

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.