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## **Draft Technical Legislative Guide on the Implementation of a Security Rights Registry**

**Note by the Secretariat**

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## Preface

At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.<sup>1</sup> In accordance with that decision,<sup>2</sup> the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector.<sup>3</sup>

At its forty-third session (New York, 21 June-9 July 2010), the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.<sup>4</sup>

In that connection, it was widely felt that a text on registration of security rights in movable assets would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *UNCITRAL Legislative Guide on Secured Transactions* (the "*Secured Transactions Guide*") did not address in sufficient detail the various legal, administrative, infrastructural and operational questions that needed to be resolved to ensure the successful implementation of a registry.<sup>5</sup>

The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Secured Transactions Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Secured Transactions Guide*. After discussion, the Commission

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<sup>1</sup> *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 313-320.

<sup>2</sup> *Ibid.*

<sup>3</sup> For the colloquium papers, see [www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html](http://www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html).

<sup>4</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

<sup>5</sup> *Ibid.*, para. 265.

decided that the Working Group should be entrusted with the preparation of a text on registration of security rights in movable assets.<sup>6</sup>

At its eighteenth session (Vienna, 5-10 November 2010), the Working Group considered a note by the Secretariat entitled “Registration of security rights in movable assets” (A/CN.9/WG.VI/WP.44 and Add.1 and 2). At the outset, the Working Group expressed its broad support for a text on the registration of security rights in movable assets, noting that empirical evidence clearly demonstrated that the efficacy of a secured transactions law depended on an effective registration system (A/CN.9/714, para. 12). As to the specific form and structure of the text to be prepared, the Working Group adopted the working assumption that the text would be a guide on the implementation and operation of a registry of security rights in movable assets that could include principles, guidelines, commentary and possibly model regulations. The Working Group also agreed that the text of the proposed registry guide should be consistent with the type of secured transactions legal regime contemplated by the *Secured Transactions Guide*, while also taking into account the diverse approaches taken by modern national and international registry regimes. It was also observed that, in line with the *Secured Transactions Guide* (see recommendation 54, subpara. (j)), the proposed registry guide should take into account the need to accommodate a hybrid electronic/paper system in which parties would have the option of submitting registration and search inquiries either electronically or in paper form (A/CN.9/714, para. 13). The Secretariat was asked to prepare a draft of the proposed registry guide based on the discussions and conclusions of the Working Group (A/CN.9/714, para. 11).

At its nineteenth session (New York, 11-15 April 2011), the Working Group considered notes by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.46 and Add.1 and 2) and “Draft Model Regulations” (A/CN.9/WG.VI/WP.46/Add.3). At the outset, the Working Group considered the form and content of the text to be prepared. One view was that a stand-alone guide should be prepared that would include an educational part introducing the secured transactions law recommended in the *Secured Transactions Guide* and a practical part that would consist of model registration regulations and commentary thereon (see A/CN.9/719, para. 13). Another view was that emphasis should be placed on model registration regulations and a commentary thereon, which would provide States that had enacted the secured transactions law recommended in the *Secured Transactions Guide* with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry (see A/CN.9/719, para. 14). At that session, differing views were also expressed as to whether the regulations should be formulated as model regulations or as recommendations (A/CN.9/719, para. 46). The Working Group requested the Secretariat to prepare a revised version reflecting the deliberations and decisions of the Working Group (A/CN.9/714, para. 12).

At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission considered the reports of the eighteenth and nineteenth sessions of the Working Group (A/CN.9/714 and A/CN.9/719, respectively). At that session, the significance of the work undertaken by Working Group VI was emphasized in particular in view of efforts currently undertaken by several States with a view to establishing a

<sup>6</sup> Ibid., paras. 266-267.

general security rights registry and the significant beneficial impact the operation of such a registry had on the availability and the cost of credit. With respect to the form and content of the text to be prepared, it was stated that, following the approach followed with respect to the *Secured Transactions Guide*, the text should be formulated in the form of a guide with commentary and recommendations, rather than as a text with model regulations and commentary thereon. In that connection, it was noted that the next version of the text before the Working Group would be formulated in a way that would leave the matter open until the Working Group had made a decision. After discussion, the Commission agreed that the mandate of the Working Group, leaving the decision on the form and content of the text to be prepared to the Working Group, did not need to be modified, and that, in any case, a final decision would be made by the Commission once the Working Group had completed its work and submitted the text to the Commission.<sup>7</sup>

At its twentieth session (Vienna, 12-16 December 2011), the Working Group continued its work based on a note by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.48 and Add.1-3). At that session, the Working Group agreed that the text should take the form of a guide (the “draft Registry Guide”) with commentary and recommendations along the lines of the *Secured Transactions Guide*. In addition, the Working Group agreed that, where the draft Registry Guide offered options, examples of model regulations could be included in an annex to the draft Registry Guide (A/CN.9/740, para. 18). As to the presentation of the text, it was agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the *Secured Transactions Guide*, and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/740, para. 30).

