form of the registration-search criterion.

Alternative:

A registration is invalidated by an errors or omission in the registration data only when the error or omission would mislead a hypothetical, reasonable person who searches the registry.

10. Amendments and Discharges

Recommended:

Amendments and discharges can be effected in either of the following ways:

- transmission of the registry data directly to the database of the registry when prior arrangements for this have been made with the registry;
- transmission of registry data in hardcopy form (delivery, telecopies or fax) or by electronic transfer to the registry. The data are entered into the registry database by registry staff.

Amendments and discharges are legally effective when they are reflected in the database of the registry. Measures are available to allow reinstatement of unauthorized amendments or discharges. These measure function in the context of priority rules that protect third parties who rely on search of the registry occurring after the amendment or discharge and before reinstatement.

Alternative:

The amendment or discharge is recorded as data in the registration but is not treated as being effective unless it has been authorized by the secured creditor.

11. Liability of Registry

Recommended:

The registry is liable for reasonable foreseeable, direct loss suffered by a person who obtained a search result from the registry when the loss resulted from an error or omissions in the operation of the system or for malfunctions in the system. The registry is not liable for corruption

or changes in data during transmission to the registry or for unauthorized amendments or discharges of registrations.

Alternative 1:

The extent of liability of the registry for loss referred to in the recommended approach is limited to an amount specified in regulations.

Alternative 2:

The registry is not liable for loss suffered by users of the system resulting from errors or omissions in the operation of the system, for malfunctions in the system, for corruption or changes in data during transmission to the registry or for unauthorized amendments or discharges of registrations.

12. Scope of the Registry

Recommended:

Charges on all types of movable property, other than property for which there exists a title registry capable of recording charges, are registered in the registry.

Leases (of a specific duration), financing leases, consignments and title retention sales agreements are treated as charges for registry and priority purposes.

Alternative:

Only charges in the strict sense are within the scope of the registry and subject to related priority rules.

APPENDIX D

STEPS IN THE CREATION OF A MODERN MOVABLES REGISTRY

Note: The following list of steps address two situations: (i) a state in which circumstances permit the creation of a modern, electronic registry; and (ii) a state where the circumstances require the jurisdiction creating the registry to start with a manual paper-based system. A country may begin with a manual, paper-based system but conclude that, after a few years of operation, conditions warrant the conversion to an electronic system. The following steps describe the measures that should be undertaken when developing an electronic system as part of the original design of a system or as a new feature to be implemented as an aspect of transition from a manual to an electronic system.

1. Obtain governmental approval in principle for the drafting and implementation of a comprehensive modern secured transactions law for movable property containing integrated priority rules designed to function in the context of a notice based registry system.
2. Make a preliminary determination based on a study of the relevant factors (e.g., whether the country has a federal or unitary state structure, or whether the country is large and communication systems are not highly developed) as to whether the registry system to support the new law is to provide for a single central national registry or a number of regional registries.
3. Appoint a team of legal drafters with substantive theoretical and practical expertise in the secured transaction area. Test the draft law on an ongoing basis through periodic seminars and workshops with national and international experts, and with representatives of the legal, financial, business and consumer communities. Continue to refine the draft based on this input.
4. If regional registries are required because the country has political subdivisions (provinces) with legislative jurisdiction over secured financing, seek to ensure that mirror-image legislation is enacted in each subdivision. This may entail a multi-regional drafting team or the preparation of a model law (and model registry structure) that can be the basis for harmonization among the various subdivisions.
5. Once a penultimate draft of the new law is complete, create an implementation team composed of the legal drafters and other persons with expertise in the subject matter of the draft law, in registry-related administrative and operational structures, and, where a computerized system is to be implemented, persons with expertise in the design of information access and retrieval computer software and hardware.
6. Determine the required database capacity of the registry taking into account: (i) current volume and predicted growth in the incidence of secured business financing; (ii) past experience with any existing registries; (iii) the extent to which charges on consumer assets are to be covered by the new law and registry system taking into account the potential credit market for high-value consumer goods as collateral and the existence of a reliable motor vehicle certificate of title or equivalent system that provides a reliable substitute to registration of charges; (iv) the extent of the transactions, in addition to charges, that are to be covered by the new law and registry (e.g., long-term leases, financing leases, title retention sales agreements and consignments).

7. Determine if the registry is to be designed and operated by a governmental agency alone or under an arrangement with a private company capable of providing the necessary guarantees of solvency, competence and accountability.

8. Determine if the registry is to be: (i) purely paper based; (ii) a combination of paper registrations with data ultimately scanned or keyed into an electronic database that can be searched on site or remotely; (iii) a combination of paper registrations and electronic registrations with both on-site and remote electronic search capability using a web or specialized computer communications; (iv) purely electronic in the sense that all data is entered and searched by the registry clientele directly or through their own lawyers or own specialized private agents. In making this decision, take into account: (a) reliability of the electrical supply to the registry (this will condition the decision as to the extent that the operations of the registry can be computerized.); and (b) the predicted nature of the registry clientele, including the relative incidence of frequent and one-time users (the latter will vary depending on the extent to which charges in consumer goods and notices of judgments are to be included in the registry); the extent to which clientele are likely to have access to computer facilities and internet connections to the registry or sufficient funds to hire an agent to perform registration and search services on their behalf.

9. Based on the decisions made on the issues identified in para. 8, determine access venues and media (e.g. access through regional government offices or through private service providers or both); walk-in access or direct electronic on-line access or both; use of fax registrations and search requests.

