

## Summary of the panel on “Regulations on Registration of Security Rights” by Ronald C.C. Cuming

I have set out hereunder in point form the central issues that were addressed in the panel which I chaired at the UNCITRAL Colloquium in 2 March.

### **Opening Remarks**

The use of a publicly accessible registry system to address the problem of third person protection where in rem rights in property are held by one person but possession or control of the property is held by another person has been a common feature of the legal systems of some states for over 150 years. For example, the first public registry for mortgages on tangible movable property was implemented in 1859 in the Province of Canada. Before the advent of modern reform in the late 1960's, each Canadian province had at least four separate registries for different types of secured transactions.

Coincident with the renaissance in secured transactions law that occurred in the Canada and the United States during the latter half of the 20th century was the advent of computer and internet technology that permitted revolutionary changes in registry design and practices resulting in dramatic increases in efficiency and significant reductions in user fees. However, the change from paper based, document filing systems to totally electronic, remote access systems was not immediate. It entailed several evolutionary steps, including a considerable amount of experimentation, undertaken principally by Canadian and US jurisdictions over the last 10-15 year. The end result of these measures are very efficient registry systems used to address the third person protection problem endemic not only to secured transactions but also to other types of transactions such as leases of movable property, liens on movable property and other relationships that involved separation of interest from possession or control of movable property. The basic features of these systems provided the pattern for the International Registry for interest in aircraft established under the widely-ratified Convention on International Interests in Mobile Equipment.

It is inconceivable that a state would currently undertake to modernize its secured transactions law without including in the reform plans the design and implementation of a modern, electronic registry system. The extensive experience gained in some jurisdictions with the design of modern, efficient registry systems makes this the least demanding feature of the undertaking. This has been recognized by international development organizations such as the World Bank, USAID, EBRD, Asian Development Bank and the Organization of American States that have focused heavily on national projects that involve implementation of modern registry systems as an indispensable feature of secured transactions law reform. The results to date have been impressive.

It should have been a surprise to no one that the UNCITRAL Guide on Secured Transactions would have a chapter comprised of 18 Recommendations dealing with the characteristics of a modern registry system that would be central to the secured transactions law based on the other recommendations in the Guide.

Drawing on my extensive experience in the design and implementation in Canadian provinces of some of the most modern, electronic registry systems in the world, as well as the International Registry for aircraft interests, I have concluded that Recommendations 55-73 of the Guide provide only a starting point in the development of a modern system. Much more is required.

There was general consensus on the part of the panel members that Chapter IV of the UNCITRAL Guide on Secured Transactions is inadequate and should be supplemented by a Guide on Secured Transactions Registration and Registries. The factors set out below are either not addressed or are inadequately addressed in Chapter IV.

## **1. The Need for More Detailed Guidance to Jurisdictions**

One panelist noted that, in his experience, the lack of a detailed guide dealing with registration of secured transactions and registry structures has resulted in countries having to invest much more money than is necessary in order to acquire modern, efficient registries that function in the context of a modern secured transactions law. He noted that there are companies offering registry design and implementation services at exorbitant cost to their clients. There is no need for this. A detailed guide would place countries intending to implement new secured transactions system in a position to assess what is involved in a modern registry and to determine what is required and the lowest possible cost.

## **2. Mechanism to Address Concerns about Registries**

It was noted that there is a considerable amount of concern in states that want to implement modern systems that these systems will be vehicle for fraud either on the part of secured creditors who effect unauthorized or unjustified registration or on the part of debtor who seek to discharge or amend registrations relating to valid interests.

It was noted that experience in jurisdictions that have had extensive experience with modern registry systems demonstrates that these fears are, for the most part, unjustified. However, given that perception often is reality to many, it is necessary to include in a registration system mechanisms designed to discourage fraudulent conduct or to permit reversal of the effect of fraudulent conduct.

A Registration Guide would described in details what these measures and describe their effect. This would be a major factor in allaying the fears of legislator and give them encouragement to implement modern systems.

## **3. Electronic Registry Systems**

A member of the panel noted that, while it may be necessary for a country that has very primitive telephony or internet facilities to implement a system under which registration data are transmitted to the registry in hardcopy form, there will be very few countries that fall into this category.

It is very important not to leave the impression that it does not matter whether a country adopts an electronic transmission system or a hardcopy transmission system. The advantages of an electronic system go well beyond efficiency.

The most modern computerized registry systems have been designed to permit only one method of accessing the registry: direct electronic entry and search of registration data. Under this type of system (often referred to as an on-line system), secured creditors (or their agents) enter their own data and transmit it, usually through the internet, directly to the registry data base to effect registrations. Persons seeking information from the registry conduct direct on-line searches.