At its twenty-first session (New York, 14-18 May 2012), the Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry: Annex I. Terminology and recommendations” (A/CN.9/WG.VI/WP.50 and Add.1-2). At that session, the Working Group approved the substance of the terminology and the recommendations of the draft Registry Guide (A/CN.9/743, para. 21). In addition, the Working Group agreed that the draft Registry Guide should be finalized and submitted to the Commission for adoption at its forty-sixth session, in 2013 (A/CN.9/743, para. 73).

At its forty-fifth session (New York, 25 June-6 July 2012), the Commission considered the reports of the twentieth and twenty-first sessions of the Working Group (A/CN.9/740 and A/CN.9/743, respectively). At that session, the Commission expressed its appreciation to the Working Group and requested the Working Group to proceed with its work expeditiously and to complete it so that the draft Registry Guide would be submitted to the Commission for final approval and adoption at its forty-sixth session, in 2013.<sup>8</sup>

*[Note to the Working Group: The Working Group may wish to note that the preface will be updated after each Working Group meeting and completed after the Commission adopts the draft Registry Guide at its forty-sixth session, in 2013.]*

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<sup>7</sup> Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 233.

<sup>8</sup> Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 99.

## Introduction

### A. Purpose of the draft Registry Guide and its relationship with the *Secured Transactions Guide*

1. The *UNCITRAL Legislative Guide on Secured Transactions* (the “*Secured Transactions Guide*”) deals with the full range of issues that should be addressed in a modern secured transactions law (as supplemented with respect to security rights in intellectual property by the *Supplement on Security Rights in Intellectual Property*; the “*Supplement*”). The establishment of a publicly accessible registry in which information about the potential existence of a security right in movable assets may be registered is an essential feature of the *Secured Transactions Guide* and of modern law reform initiatives in this area generally. Chapter IV of the *Secured Transactions Guide* contains commentary and recommendations on many aspects of a security rights registry. In addition, chapters III and V of the *Secured Transactions Guide* address the related issues of third-party effectiveness and priority of a security right.

2. However, the *Secured Transactions Guide* does not address in every detail the myriad of legal, technological, administrative and operational issues involved in developing and operating an effective and efficient security rights registry. This is in line with the typical legislative drafting approach, under which the detailed rules applicable to the establishment and the operation of the registry, as well as the registration and search process, are left to be dealt with in subordinate regulations, ministerial guidelines or the like. Thus, the draft Technical Legislative Guide on the Implementation of a Security Rights Registry (the “draft Registry Guide”) seeks to implement the *Secured Transactions Guide* by addressing these issues in greater detail.

3. It should be emphasized at the outset that the recommendations of the draft Registry Guide are intended to be implemented by States that have enacted a secured transactions law that is substantially in conformity with the recommendations of the *Secured Transactions Guide*. It follows that, in order to understand the legal framework in which the registry is intended to function, a user of the draft Registry Guide should have a basic understanding of the secured transactions law contemplated by the *Secured Transactions Guide*. Thus, section E of the Introduction to the draft Registry Guide offers a concise summary of the secured transactions regime recommended by the *Secured Transactions Guide*. Other chapters of the draft Registry Guide include additional guidance about matters addressed in the secured transactions law recommended by the *Secured Transactions Guide*. For a thorough understanding, however, the draft Registry Guide should be read together with the *Secured Transactions Guide*.

4. The experience of States that have instituted the kind of general security rights registry contemplated by the *Secured Transactions Guide* demonstrates how advances in information technology can vastly improve the operational efficiency of such a registry. Particularly in relation to the technical aspects of registry design and operation, the draft Registry Guide draws on these national precedents. In addition, the draft Registry Guide has benefitted from international sources, including the following:

(a) Law and Policy Reform at the Asian Development Bank – A Guide to Movables Registries (2002);

(b) Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry, European Bank for Reconstruction and Development (EBRD) (2004);

(c) Publicity of Security Rights: Setting Standards for Charges Registries, EBRD (2005);

(d) Principles, Definitions and Model Rules of a European Private Law, Draft Common Frame of Reference (DCFR), volume 6, book IX (Proprietary security in movable assets), chapter 3 (Effectiveness as Against Third Parties), section 3 (Registration), (2010), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group);

(e) Model Registry Regulations under the Model Inter-American Law on Secured Transactions, Organization of American States (OAS) (2009);

(f) Secured Transactions Systems and Collateral Registries, The International Finance Corporation (World Bank Group) (2010); and

(g) Convention on International Interests in Mobile Equipment (Cape Town, 2001) and its Protocols, providing for the establishment of international registries (which, although they are asset-based and cover other transactions in addition to secured transactions, are notice-based, with registration resulting in third-party effectiveness and priority).