10. Prepare the design specifications for the registry based on the additional factors set out paras. 8 and 9 and in Appendix C. Whether the system is to be paper or electronic based, the most significant design specification issues are: (i) the required contents of the registered notice; (ii) whether a general debtor-identification registration-search criterion is to be supplemented for some collateral types by a collateral identifier registration-search criterion; (iii) the optimal security features of the system, from a cost benefit analysis, with due regard to safeguarding the physical integrity of the registry record or database and as well as the integrity and reliability of its contents; (iv) whether any existing databases are to migrate into the new system; and (v) the extent to which the registry is to be cross-linked with other databases, e.g., other regional registries corporate records, the land registry.

11. To the extent the registry is computerized, determine on the basis of the design specifications whether the software for the registry (including programs for the database, communications, financing accounting and statistical reporting) can be "off-the-shelf" programs appropriately modified for the registry or unique programs designed for the registry and the governing law.

12. Determine on the basis of the predicted volumes of registrations the capacity of the hardware required for the system.

13. If the registry is to be constructed outside a government agency, tender for the software and hardware and all related construction and training services. If the registry operations are to be maintained by a private operator in the future, verify whether the tendering firms will be able to provide this potential service post-construction.

14. Arrange for physical facilities for the registry office. If registry services are to be available to "walk-in" users, the size of the registry office, and the need for any branch offices, will be an

important consideration. To conserve resources, consider whether the registry operations can be combined with existing government public government offices and personnel (e.g., real estate registries, vital statistics office).

15. Draft the regulations that will provide the detailed rules applicable to the entry and retrieval of information in and from the registry, and registry administration, services and operation. Once the system is operational, these regulations along with a users' manual should be made available to the public in hardcopy format and on a registry web page.

16. Design the necessary forms (paper and/or electronic fields as the case may be) and the computer user interfaces to support operating systems and procedures. Draft the necessary contractual documents and prepare the necessary informational and software in cases where frequent clients are to have the facility for direct entry and searching. Ensure the software includes an appropriate field for entering authorized user data at the registration level.

17. Develop internal operating procedures and prepare an operations manual for administrative staff.

18. Prepare a users' manual. Refer to step 15.

19. Develop an administrative strategy including an organizational structure and job descriptions for registry staff. The size and required expertise of the staff will vary dramatically depending on the earlier decisions made with respect to access venues and access media.

20. Establish appropriate financial accounting and reporting systems, including a facility for frequent users of the system to deposit amounts with the registry against which the costs of registry services can be charged.

21. Arrange for training of registry staff, preferably including an on-site training visit to an established registry that has operational features similar to those of the registry.

22. Once electronic hardware and software (if any) are acquired and installed, provide for an extensive testing period before the registry becomes operational. Solicit feedback from expected users and refine the design and capabilities of the system accordingly.

23. Design and implement an educational program on the new law and the supporting registry for potential users of the system both at the registration and search levels, and for members of the legal community, both lawyers and judges. If security in consumer goods is to be included, invest in a public media campaign to inform consumers of the benefits of the system and the risks if they fail to search.

24. Based on the extent to which ongoing maintenance and administration of the system is to be supplied outside government, tender and enter into the appropriate contractual arrangements.

25. Develop a revenue strategy designed to ensure recovery of operating costs and initial capital investment while avoiding the use of the system as a tax revenue source.

26. Fine-tune regulations and law to ensure they are compatible with the ultimate design and intended operation of the system. After an appropriate period of advance publicity to affected users to make necessary adjustments, enact law and put regulations into force.

27. Provide for ongoing assessment of the system once it is operational to ensure that it is meeting the objectives of the law in an efficient manner and is addressing the needs of users.

APPENDIX E

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APPENDIX F

OVERVIEW OF THE REGISTRATION SYSTEM FOR SECURED TRANSACTIONS IN VIET NAM

Introduction

1. The purpose of the following overview is to highlight the salient components of the newly-established registration system for secured transactions in Viet Nam and to analyse these components considering the characteristics of a modern registration system for movable property discussed in the Guide.⁵⁶

2. The essential rules pertaining to registration of secured transactions in Viet Nam are set out in Decree No. 08/2000/ND-CP of the Government on Registration of Secured Transactions dated March 10, 2000 ("Decree No. 8").⁵⁷ This decree also deals with the organisation of five specialized registries and the duties and powers of the registrars. Circular No. 01/2002/TT-BTP ("Circular No. 1"), issued by the Minister of Justice, with effect on 1 February 2002, is applicable to secured transactions registered at the National Registrar for Secured Transactions, the principal registration office for secured transactions in movable property. Circular No. 1 clarifies

⁵⁶ This overview of the registration system for secured transaction in Viet Nam is based upon the unofficial English versions of the decrees, circulars and decisions referred to below. It does not address problems that might arise in relation to the translation of such documents. The registration regime for secured transactions was adopted without a comprehensive reform of the substantive rules concerning secured transactions. In effect, the existing regime contained in the Civil Code of Viet Nam ("Civil Code") was supplemented with complementary rules principally contained in Decree of the Government on Secured Transactions, No. 165/1999/ND-CP, dated November 19, 1999 ("Decree No. 165"). Decree No. 165 makes it clear that nonpossessory security is valid and that a security agreement can cover both future property and obligations. Moreover, Decree No. 165 permits multiple security over the same property. Equally important, Decree No. 165 also recognizes to some extent the right for the parties to a secured transaction to determine in the security agreement their arrangement with respect to their respective rights and obligations. Decree No. 165 was supplemented by Circular No. 06/2002/TT-BTP, which is titled "Guiding the implementation of some provisions of Decree No. 165/1999/ND-CP of the Government dated 19 November 1999 on Secured Transactions". This circular sets out additional rules on secured transactions and provides further clarifications on the rules contained in Decree No. 165. In addition to Decree No. 165, Decree No. 178/1999/ND-CP of the Government on Security Interests for Loans extended by Credit Institutions, dated December 29, 1999, sets out additional rules on secured transactions applicable to secured loans made by credit institutions. This approach to legislative reform is complex, but presumably was adopted as an alternative to a comprehensive reform of the regime for secured transactions.