Frequent users such as financing institutions are given direct access to the database from their own computer systems either through the Internet or through LAN communication systems. Casual users or those who have not made arrangements with the registry for direct access use the computer access facilities located in government agencies or employ private agencies that have arranged for direct access to effect registration or obtain searches on their behalf.

There are some very important advantages associated with an on-line system:

An on-line electronic system is much less costly to operate since registration and searching are done by its users. Such registries are very efficient. They generate more than sufficient income to cover start-up and operational costs and improvements.

Secured creditors have complete control over what is transmitted to the registry, the timing of registration and any amendment or discharge of a registration. Access to the registry for the purposes of effecting and amending registrations is limited to persons who have been issued access codes for which they are fully responsible.

The potential for error, omission or fraudulent conduct on the part of the registry staff in dealing with registration data is eliminated. Registry personnel have no role in determining the correctness of the registration information since it goes directly from the registering party's computer into the registry database.

As a consequence of the lack of involvement of registry staff, the potential for registry liability for human error or improper operation of the system is dramatically reduced.

#### **4. Variable Registration Periods**

A modern, computerized registry that is designed to accommodate users allows the secured party effecting a registration to select the period of registration that matches its relationship with the debtor named in the registration. In most of the jurisdictions that provide this feature, the registration period can be between one and 25 years or infinity (an unspecified duration). Unless the secured party renews the registration before the selected period expires, the registration is automatically expunged.

A statutorily fixed registration period will often be either too short or too long for most transactions. Where the term is too short, secured parties face the risk that an inadvertent failure to effect a timely renewal will result in a loss of priority. Where the term is too long, the registry records become cluttered with stale registrations that no longer reflect a debtor-creditor relationship between the parties. A fixed period limits the capacity of the parties to rely on a single registration to support a long-term creditor debtor relationship that may involve several separate agreements extending over a long period of time.

A system that gives to the secured creditor the power to select the period of registration is often associated with the fear that some secured creditors will be tempted to select inappropriately long registration periods. However, this can be addressed by setting registration fees proportional to the time of registration and by placing the secured creditor under a legal obligation to discharge any registration that does not represent an existing security agreement. This is backed up by a simple procedure under which the person named as debtor in the registration can compel discharge of the registration by the former secured party.

#### **5. Collateral Identifier as Search Criterion (Serial number registration)**

A registry system must employ protocols for indexing and retrieving registration data. A protocol specifies the item or items of information under which a registration is achieved and retrieved. This is often referred to as publication-search criterion (ia). The criterion (ia) for registration is the same criteria for searching.

It was noted that a system that requires the use of a specific collateral identifier in registrations relating to collateral that can be specifically identified dramatically enhances the value of the registry as a method through which third persons are protected. This is particularly important in systems that provide for registration of security interests in high-value consumer goods for which there are significant resale markets. This will be the case in most developing countries where markets for used consumer goods are very active.

As a practical matter, many types of collateral cannot be described in a registration other than by a generic description. Consequently, it is not feasible to require collateral-identifiers as the registration-search criteria for registrations of these security interests. The debtor-identifier enables a single search to capture a registration relating to a security interest on generically described categories of property.

When it can be used, a specific collateral identifier will be the best registration-search criterion. A property identifier is the most efficient registration-search criterion for an electronic registry system. Not only does it avoid the problems associated with identification and recording the correct name of the debtor, but in addition it addresses a weakness that is endemic to any registry system that is based solely on the debtor-identifier as the registration-search criterion.

### <Scenario>

Debtor enters in to a security agreement providing to Bank a security interest in a specific motor vehicle. Bank effects a registration using Debtor's name as the registration criterion.

In violation of the agreement, Debtor sells the vehicle to Buyer 1.

Buyer 1 then offers the equipment for sale to Buyer 2. Buyer 2 is unaware of the identity or existence of either Debtor or Bank. However, before purchasing the vehicle, Buyer 2 searches the registry using Buyer 1's identifier as the search criterion. The search will not reveal the registration of Bank's security interest since the only way it can be accessed is by conducting a search based on Debtor's identifier the search criterion.

An effective solution that protects both Bank and Buyer 2 is to require Bank to include in the registration information a specific collateral-identifier for the vehicle (e.g., its serial number or vehicle identification number) as a supplementary registration-search criterion. When the system records security interests by reference to specific collateral identifiers, Buyer 2 will discover the charge by using that collateral-identifier.