

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.