⁵⁷ Decision No. 104/2001/QĐ-TTg, issued by the Prime Minister, which is titled "Decision Of The Prime Minister of the Government on Establishment of Department for National Registration of Secured Transactions Within the Ministry of Justice", supplements Decree No. 8 and establishes the "Department for National Registration of secured transactions under the jurisdiction of the Ministry of Justice". This decision also confers rule making and administrative authority to the Ministry of Justice and the Department with respect to registration of secured transactions.

and supplements the provisions of Decree No. 8 and adopts sixteen prescribed forms for registration of secured transactions in movable property.⁵⁸

Public Registration for Secured Transactions

3. The purposes of the registration of secured transactions are: (i) to make available to the public information on secured transactions; and (ii) to determine the priority of conflicting claims over the same property subject to multiple security. To accomplish these objectives, Decree No. 8 provides that: (i) registrations must be based upon a name based-notice filing system; (ii) the relevant registrar must promptly proceed with the registration of applications for registration, including amendments and cancellations; (iii) applicants for registration must be responsible for the contents of their application, including for the accuracy of the information disclosed; and (iv) applicants must register secured transactions with the relevant registrar according to the nature of the property subject to the security, and the registers maintained by the registrars must be open to the public for consultation. In effect, the registration system established by Decree No. 8 allows third parties, in particular prospective lenders (or other creditors) to determine whether property of a prospective debtor (i.e., any person who owes performance of any obligation) is subject to a security in favor of an existing creditor. The registry system established by Decree No. 8 is simply a security registration system organized by reference to the grantor's name and is not an ownership (or other rights) registry system. The grantor's ownership rights (or other rights) with respect to the property subject to the security cannot be determined by reference to the recorded information in the registry system for secured transactions. In short, the registration system, as a notice system for secured transactions, is not a source of information on substantive property rights with respect to the property subject to the security.

4. Decree No. 8 establishes a single registration regime for secured transactions in Viet Nam, with a centralized general registry for movable property and four complementary specialized registries for security on sea-going vessels, aircraft, land use rights and immovable property. The requirements of the registration regime apply to all categories of property. The registries, in the same order of presentation, consist of the National Registrar for Secured Transactions, the Regional Registrars for sea-going vessels and crews, the Viet Nam Civil Aviation Administration, the Provincial Land Administration Departments (or the Land and Housing Administration Departments) and People's Committees.

5. The difficulties in coordinating the registrations in the specialized registries with the general registry (or centralized system) are attenuated to some extent through the transfer of

⁵⁸ Circular No. 1, which is titled "Guiding some issues on the authority and order of and procedures for registration of and provision of information on secured transactions at the National Registrar for Secured Transactions under the Ministry of Justice and its Branches", provides examples of the types of tangible and intangible movable property that could be used as security. This list is non-exhaustive and includes automobiles, equipment, river-going ships, raw materials, securities, intellectual property, claims under contracts, receivables, and rights to repayment of debts. Circular No. 1 applies to movable property other than aircraft and sea-going vessels. It does not apply to registration through electronic means. In addition to Decree No. 8 and Circular No. 1, in order to understand the registration system in Viet Nam, it is necessary to examine the framework for secured transactions set out in the Civil Code, as well as the Decree. Decree No. 165 supplements the rules on secured transactions contained in the Civil Code. In addition to expanding the rules contained in the Civil Code, Decree No. 165 also provides the basic rules on enforcement of secured transactions, which requires, as preliminary measure, the registration of a notice of enforcement with the registrars. The Civil Code and Decree No. 165 also contain substantive rules on registration of secured transactions. For example, see Articles 324 to 376 (pledge, mortgage, security deposit and guaranty), Articles 690 to 698 and Articles 727 to 737 (mortgage of land use rights) of the Civil Code and Articles 6, 13, 14, 15, 16, 25, 26, 27 and 40 of Decree No. 165.

the information recorded in each register maintained by the registrars in a common depository. The common depository is designated in Decree No. 8 as the “Data System”.

6. Decree No. 8 sets out the rules relating to: (i) registration of mortgage, pledge and asset-based securities; (ii) organization, duties and powers of the registrars; and (iii) the formalities for registration of secured transactions.⁵⁹

Transactions Subject to Registration

7. Decree No. 8 provides rules requiring the registration of the following secured transactions with the relevant registrar: (i) where ownership of an asset must be registered, notice of the pledge or the mortgage of the asset must also be registered; (ii) where a pledged or mortgaged asset is held by someone other than the pledgee or mortgagee, notice of the pledge or mortgage of that asset must be registered; (iii) where an asset is pledged or mortgaged as security for multiple obligations, then notice of the pledge or mortgage of such asset must be registered; and (iv) where a pledged or mortgaged asset is disposed of (presumably upon enforcement), notice of such disposition must be registered.⁶⁰ In addition, asset-based guarantees must be registered when so required by law. The registration system adopted is a pure encumbrance registration system, which is not designed to provide evidence of the grantor’s ownership rights (or other rights) with respect to the property subject to the security. The registry system does not apply to all security arrangements. The registry system extends only to security created by pledge, mortgage or asset-based guarantees (i.e., collateral surety, a form of surety secured by security) and would appear not to apply to security rights created by operation of law.⁶¹

8. Decree No. 8, along with Circular No. 1, does not contemplate the registration of the secured transaction before the actual creation of the security pursuant to a security agreement. It would, therefore, not be possible to register a security interest against any property before the actual grant of the security by the grantor in favor of the secured creditor.

