

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.

Box IV-1

Scenario 9: Illustration of Potential Weakness of Debtor Identifier as the Sole Search Criterion

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.

On 1 July, in violation of the charge agreement, Debtor sells the equipment to Buyer 1.

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.

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.