5. The national, regional and international sources referred to above are largely consistent with, but do not always fully accord with, the recommendations of the *Secured Transactions Guide*. Where appropriate, the draft Registry Guide explains the policy rationale for the approach recommended in the *Secured Transactions Guide* relative to other possible approaches.

6. The draft Registry Guide is addressed to all those who are interested or actively involved in the design and implementation of a security rights registry, as well as to those who may be affected by or interested in its establishment and operation, including:

(a) Policymakers implementing the recommendations of the *Secured Transactions Guide*, especially in relation to the establishment of a security rights registry;

(b) Registry system designers, including technical staff charged with the preparation of design specifications and with fulfilling the hardware and software requirements for the registry;

(c) Registry administrators and staff;

(d) Registry clientele, including potential secured creditors, credit reporting agencies, other creditors of the grantor of a security right and the grantor's insolvency representative, as well as all other persons whose rights may be affected by a security right, such as a potential buyer of an encumbered asset;

(e) The general legal community (including judges, arbitrators and practising lawyers); and

(f) All those involved in secured transactions law reform and the provision of technical assistance, such as the World Bank Group, the EBRD, the ADB and the Inter-American Development Bank.

7. Not all of these potential readers will be versed in the intricacies of secured transactions law or have legal training. Accordingly, the draft Registry Guide is written in "plain language" style employing "reader-friendly" aids.

8. The draft Registry Guide uses neutral generic legal terminology that is consistent with the terminology used in the *Secured Transactions Guide*. Consequently, it can be adapted readily to the diverse legal traditions and drafting styles of different States. The draft Registry Guide is also formulated in a flexible fashion enabling it to be implemented in accordance with local drafting conventions regarding which types of rule must be incorporated in principal legislation and which may be left to subordinate regulations, or ministerial or other administrative guidelines.

## B. Terminology and interpretation

9. The terminology and interpretation section of the *Secured Transactions Guide* (see Introduction, sect. B, para. 20), applies also to the draft Registry Guide. The terminology of the draft Registry Guide is also consistent with the refinement of these terms and the explanations of additional terms in the various chapters of the *Secured Transactions Guide*.

10. For example, when the draft Registry Guide uses the term "future asset", it means, as explained in the *Secured Transactions Guide*, assets that come into existence or are acquired by the grantor after the time the security agreement is entered into (see *Secured Transactions Guide*, chap. I, para. 8; chap. II, para. 51; and chap. V, para. 151).

11. However, the draft Registry Guide refines certain of the terminological and interpretation provisions of the *Secured Transactions Guide* and also introduces additional terms as follows:

### (a) Address

"Address" means: (i) a physical address, including a street address and number, city, postal code and State; (ii) a post office box number, city, postal code and State; (iii) an electronic address; or (iv) another address that is equivalent to (i), (ii) or (iii).

## (b) Amendment

“Amendment” means the act of adding, deleting or modifying information contained in a registered notice, [by the one and only registrant or, if there is more than one registrant, some of them,] as well as the effect thereof.

*[Note to the Working Group: The Working Group may wish to consider the text within square brackets in the terms “amendment” and “cancellation”), which, as explained in para. 12 below, is intended to distinguish between an amendment and a cancellation in cases in which there is more than one registrant.]*

12. Examples of amendments include the following: (a) the extension or reduction of the period of effectiveness of a notice (if applicable); (b) the addition or deletion or modification of the identifier or address of a secured creditor or grantor; (c) the addition or deletion of encumbered assets; and (d) the modification of the maximum monetary amount for which the security right may be enforced (if applicable) (for a discussion of amendments, see A/CN.9/WG.VI/WP.52/Add.2, paras. 47-50 and A/CN.9/WG.VI/WP.52/Add.4, paras. 1-22). If information is deleted by one of several registrants, it is an amendment. Only the deletion of all information by all registrants amounts to a cancellation (see the term “cancellation” below).

(c) “Cancellation” means the act of deleting all information contained in a registered notice [by the one-and only registrant or, if there is more than one registrant, all of them].