Principles of Registration of Secured Transactions and Fees

9. The registration of a secured transaction requires (i) the filing and registration of a registration application on a prescribed form, which contains the required information regarding the transaction, the property subject to the security, and the parties, with the relevant registrar; and (ii) the registration of the information set out on such form in the register by the registrars. The recording of the information contained in the relevant application form, by the registrars, constitutes registration. The registration process is simplified in that it requires the filing of a simple notice setting out the basic information to inform third parties of the existence of security over property of the grantor. The registration form requires the identification of the grantor and the secured creditor and the description of the property subject to the security. The principal search criterion is the name of the grantor. The applicant is not required to file the security agreement, nor does the system contemplate such a filing. The registrars may, however, require

⁵⁹ See Article 1 of Decree No. 8.

⁶⁰ See Article 2 of Decree No. 8 and Article 13 of Decree No. 165. Decree No. 8 and Decree No. 165 confirm that nonpossessory security is valid in Viet Nam.

⁶¹ The registration requirements apply to both nonpossessory and possessory security in property. However, Article 329 of the Civil Code provides that only movable property in which the owner has registered the ownership may be the subject of a nonpossessory pledge. This raises the question of whether registration of a pledge of movable property that is not otherwise registered will constitute registration of ownership for the purposes of Article 329 without conferring greater ownership rights (in itself) in subject property.

the submission of relevant documents with respect to applications for registration from applicants. The responsibility for the completeness and accuracy of the registration form is upon the applicant who files the form.⁶²

10. The registrars have the duty to perform the registration in a timely and accurate manner on the basis of the information provided by the applicant on the registration form. In addition, the registrars have the duty to facilitate the registration of the secured transaction and to facilitate searches of the information contained in the registration application form. All information contained in the registry is publicly accessible.⁶³

11. The use of the registration system, whether for registration purposes or access to information, is subject to fees payable to the registrars. The fee structure is determined jointly by the Ministry of Finance and the Ministry of Justice.⁶⁴

Role of Government Agencies

12. The Ministry of Justice is the responsible government department with respect to the management of registration of secured transactions in movable property (other than sea-going vessels and aircraft). The Ministry of Justice has the following powers: (i) rulemaking authority, including directives; (ii) a supervisory function, including dealing with complaints; (iii) administration of the National Registrar for Secured Transactions; and (iv) authority to enter into international co-operation agreements.⁶⁵

13. The Ministry of Transportation and Communications is responsible for the registration of secured transactions where the asset secured is a sea-going vessel, while the Viet Nam Civil Aviation Administration is responsible for the registration of secured transactions where the property secured is an aircraft. To give effect to this responsibility, the Ministry of Transportation and Communications and the Viet Nam Civil Aviation Administration have the following principal powers: (i) rulemaking authority, including directives; (ii) a supervisory function; and (iii) administration of their respective registries. These powers are exercised in co-ordination with the Ministry of Justice.⁶⁶

Role of People's Committees

14. The People's Committees in the provinces and cities under central authority are responsible for the registration of secured transactions pertaining to land use rights and immovable property within the locality of the immovable property. The People's Committees and the central authority have the following principal powers: (i) rulemaking authority, including directives; (ii) a supervisory function; and (iii) administration of their respective registries. These powers are exercised in co-ordination with the Ministry of Justice.⁶⁷

⁶² See Article 3 of Decree No. 8.

⁶³ Decree No. 8 does not specify the type of registry system that it establishes. The system can function as a paper-based or electronic registry system (or a combination of both). Circular No. 1 makes it clear at the outset that the registry system is paper-based. It is assumed that the paper-based system will be converted into an electronic registry system.

⁶⁴ See Article 4 of Decree No. 8.

⁶⁵ See Article 5 of Decree No. 8.

⁶⁶ See Article 6 of Decree No. 8.

⁶⁷ See Article 7 of Decree No. 8.

Registrars for Secured Transactions

15. The agencies responsible for the registration of secured transactions consist of: (i) the National Registrar for Secured Transactions (with branches), an administrative authority of the Ministry of Justice; (ii) the Viet Nam Maritime Department regional registrars for sea-going vessels and crews; (iii) the Viet Nam Civil Aviation Administration; (iv) the land and housing departments of provinces and cities; and (v) the People's Committees.⁶⁸ Decree No. 8 attempts to establish rules that would uniformly apply to the registration of secured transactions, without regard to the registry used for registering secured transactions. The only difference between the various types of secured transactions will be where the parties to secured transactions register such transactions and where the public can have access to the information contained in the register or, in certain cases, the national data system for secured transactions (the "Data System").⁶⁹

16. The National Registrar for Secured Transactions is the general registration system for security in movable property, with the regional registrars for sea-going vessels and the Viet Nam Civil Aviation Administration as two complementary specialized registration agencies. The registry most likely to be used is the National Registrar for Secured Transactions. In this way, Decree No. 8 has met the objective of having a nation-wide system of registrations for secured transactions in respect of movable property.

