

## **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.

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<sup>33</sup> 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 through 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.<sup>34</sup> 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

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<sup>34</sup> For example, see *British Columbia Personal Property Registry Regulations*, Reg. 279/90, Div. 12.1 reproduced at: [www.qp.gov.bc.ca](http://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.<sup>35</sup> 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.<sup>36</sup> 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.

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<sup>35</sup> 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.

<sup>36</sup> 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](http://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 identify 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.<sup>37</sup> The same assurance can be obtained if the registrant is able 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.

<sup>37</sup> 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.<sup>38</sup> 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 provinces<sup>39</sup> 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

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

<sup>39</sup> 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.

<b>Box VI-2: Movables Registry Financial Self-Sufficiency Factors</b>
<p><b>Computerization:</b> 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 handing 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><b>Fee Structures:</b> 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><b>Types of Transactions Registered:</b> 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.<sup>40</sup>

<sup>40</sup> 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

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