## (d) Grantor

“Grantor” means the person identified in the notice as the grantor.

## (e) Law

“Law” means the law governing security rights in movable assets.

13. “Law governing security rights in movable assets” means a law based on the recommendations of the *Secured Transactions Guide*. This is because the recommendations of the draft Registry Guide may only be implemented by States that have enacted or are prepared to enact a secured transactions law in substantive conformity with the recommendations of the *Secured Transactions Guide*. For example, in order to implement the recommendations of the draft Registry Guide, a State would need to have in place or be prepared to enact a secured transactions law that provides for notice (rather than document) registration and that treats registration as a method of making a security right effective against third parties (rather than also for creating a security right).

## (f) Notice

“Notice” means a communication in writing (paper or electronic) and includes an initial notice, an amendment notice or a cancellation notice.

14. The *Secured Transactions Guide* uses the term “notice” in the general sense of a communication (that is, in a broader sense than the draft Registry Guide). Thus, in the *Secured Transactions Guide* the term covers not only a form (or screen) used to transmit information to the registry (see *Secured Transactions Guide*, Introduction, B, “notice”, and recs. 54, subpara. (b), and 57), but also other communications, such as the non-registry-related notices required to be sent by secured creditors in the context of enforcing their security rights (see *Secured*



*Transactions Guide*, recs. 149-151). Chapter IV of the *Secured Transactions Guide* supplements the meaning of the term “notice” in the registration context by referring to: (a) “information contained in a notice” or “the content of the notice” (see *Secured Transactions Guide*, recs. 54, subpara. (d), and 57); and (b) the “registry record” in the sense of information contained in all notices that have been accepted by the registry and entered into the registry database that is available to the public (see *Secured Transactions Guide*, rec. 70). The draft Registry Guide uses the term “notice” only in the narrower sense, emphasizing more the information contained in the paper or electronic communication to the registry rather than the medium of communication. Thus, the word “notice” in the draft Registry Guide should be understood in that sense.

(g) Registrant

“Registrant” means the person identified in the notice as the secured creditor.

15. The registrant may be the secured creditor or its representative (see rec. 57, subpara. (a)).

(h) Registrar

“Registrar” means the person designated pursuant to the law and the regulation to supervise and administer the operation of the registry.

(i) Registration

“Registration” means the entry of information contained in a notice into the registry database.

(j) Registration number

“Registration number” means a unique alphanumeric identifier assigned to an initial registered notice by the registry and permanently associated with that notice and any related subsequent amendment or cancellation notice.

(k) Registry record

“Registry record” means the information in all registered notices that is stored in the registry database and includes both the information that is publicly available to searchers and the information in cancelled notices that is in the archives.

16. The term “registry record” includes all registered notices and not just the notices relating to a specified grantor. For this reason, to refer to one notice in the registry record, reference is made to a “registered notice”.

(l) Regulation

“Regulation” is the body of rules implementing the provisions of the law with regard to the registry.

*[Note to the Working Group: The Working Group may wish to consider whether, if the secured transactions law is enacted in two or more statutes (e.g., one that deals with all the substantive rules, another that deals with conflict-of-laws rules, and another that establishes the registry), there may be rules relating to registration that are enacted as subordinate legislation (e.g., a regulation that is a separate enactment) in respect of all these statutes. If so, the scope of the term “regulation” may be slightly expanded beyond a text that establishes the registry*

and explained in the commentary. The Working Group may also wish to consider whether, because of its importance, the term “designated field” should be explained, for example, along the following lines: “‘designated field’ means a specific place on the notice designated by the registry for entering specified information.”]

### **C. Key objectives and fundamental policies of an efficient registry**

17. The key objectives and fundamental policies of an effective and efficient secured transactions regime discussed in the *Secured Transactions Guide* (see Introduction, section D) are relevant for the establishment and operation of an efficient security rights registry. Particularly relevant in this respect are: (a) the key objective of enhancing certainty and transparency by providing for registration of a notice in a general security rights registry (see *Secured Transactions Guide*, Introduction, para. 54, and rec. 1, subpara. (f)); and (b) the fundamental policy of adopting a functional, integrated and comprehensive approach to secured transactions and to establishing a general security rights registry (see *Secured Transactions Guide*, Introduction, paras. 62 and 66).