17. Secured transactions pertaining to sea-going vessels are recorded in the national vessel registration book, while secured transactions pertaining to aircraft are registered in the aircraft registration book. Secured transactions pertaining to land use rights and immovable property are recorded in the immovable registration book. Registration of secured transactions is made in the name of the grantor of security.⁷⁰ Some of the complexities of maintaining diverse registries will be, to some extent, mitigated by the linkage of the recorded information to the Data System, which will serve as a national repository of information on secured transactions.

18. The other specialized registries for land use rights and immovable property give rise to special concerns that must be addressed in the Civil Code or in decrees to ensure their effective implementation. Registries for immovable property are organized generally by reference to specifically identified property (e.g., legal description or unique identification or reference number) and serve as a system to record ownership and other rights, including security, with respect to specific immovable property. The question of description of land use rights and immovable property, including mortgages, as a requirement for registration is one of the issues which the Ministry of Justice of Viet Nam and other authorities must address.

Duties of Registrars

19. The registrars have the following duties: (i) to register secured transactions; (ii) to deliver certificates with respect to registered secured transactions; (iii) to collect fees; (iv) to reject

⁶⁸ See Article 8 of Decree No. 8.

⁶⁹ See Article 16 of Decree No. 8. All information pertaining to secured transactions where the secured property consists of movable property, sea-going vessels, aircraft, land use rights and immovable property is maintained in the Data System, which is based on the name of the grantor of the security. The Data System is a single database for Viet Nam and is under the administration of the National Registrar for Secured Transactions. The registrars of the other specialized registries transfer the information from their registers to the Data System. This transfer of information should greatly simplify searches on secured transactions. Information in the Data System is available to the public for consultation.

⁷⁰ See Article 17 of Decree No. 8.

improper registration applications; (v) to cancel registrations; (vi) to provide information on registrations; and (vii) to maintain accurate records of registrations.⁷¹ It would appear that the registrars have no right of review or inquiry concerning the validity of secured transactions being registered or the underlying transactions or obligations secured or the ownership of the property subject to the secured transactions. In this regard, the duties of the registrars are purely administrative in nature.

20. The registrars are responsible for ensuring that applicants file applications for registration, amendment or cancellation in the prescribed forms and pay appropriate filing fees. When this is done, the relevant registrar is required to promptly stamp the date, time and numbers on the appropriate prescribed forms and enter the information contained in the prescribed forms in the register or Data System.

21. The registrars are liable for any damages caused by their failure to correctly record the information contained in the registration application pursuant to laws governing the liability of State officers.⁷²

Contents of Application for Registration of Secured Transactions

22. The parties to a secured transaction or an authorized representative of either party may file a registration form with the appropriate registrar. The application for registration may be made in person, by mail, or by any other means of communication.⁷³ Currently, the registration system is paper-based using the prescribed forms. It would, therefore, appear that the applicant may only file prescribed application forms and no other document, including the security agreement and title documents. The identification of the grantor is an essential component for the effectiveness of the registration system, since registrations and searches are made with reference to the grantor's name. Circular No. 1, with the attached forms, provides guidance concerning the identification of the grantor, whether an individual or an entity.⁷⁴

23. The application for registration contains basic information on the parties to the transaction and a description of the property subject to the security. The formal requisite information for registration of secured transactions is the names and addresses of the grantor and secured creditor and a description of the property subject to the secured transaction.⁷⁵ The secured transactions system is one of "notice filing" where a simple notice containing basic

⁷¹ See Article 9 of Decree No. 8.

⁷² See Section 5.3 of Circular No. 1. Circular No. 1 also provides directives concerning complaints against the registrars and other registration officers as well as the procedure that must be followed to pursue such claims.

⁷³ See Article 10 of Decree No. 8.

⁷⁴ Circular No. 1 provides the prescribed forms for registration of secured transactions with respect to movable property (other than sea-going vessels and aircraft). Form 02 must be used for an application for registering a pledge of property and Form 03 for registration of a guarantee by way of assets. The application is made on a form (i.e., paper) and can be filed either at the National Registrar for Secured Transactions (in Hanoi) or at any of its branches. If the applicant is an accredited financial institution, registration may be made by facsimile using Form 01. Payments are made at the registrars either in cash, or by fund transfers where the applicant is an accredited financial institution. In addition to the name of the grantor, the registration forms contemplate schedules for the description of property subject to the security and, presumably, cautious secured creditors will, when possible, provide specific references to the property (e.g. cars, ships with serial numbers). The signature of both the grantor and the secured creditor are required for the legal adequacy of a registration form. This is a requirement for the effectiveness of the registration.

⁷⁵ See Article 11 of Decree No. 8. Although there are no specific rules in Decree No. 8 concerning the name of the grantor for registration and searching purposes, Circular No. 1 and the applicable forms provide some guidance in this respect.

information on the parties to the secured transaction and a description of the property (or right) subject to the security is filed with the relevant registrar, which enters the information in a register or database for public consultation. Further inquiry from third parties will be necessary to discover the complete state of affairs of the grantor of the security. The notice of registration does not create any rights, including rights in the property subject to the security. The rights are created in the security agreement.

24. The relevant decrees do not establish conditions as to the adequacy of the description of the property subject to the security. A proper standard could be that a description of property is sufficient, whether or not specific, if it reasonably identifies what it describes and an application for registration which substantially complies with the requirements of Decree No. 8 would be effective as long as any errors therein are not seriously misleading. If a dispute arises, the interested parties may resolve such dispute by mutual agreement or before the courts.⁷⁶ The applicant is responsible for providing accurate information required to be disclosed in the application form and is liable for any damages resulting from any false information provided.⁷⁷ To the extent that the applicants are responsible for the accuracy of the information contained in the application form, the registrars should not be involved in any dispute.