18. Consistently with the key objectives and fundamental policies of the *Secured Transactions Guide*, the draft Registry Guide is informed by the following overarching principles:

(a) Legal efficiency: the legal and operational guidelines governing registry services, including registration and searching, should be simple, clear and certain;

(b) Operational efficiency: registry services, including registration and searching, should be designed so as to be as fast and inexpensive as possible, while also ensuring the security and searchability of the information entered in the registry record; and

(c) A balanced approach to the interests of all registry users: the legal and operational framework of the registry should be designed to fairly balance the interests of all persons who may have an interest in the extent and scope of information that is entered in a security rights registry, as well as in the availability of that information, including potential grantors and secured creditors, the grantor’s other creditors and insolvency representative, and other potential competing claimants, such as potential buyers of assets encumbered by a security right.

### **D. Transitional considerations**

19. The *Secured Transactions Guide* contains a detailed discussion of the various issues that States implementing its recommendations may wish to consider (see *Secured Transactions Guide*, Introduction, sect. E). These issues include harmonization with prior law, legislative method and drafting technique, as well as issues relating to post-enactment acculturation.

20. Harmonization with prior law is important as a law based on the recommendations of the *Secured Transactions Guide* may well constitute a significant departure from prior law. The *Secured Transactions Guide* contains a set of balanced and efficient recommendations governing the transition from the prior

law to the new law (see *Secured Transactions Guide*, recs. 228-234). In particular, these recommendations address two important transition issues, the date as of which the new law will come into force (the “effective date”) and the extent to which the new law will apply to transactions or security rights that existed before the effective date.

21. Generally, the *Secured Transactions Guide* recommends that the secured transactions law contemplated therein apply to all security rights including those already in existence on the effective date. However, it recognizes four important exceptions. First, prior law applies to matters that are the subject of litigation or alternative binding dispute resolution proceedings that have commenced before the effective date (however, out-of-court enforcement that has commenced before the effective date law may continue under the new law; see *Secured Transactions Guide*, rec. 229). Second, prior law determines whether a security right has been created before the effective date (see *Secured Transactions Guide*, rec. 230). Third, a security right that was effective against third parties under prior law remains effective until the earlier of: (a) the time it would cease to be effective against third parties under prior law; and (b) the expiration of a period of time specified in the law after the effective date (the “transition period”) (see *Secured Transactions Guide*, rec. 231). Under this approach, the holder of a security right that was created under prior law is given a transition period to comply with the third-party effectiveness requirements of the new secured transactions law. And fourth, the priority of a security right is determined by prior law if: (a) the security right and all competing rights arose before the effective date; and (b) the priority of none of these rights changed after the effective date (see *Secured Transactions Guide*, rec. 233).

22. The new general security rights registry contemplated by the *Secured Transactions Guide* would give all existing secured creditors a quick, easy and inexpensive way of maintaining the third-party effectiveness and priority status of their security rights. The new registry would also allow grantors to use more easily than under prior law the full value of their assets as security for credit as they would be able to create security rights in the same assets in favour of more than one secured creditor as long as the priority status of each secured creditor would be clear.

23. If the enacting State already has in place a registry for security rights in movable assets, additional transitional considerations will need to be addressed. For example, if the new registry is intended to cover security rights previously within the scope of an existing registry, the enacting State or the private entity responsible for implementing the registry may assume responsibility for migrating the information in the existing records into the new registry record. However, as mentioned above, the *Secured Transactions Guide* recommends that the burden of migration can be placed on secured creditors by giving them a transitional period (for example, one year) to register or otherwise make their security right effective against third parties. This latter approach has been used with considerable success in a number of States (especially, when such “re-registration” is free of charge). If this option is chosen, a space or field on the registration form should be provided for entering a note that the registration is a continuation (or transfer) of a registration made prior to the coming into operation of the new registry (for a more detailed discussion of these types of transition issue, see chap. XI of the *Secured Transactions Guide*).

24. States considering the draft Registry Guide for implementation will also need to consider issues of legislative methods and drafting technique. Certain of the recommendations of the draft Registry Guide reiterate or implement recommendations of the *Secured Transactions Guide* because of their importance or because of their relevance to the administration of the registry or its technical design. Such recommendations include the following: 8 (see recs. 55, subpara. (b), and 54, subpara. (d)); 10, subparagraph (a) (see rec. 70); 11 (see rec. 69); 12 (see rec. 67); 13 (see rec. 68); 16 (see rec. 55, subparas. (c), and (d)); 21 (see rec. 57); 26, subparagraph (a) (see rec. 63); 27, subparagraph (a) (see rec. 58); 27, subparagraph (b) (see rec. 64); 27, subparagraph (c) (see rec. 65); 31 (see rec. 72). The rest of the recommendations address purely technical registration matters. Enacting States will need to consider whether to deal with all these issues in the secured transactions law, in the registry regulation, in the terms of use of the registry, or in all or more than one of these texts.