Duration of Effectiveness of Registration

25. The registration of a secured transaction is only valid for a period of five years from the date of registration, subject to early cancellation or continuation. The effectiveness of the registration of a secured transaction will lapse upon the expiration of the 5-year period unless an application for continuation has been filed with the relevant registrar no less than 6 months prior to the expiry date.⁷⁸ The extension of the registration continues the effect of the original registration for an additional period of 5 years, unless cancelled. If the registration is not continued, it ceases to have any effect and the relevant registrar must cancel the entries of the registration in the register or Data System.

Registration of Secured Transactions

26. The registrars must record the information contained in the relevant forms in the registration system.⁷⁹ To effect this, upon presentation of a completed application for registration, the relevant registrar must stamp on the registration the date and hour of receipt and return one stamped copy of the application form to the applicant. The registrars must, within three days from the date of receipt, enter the information contained in the application for registration in the register or Data System and issue a certificate confirming the registration to the applicant. The registrars must return to the applicant applications for registration that are not properly completed with a statement clearly indicating the reasons for the refusal to register.⁸⁰

⁷⁶ Title registries for immovable property normally require specific identification of the property and the security over such property is registered and searched by reference to the specific property. The effectiveness of a grantor-name registration system for secured transactions involving immovable property is questionable.

⁷⁷ See Article 12 of Decree No. 8.

⁷⁸ See Section IV.1 of Circular No. 1.

⁷⁹ See Article 14 of Decree No. 8.

⁸⁰ See Article 14 of Decree No. 8.

Certificate of Registration of Secured Transactions

27. The registrars must record the information contained in the relevant form in the Data System or register within three days from the date of receipt of the duly completed registration application form, accompanied by payment of the requisite fees.⁸¹

28. The registrars issue to the applicant a certificate of registration that provides the following: information identifying the parties to the transaction, a description of the secured property, time of the registration, expiry of the registration, confirmation of validity of the registration, registration number and a list of secured transactions under the name of the grantor of the security.⁸² The information contained in the certificate is derived from the information contained in the registration application originally registered.

29. The registration application contains information which is very useful for a third party who needs a preliminary assessment of the status of a grantor with respect to security over the grantor's property. However, the greater the amount of information contained in a document, the greater the possibility of error in data entry. The effects of an error in registration depend upon whether the registrar or the applicant for registration committed the error. The principal consequence of such errors is the effective date of the corrections, once registered with the registrars.⁸³

Amendments and Corrections

30. An amendment to the registration can be filed with the relevant registrar to effect modifications to the original registered secured transaction.⁸⁴ The applicant for the registration of a secured transaction may request that the relevant registrar correct entries in the appropriate registry. The relevant registrar is required to make the correction within three days following receipt of the duly completed request for amendment.⁸⁵

Time of Registration

31. The basic rule concerning the time of registration of a secured transaction is that the registration will take effect upon receipt by the relevant registrar of the duly completed application and payment of required fees. To this rule, there are the following exceptions: (i) where the applicant has made an error in a registration, the time of the registration of the amendment is considered to be the time when the relevant registrar receives the application for correction; (ii) where the registrars have made an error in a certificate of registration, the effective time of the correction coincides with the time of the original filing or registration; and (iii) where an applicant files an application to effect a change in a registration (including the

⁸¹ See Article 15 of Decree No. 8. Circular No. 1 provides that the registrar issues a certificate of registration in Form 10 (registration of pledge) or Form 11 (registration of a guarantee). Oddly, Circular No. 1 prohibits the issuance of a certificate of registration by the registrars if more than one request for registration for the same pledge or guarantee agreement is made (see Section II.5).

⁸² See Article 18 of Decree No. 8.

⁸³ See Article 21 of Decree No. 8.

⁸⁴ Circular No. 1 provides that amendments to registrations are made by filing Form 04 with the registrar. The modifications include changes to the parties to the secured transactions, changes in the property covered by the security and changes in priority. The registrar confirms the changes by issuing a certificate of registration of change in Form 12.

⁸⁵ Circular No. 1 provides that corrections to the register of secured transactions are made by filing Form 08 with the registrar.

addition of secured property), the effective time of the change is the time when the relevant registrar receives the application for modifications.⁸⁶

Legal Validity of Secured Transactions Registration

32. The effects of registration are: (i) to render secured transactions effective against third parties; and (ii) to establish rules of priority among conflicting secured creditors over the same property subject to multiple secured transactions.⁸⁷ In particular, registration does not create rights in the property subject to the security. The security agreement creates the security that secures the debtor's obligations (the grantor of the security is not necessarily the debtor).

33. The registry system established by Decree No. 8 can be characterized as a movables registry, where the purposes of the system is to ensure: (i) the effectiveness of the security against third parties (and not between the grantor and the secured creditor), and (ii) the establishment of priority rules, without any effect on ownership of the property subject to the security interest.⁸⁸ Registration is not a requirement as to the validity of a secured transaction between the parties. Although not expressly stated in the Civil Code, Decree No. 165 or Decree No. 8, it is not unreasonable to conclude that a secured transaction is without effect against third parties unless registered, irrespective of any knowledge of any competing claim on the part of such third parties.

Removal of Registration

34. The grantor of security or the secured creditor may request the cancellation of the registration of the secured transaction upon the occurrence of the termination events set out in Articles 343 (termination of pledge), 362 (termination of mortgage), 375 (termination of guarantee) and 418 (termination of civil contracts) of the Civil Code. In addition, either the grantor or the secured creditor may require the cancellation of the security when there is no outstanding obligation secured.⁸⁹ The registrars must cancel the registration of the secured transaction in the appropriate register within three days following the receipt of the application for cancellation. No fee is payable for the cancellation of a registration. If the grantor makes the cancellation, the registrars must send a copy of the cancellation to the secured creditor.⁹⁰

35. Since the registration of a secured transaction is only valid for a period of 5 years, unless renewed (i.e., the effects of registration are continued), there is no compulsion placed upon the

⁸⁶ See Article 21 of Decree No. 8.

⁸⁷ See Article 22 of Decree No. 8 and Sections 14 and 16 of Decree No. 165.

⁸⁸ Decree No. 8 establishes a clear and simple rule regarding priority (i.e., time of registration of the secured transaction).

⁸⁹ Circular No. 1 provides that voluntary cancellations are made by filing an application in Form 06 with the registrar. Moreover, Circular No. 1 provides that a notice of disposition of property pledged must be filed with the registrar seven days prior to its disposition and the registrar, within three days of the filing of such notice of disposition, must issue to the applicant a certificate in Form 15 and notify the other parties who had security over the same secured property. Article 26 of Decree No. 165 provides that, prior to the disposal of secured property, the secured creditor must give written notice of such disposal to the grantor of the security and must register this notice at the registration office for secured transactions. If a specific property is used to secure several obligations, the relevant registrar must provide written notice of the disposal to all secured creditors. Conservatory measures may also be taken by the secured creditor to protect the secured property.

⁹⁰ See Article 23 of Decree No. 8. The unauthorized cancellation by the grantor of the security could give rise to difficulties, which would not be remedied by the notice of cancellation provided to the secured creditor, including problems relating to reliance by third parties. A possible solution would be for the registrars to permit a response time to the secured creditor to the notice prior to effecting the cancellation.

secured creditor to file an application for cancellation, unless requested by the grantor of the security.

Provision of Information on Secured Transactions

Upon providing the relevant registrar with the name of a grantor on a prescribed application form, with payment of the requisite fees, the registrar will provide any person, upon request, the information that is recorded under the name of such grantor.⁹¹ Any interested party, whether Vietnamese or foreign, is authorized to make inquiries and obtain information regarding registered secured transactions.⁹²

36. The fact that an application must be filed in order to obtain information concerning a secured transaction has the effect that direct access to the registry is precluded. As such, the registration system established by Decree No. 8 is a restricted access system. It is, however, important to recognise that Decree No. 8 explicitly states that anyone may search the security registries, without interference of the registrars.

Re-registration of Secured Transactions

37. As a transitional rule in respect of secured transactions existing at the time of the adoption of Decree No. 8, secured transactions relating to movable property which were registered before 25 March 2000 must be registered in compliance with Decree No. 8 with the National Registrar for Secured Transactions before 25 March 2001. The secured transactions, which are so registered, will maintain their original registration date. The secured transactions, which are registered after 25 March 2001, are considered to be new registrations for secured transactions and will take effect upon their actual registration date in compliance with Decree No. 8.⁹³

Validity and implementation

38. Decree No. 8 became effective on March 25, 2000 and, on the effective date, all regulatory provisions that were contrary to the provisions of the Decree were repealed.⁹⁴ The Ministry of Justice, with other agencies, is responsible for facilitating the implementation of Decree No. 8 by providing directives, while the Ministers and Heads of other government agencies and chairmen of People's Committees are responsible for the implementation of Decree No. 8.⁹⁵

⁹¹ See Articles 24 and 25 of Decree No. 8.

⁹² See Circular No. 1. The application for information is made by filing an application for information (Form 09) with the registrar, accompanied by the requisite fees. The registrar must provide this information, within three days of receipt of the application, in a prescribed form. Decree No. 165 provides for equal treatment of domestic and non-domestic secured creditors. However, this right may be somewhat limited by other laws of general application, especially those relating to land use rights and immovable property, which provide significant constraints applicable to foreigners.

⁹³ See Article 26 of Decree No. 8.

⁹⁴ See Article 27 of Decree No. 8. This raises questions regarding the rules on the hierarchy of laws and the effect of purporting superseding legislative instruments and provisions.

⁹⁵ See Article 28 of Decree No. 8.

APPENDIX G**REGISTRY PROVISIONS OF THE CONVENTION ON INTERNATIONAL INTERESTS IN
MOBILE EQUIPMENT, 2001***Chapter IV*

The international registration system

Article 16 – The International Registry

1. An International Registry shall be established for registrations of:
 - (a) international interests, prospective international interests and registrable nonconsensual rights and interests;
 - (b) assignments and prospective assignments of international interests;
 - (c) acquisitions of international interests by legal or contractual subrogations under the applicable law;
 - (d) notices of national interests; and
 - (e) subordinations of interests referred to in any of the preceding sub-paragraphs.
2. Different international registries may be established for different categories of object and associated rights.
3. For the purposes of this Chapter and Chapter V, the term “registration” includes, where appropriate, an amendment, extension or discharge of a registration.

Article 17 – The Supervisory Authority and the Registrar

1. There shall be a Supervisory Authority as provided by the Protocol.
2. The Supervisory Authority shall:
 - (a) establish or provide for the establishment of the International Registry;
 - (b) except as otherwise provided by the Protocol, appoint and dismiss the Registrar; Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;
 - (c) after consultation with the Contracting States, make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;
 - (d) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;

- (e) supervise the Registrar and the operation of the International Registry;
- (f) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;
- (g) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;
- (h) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol; and
- (i) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.