25. Enacting States will also need to consider issues of post-enactment acculturation and, in particular, will need to design a programme aimed at familiarizing potential registry users with the operation of the registry. More specifically, to ensure the smooth implementation of the registry and its active take up by potential users, enacting States will need to consider entrusting an implementation team with the task of developing education and awareness programmes, disseminating promotional and explanatory material and conducting training sessions. The implementation team should also develop instructions on entering information into paper registration forms and electronic screens.

## **E. Overview of secured transactions law and the role of registration**

### **1. General**

26. As already mentioned, a general security rights registry does not exist in a vacuum. It is an integral component of the secured transactions regime recommended by the *Secured Transactions Guide*. Accordingly, this chapter provides an overview of that regime, focusing in particular on the legal function and consequences of registration. For more detailed information, the reader is encouraged to refer to the *Secured Transactions Guide*.

### **2. Notion and function of a security right**

27. Under the *Secured Transactions Guide*, a security right is a property right (a right in rem, distinct from ownership and personal rights) in a movable asset that is created by agreement and secures payment or other performance of an obligation (see the term “security right” and “grantor” in the introduction to the *Secured Transactions Guide*, sect. B). The function of a security right is to mitigate the risk of loss resulting from a default in payment by entitling the secured creditor to claim the value of the assets encumbered by the security right as a back-up source of repayment in preference to the claims of the grantor’s other creditors. For example, if a business that borrows funds on the security of its equipment fails to repay the loan, a secured creditor with a security right in that equipment will be entitled to obtain possession and dispose of the equipment and apply the proceeds to the

outstanding balance. As the risk of loss from default is mitigated, the grantor's access to credit is expanded, quite often on more favourable terms.

28. The *Secured Transactions Guide* adopts a functional, integrated and comprehensive approach to secured transactions so as to encompass any type of property right in a movable asset that functions in substance to secure performance of an obligation regardless of the form of the transaction, the type of encumbered asset, the nature of the secured obligation or the status of the parties (see *Secured Transactions Guide*, chap. I, paras. 101-112, and recs. 2 and 10). Thus, the concept of "security right" is not limited to the types of nominated security device conventionally recognized by different legal systems, such as a pledge, charge or hypothec. It also encompasses any type of property right, including ownership, that functions as security, such as a retention-of-title right to secure payment of the purchase price of an asset, financial lease right, the right of a transferee in a transfer of assets for security purposes and the right of an assignee in an assignment of receivables for security purposes (see *Secured Transactions Guide*, chap. I, paras. 101-112 and recs. 2, 8 and 9).

29. The *Secured Transactions Guide* adopts this substance-over-form approach to the concept of security in order to ensure that the legal rights of the immediate parties and any third parties affected by a security agreement are subject to the same uniform set of legal rules. The *Secured Transactions Guide* recommends that, to the extent that exceptions are recognized for general policy reasons (for example, to protect buyers of relatively low-value consumer assets), these exceptions should be narrow and clearly specified in the law (see *Secured Transactions Guide*, recs. 4 and 7).

### 3. Creation of a security right

30. The *Secured Transactions Guide* recommends that a distinction should be drawn between the creation of a security right (effectiveness between the grantor and the secured creditor) and its effectiveness against third parties (see *Secured Transactions Guide*, chap. I, paras. 1-7, chap. III, paras. 6-8, and recs. 1, subpara. (c), 13 and 30). The main reason for this approach is to implement one of the key objectives of an effective and efficient secured transactions law, that is, to enable parties to create a security right in their assets in a simple and efficient manner by keeping the creation-related formalities to a minimum (see *Secured Transactions Guide*, recs. 1, subpara. (c) and 13).

31. Thus, the *Secured Transactions Guide* contains a number of features intended to achieve this objective. It recommends that: (a) a security right be created simply by agreement between the grantor and the secured creditor; (b) the agreement be in writing if it is not accompanied by a transfer of actual possession of the encumbered asset to the secured creditor; (c) the required form of writing be flexible to include electronic means of communications and require the signature of the grantor only; and (d) the agreement reflect the intent of the parties to create a security right, identify the parties and describe the secured obligation and the encumbered assets (see *Secured Transactions Guide*, recs. 14 and 15).

32. By dispensing with the need for a transfer of possession of the encumbered assets to create a security right, the secured transactions law contemplated by the *Secured Transactions Guide* enables an enterprise to encumber not only its tangible

existing assets but also its intangible and future assets, as well as pools of circulating assets, including, most significantly, receivables and inventory (see *Secured Transactions Guide*, chap. II, paras. 49-70 and recs. 2 and 17). Under the recommendations of the *Secured Transactions Guide*, a security right in future assets is created as soon as the grantor acquires rights in the assets (see *Secured Transactions Guide*, rec. 13). This approach is likely to increase access to credit by expanding the range of assets that a grantor can offer as security. The recommendations of the *Secured Transactions Guide* further confirm that a security right may secure any type of obligation, including future and indeterminate obligations (see *Secured Transactions Guide*, rec. 16).

33. This recognition by the *Secured Transactions Guide* of non-possessory security rights also enhances consumer access to credit since it enables consumer grantors to take immediate possession of assets acquired on secured credit terms. The *Secured Transactions Guide*, however, is mindful of the need to preserve the rights of consumers and other persons that may require special protection. Thus, it recommends that the secured transactions law should not affect the rights of consumers under consumer protection legislation or override statutory limitations relating to whether particular types of assets may be transferred or encumbered (see *Secured Transactions Guide*, chap. I, paras. 10 and 11; chap. II, paras. 56, 57 and 107; recs. 2, subpara. (b), and 18).

34. The *Secured Transactions Guide* also confirms that a security right automatically continues in any proceeds of the encumbered assets (and proceeds of proceeds) without the need for a specific agreement (see *Secured Transactions Guide*, rec. 19). This approach is consistent with the expectations of the parties. If the security right did not extend in the proceeds, an authorized transfer of the encumbered assets could defeat or sharply diminish its ability to rely on those assets to secure the debt. Even where the security right follows the encumbered assets in the hands of a transferee, an extension of the security right in the proceeds is meaningful as it may provide more security in particular where the proceeds happen to be more valuable than the encumbered assets (see *Secured Transactions Guide*, chap. II, paras. 72-81).

#### **4. Third-party effectiveness of a security right**

35. Under the recommendations of the *Secured Transactions Guide*, a security right becomes effective between the parties as soon as the requirements outlined above are satisfied. However, the security right cannot be set up against rights acquired by third parties in the encumbered assets unless and until the requirements for third-party effectiveness of the security right are satisfied. The reason for this distinction is to ensure that the security right created by the parties' private agreement is adequately publicized to third parties that might be negatively affected by its existence.

36. Registration of a notice in a general security rights registry is the main method recognized by the *Secured Transactions Guide* for achieving the third-party effectiveness of a security right (see *Secured Transactions Guide*, rec. 32). While this is the only method available for all types of encumbered asset, the *Secured Transactions Guide* recognizes other methods depending on the type of encumbered asset.

37. First, the transfer of possession of the encumbered assets to the secured creditor or its representative is considered to be sufficient practical notice to third parties that the grantor's rights in the assets are likely to be encumbered. Consequently, the dispossession of the grantor qualifies as an alternative method of achieving third-party effectiveness, provided that the dispossession is actual (not constructive, fictive, deemed or symbolic; see *Secured Transactions Guide*, Introduction, sect. B, "possession" and rec. 37). Clearly, this method of achieving third-party effectiveness is available only for the presently owned tangible assets of a grantor that, as a practical matter, the grantor is prepared to relinquish possession of.

38. Second, the *Secured Transactions Guide* recommends that, where the encumbered asset is the right to payment of funds credited to a bank account or a right to receive the proceeds of a letter of credit, secured creditors be given the option of achieving third-party effectiveness by taking "control" of the encumbered asset in lieu of registration in the general security rights registry (see *Secured Transactions Guide*, Introduction, sect. B, "control" and rec. 103). It should be noted that securities and payment rights arising under or from financial contracts governed by netting agreements and foreign exchange contracts are excluded from the scope of the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. I, paras. 37-39, and rec. 4, subparas. (c)-(e)). For these types of asset, an enacting State will typically wish to also provide for alternative methods of achieving third-party effectiveness.

39. Third, the *Secured Transactions Guide* may apply to security rights in types of asset that are subject to a specialized registration regime, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)). To the extent that the *Secured Transactions Guide* applies to security rights in these types of asset, it recommends that registration in the specialized registry be recognized as an alternative method of achieving third-party effectiveness (see *Secured Transactions Guide*, rec. 38).