Chapter V

Other matters relating to registration

Article 18 – Registration requirements

1. The Protocol and regulations shall specify the requirements, including the criteria for the identification of the object:
 - (a) for effecting a registration (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article 20);
 - (b) for making searches and issuing search certificates, and, subject thereto;
 - (c) for ensuring the confidentiality of information and documents of the International Registry other than information and documents relating to a registration.
2. The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.
3. Where an interest registered as a prospective international interest becomes an interest, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.
4. The Registrar shall arrange for registrations to be entered into the International Registry database and made searchable in chronological order of receipt, and the file shall record the date and time of receipt.

Article 19 – Validity and time of registration

1. A registration shall be valid only if made in conformity with Article 20.
2. A registration, if valid, shall be complete upon entry of the required information into the International Registry database so as to be searchable.

3. A registration shall be searchable for the purposes of the preceding paragraph at the time when:

- (a) the International Registry has assigned to it a sequentially ordered file number; and
- (b) the registration information, including the file number, is stored in durable form and may be accessed at the International Registry.

4. If an interest first registered as a prospective international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest provided that the registration was still current immediately before the international interest was constituted as provided by Article 7.

5. The preceding paragraph applies with necessary modifications to the registration of a prospective assignment of an international interest.

6. A registration shall be searchable in the International Registry database according to the criteria prescribed by the Protocol.

Article 20 – Consent to registration

1. An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.

2. The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.

3. A registration may be discharged by or with the consent in writing of the party in whose favor it was made.

4. The acquisition of an international interest by legal or contractual subrogation may be registered by the subrogee.

5. A registrable nonconsensual right or interest may be registered by the holder thereof.

6. A notice of a national interest may be registered by the holder thereof.

Article 21 – Duration of registration

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

Article 22 – Searches

1. Any person may, in the manner prescribed by the Protocol and regulations, make or request a search of the International Registry by electronic means concerning interests or prospective international interests registered therein.
2. Upon receipt of a request therefor, the Registrar, in the manner prescribed by the Protocol and regulations, shall issue a registry search certificate by electronic means with respect to any object.
 - (a) stating all registered information relating thereto, together with a statement indicating the date and time of registration of such information; or
 - (b) stating that there is no information in the International Registry relating thereto.
3. A search certificate issued under the preceding paragraph shall indicate that the creditor named in the registration information has acquired or intends to acquire an international interest in the object but shall not indicate whether what is registered is an international interest or a prospective international interest, even if this is ascertainable from the relevant registration information.

Article 24 – Evidentiary value of certificates

A document in the form prescribed by the regulations which purports to be a certificate issued by the International Registry is prima facie proof:

- (a) that it has been so issued; and
- (b) of the facts recited in it, including the date and time of a registration.

Article 25 – Discharge of registration

1. Where the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, or where the conditions of transfer of title under a registered title reservation agreement have been fulfilled, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.
2. Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall, without undue delay, procure the discharge of the registration after written demand by the intending debtor or assignor which is delivered to or received at its address stated in the registration before the intending creditor or assignee has given value or incurred a commitment to give value.
3. Where the obligations secured by a national interest specified in a registered notice of a national interest have been discharged, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

4. Where a registration ought not to have been made or is incorrect, the person in whose favor the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor delivered to or received at its address stated in the registration.

Article 26 – Access to the international registration facilities

No person shall be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by this Chapter.

Chapter VII

Liability of the Registrar

Article 28 – Liability and financial assurances

1. The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system except where the malfunction is caused by an event of an inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those related to back-up and systems security and networking.

2. The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information or for acts or circumstances for which the Registrar and its officers and employees are not responsible and arising prior to receipt of registration information at the International Registry.

3. Compensation under paragraph 1 may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.

4. The Registrar shall procure insurance or a financial guarantee covering the liability referred to in this Article to the extent determined.

APPENDIX H
UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN
INTERNATIONAL TRADE

CHAPTER II
GENERAL PROVISIONS

Article 5

Definition and rules of interpretation

For the purpose of this Convention:

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

ANNEX TO THE CONVENTION

SECTION I
PRIORITY RULES BASED ON REGISTRATION

Article 1

Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of conclusion of the respective contracts of assignment.

Article 2

***Priority between the assignee and the insolvency
administrator or creditors of the assignor***

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

SECTION II REGISTRATION

Article 3 ***Establishment of a registration system***

A registration system will be established for the registration of data about assignments, even if the relevant assignment or receivable is not international, pursuant to the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.

Article 4 ***Registration***

1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.
2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.
3. A registration may be made in advance of the assignment to which it relates. The regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.
4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.
5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.
6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective

Article 5 ***Registry searches***

1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.
2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.

SECTION III PRIORITY RULES BASED ON THE TIME OF THE CONTRACT OF ASSIGNMENT

Article 6

Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order of conclusions of the respective contracts of assignment.

Article 7

Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

Article 8

Proof of time of contract of assignment

The time of conclusion of a contract of assignment in respect of articles 6 and 7 of this annex may be proved by any means, including witnesses.

SECTION IV PRIORITY RULES BASED ON THE TIME OF NOTIFICATION OF ASSIGNMENT

Article 9

Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which notification of the respective assignments is received by the debtor. However, an assignee may not obtain priority over a prior assignment of which the assignee had knowledge at the time of conclusion of the contract of assignment to that assignee by notifying the debtor.

Article 10

Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by

attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned and notification was received by the debtor before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

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