40. Fourth, where the encumbered asset is or may be attached to immovable property so as to form part of the immovable property, the *Secured Transactions Guide* recommends that the security right in the encumbered asset may be made effective against third parties by the registration of a notice either in the general security rights registry or in the immovable property registry (see *Secured Transactions Guide*, rec. 43). It should be noted that the asset description requirements for an effective registration may differ depending on where the notice is registered owing to differences in the way in which registrations are organized in the two types of registry. The *Secured Transactions Guide* recommends that a description of an encumbered asset in a notice registered in the general security rights registry is sufficient if it reasonably allows its identification since notices in that registry are organized, not by asset description, but by grantor identifier (see *Secured Transactions Guide*, rec. 57, subpara. (b)). In contrast, registrations in an immovable property registry are generally organized by reference to the specific identifier for the relevant parcel of land. Consequently, the identifier used to identify the parcel of immovable property to which the encumbered asset is or will be attached will also need to be included in the notice that is registered in the immovable registry.

## **5. Priority of a security right**

### **(a) Competing security rights**

41. If more than one security right created by the same grantor in the same encumbered asset has been made effective against third parties, it is necessary to have a priority rule to rank the competing security rights as among themselves (see *Secured Transactions Guide*, chap. III, paras. 12-14). Where the competing security rights were all made effective against third parties by registration, priority is generally determined by the order of registration (see *Secured Transactions Guide*, rec. 76, subpara. (a)). Where the competing security rights were all made effective against third parties otherwise than by registration, priority is determined by the order of third-party effectiveness (see *Secured Transactions Guide*, rec. 76, subpara. (b)). In the event a security right that was made effective against third parties otherwise than by registration (e.g. by delivery of possession) comes into competition with a security right that was made effective against third parties by registration, priority is generally determined by the respective order of registration or third-party effectiveness (e.g. delivery of possession), whichever occurs first (see *Secured Transactions Guide*, rec. 76, subpara. (c)).

42. Although these recommendations provide the baseline rules, a modern secured transactions law along the lines recommended in the *Secured Transactions Guide* will invariably recognize some exceptions in the interest of facilitating other business practices and policy objectives. The following paragraphs summarize the principal exceptions recognized by the *Secured Transactions Guide*.

43. First, the *Secured Transactions Guide* recognizes a special priority in favour of a secured creditor that finances the grantor's acquisition of tangible assets (for example, consumer goods, equipment or inventory) or intellectual property (see *Secured Transactions Guide*, chap. X, paras. 125-139, and *Supplement*, paras. 181-183). Provided the requirements recommended by the *Secured Transactions Guide* for obtaining this special priority are satisfied, the "acquisition security right" has priority with respect to the value of those assets over security rights in the grantor's future assets of that kind that were previously acquired and registered or otherwise made effective against third parties. This approach does not prejudice the prior secured creditor since the grantor would not have been able to acquire these new assets but for the new financing (and the secured creditor could first enter into the security agreement, check the registry, wait for a short period of time and then disburse any funds). Giving priority to acquisition security rights also benefits the grantor by giving it access to diversified sources of secured credit to finance new acquisitions.

44. Second, a security right in money and in negotiable instruments or negotiable documents that is made effective against third parties by a transfer of possession to the secured creditor has priority over a security right that was previously made effective against third parties by registration (see *Secured Transactions Guide*, recs. 101, 102, 108 and 109). This exception is based on the policy of preserving the free negotiability of these types of asset in the market place.

45. Third, where the encumbered asset is the right to payment of funds credited to a bank account or a right to receive the proceeds of a letter of credit, a secured creditor that achieves priority by taking "control" of the encumbered asset has priority over a prior or subsequent security right that is made effective against third



parties by registration (see *Secured Transactions Guide*, Introduction, sect. B, “control” and recs. 103 and 107). As already mentioned (see para. 38 above), securities and payment rights arising under or from financial contracts governed by netting agreements and foreign exchange contracts are excluded from the scope of the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. I, paras. 37-39, and rec. 4, subparas. (c)-(e)). Enacting States will need to enact special priority rules in relation to these types of asset.

46. Fourth, to the extent that the secured transactions law applies to security rights in types of movable asset that are subject to specialized registration systems, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)), the *Secured Transactions Guide* recommends that priority be given to a security right that was made effective against third parties by registration in the specialized registry as against a security right registered in the general registry; and where both security rights are registered in the immovable registry, priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 77 and 78). These rules are designed to preserve the integrity and completeness of the specialized registry record.

47. Fifth, the *Secured Transactions Guide* recommends a similar approach to priority competitions involving competing security rights in attachments to immovable property. More concretely, the *Secured Transactions Guide* recommends that priority should be given to a security right, notice of which was registered in the immovable property registry, over a security right in the attachment, notice of which was registered only in the general security rights registry; and where registration with respect to the competing security rights in the attachment or in the immovable property has been made in the immovable property registry, priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 87 and 88). These rules are designed to preserve the integrity and completeness of the immovable property registry record.

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