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# Secured Transactions

In this paper I describe the work that is currently under way, within the Network of Excellence charged with creating a draft Common Frame of Reference, to draft rules on security over moveable assets. After a brief introduction, I deal with two broad questions: (1) the general aims and scope of the scheme for security interests in the traditional sense (such as possessory and non-possessory pledges or mortgages) and (2) registration and other forms of ‘perfection’ (i.e., ensuring that the security interest will be as fully effective as is possible under the applicable law of insolvency). Professor Veneziano’s paper<sup>\*1</sup> deals with the enforcement of security interests and the very controversial question of whether transactions that are not traditionally classified as security transactions but that serve the same economic function (such as retention-of-title clauses and finance leases) should be brought within the scheme.

## 1. Introduction

The field of security over moveable property is one in which the laws of the various Member States are so different that the pan-European picture is one of complete disarray. There are wide variations in the extent to which it is possible to create security interests over moveable property: whereas some legal systems allow security to be taken over almost any form of business asset, others are much more restrictive, particularly with respect to non-possessory security over goods. Moreover, there are major differences among both the practical requirements (for example, whether security interests must be registered if they are to be fully effective) and the concepts involved (for example, whether registration is necessary in order for any proprietary right over the moveable to come into existence or whether a failure to register merely means that the security right may not be effective in certain cases, such as that of the debtor’s insolvency). This creates two problems, one a practical one and the other a legal one.

The practical problem is that it may be difficult for a business that is accustomed to employing secured credit to operate in its accustomed way in another jurisdiction, if that jurisdiction does not recognise the relevant type of security right or does not recognise it over the kind of asset available. Indeed, it is strongly arguable that there is a problem here for many Member States themselves. The lack of a comprehensive and efficient system of security over moveable property may mean that credit is less readily available in that jurisdiction, or at least that it will cost more, and this is likely to hinder economic development.

The legal problem arises if assets are moved from one Member State to another. A security interest created over moveable assets in the first Member State may not be recognised by the law of the second Member State. In commonly accepted conflicts of laws practice, the creation of the security right is governed by the law of the *situs* at the relevant time. If the second Member State’s domestic law recognises a similar kind of security right, it will probably treat the asset as if it were subject to that type of right created in the first state. But if the second state’s law simply doesn’t recognise that kind of right (for example, it does not recognise non-possessory security rights over goods), it may not be able to translate the right into its own terms and it

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<sup>1</sup> See pp. 89–95.

may simply ignore it. It is strongly arguable that this is incompatible with the freedom of movement of goods guaranteed by the European Treaty.<sup>\*2</sup>

Even if the relevant kind of security right over the assets is recognised in the second Member State, it may be treated as less than fully effective (for example, not effective in the security provider's insolvency) unless it is registered in the second state. This may not be incompatible with the freedoms under treaty, in that requiring registration in the second Member State may be justifiable in order to protect third parties who might buy the asset or take further security over it without having a way of finding out about previous encumbrances. However again practical problems are created for the secured creditor.

There is therefore a strong case for European legislation. This might take the form of harmonisation measures, requiring Member States to recognise security rights created in other Member States (and thus probably to harmonise the kinds of security right that can be created in the different Member States). Alternatively, it may be possible to circumvent the differences in the national laws by creating a form of security right that would have to be recognised and enforced by the laws of all Member States — the so-called European security interest. This would be, in effect, a form of optional instrument but one that allows the parties to create proprietary interests that are not necessarily recognised by their domestic laws.<sup>\*3</sup>

There has been a limited amount of harmonisation already. The Financial Collateral Directive<sup>\*4</sup> requires Member States to recognise security rights (and also functionally equivalent title-transfer arrangements) taken over investment securities, bank accounts, and similar “financial collateral” where both parties are public authorities, central banks, or financial institutions<sup>\*5</sup> and the secured party has “possession or control” over the collateral.<sup>\*6</sup> Formalities such as registration may not be required<sup>\*7</sup>; certain types of enforcement procedures such as the right to appropriate the collateral in the event of default, if provided for in the security agreement, must be permitted<sup>\*8</sup>; and a wide range of rules that might affect the security right in the event of the debtor's insolvency must be dis-applied.<sup>\*9</sup>

However, with other types of moveable collateral, such as goods, receivables, or intellectual property rights, the laws of the Member States remain widely disparate. When the European Commission enquired about barriers to trade within the internal market that are caused by divergences between the laws of the Member States, respondents frequently mentioned differences in the law of security.<sup>\*10</sup> This seems a likely target for future European legislation.

So it is very good news that within the Study Group on a European Civil Code there is a team working on security over moveable property. The team is led by Professor Ulrich Drobnig, former director of the Max Planck Institute for Comparative and International Private Law. It is hoped that the results of their work will form part of the revised DCFR to be submitted to the European Commission by the end of 2008. With Professor Veneziano, I am a member of the group of advisers to the team, and it is largely my ideas for the DCFR book on security over moveable property which I will be discussing. Naturally, what I say is only my personal view, not that of the team or of the Co-ordinating Committee of the Study Group.

At the same time, a working group within UNCITRAL has been busy with the Legislative Guide on Secured Transactions. This is now in almost finished form.<sup>\*11</sup> It contains a great deal of valuable information and discussion, even if in producing model rules for Europe we may not want to follow it to the letter.

The team and the advisers have many other models to look at also. There are the various laws of the Member States, some of which are highly developed. There is the European Bank for Reconstruction and Development Model Law on Secured Transactions. There is article 9 of the US Uniform Commercial Code, now in its ‘Revised’ form. There are the many Canadian Personal Property Security Acts<sup>\*12</sup> (PPSAs) and the variant

<sup>2</sup> See W.-H. Roth. Secured Credit and the Internal Market: The Fundamental Freedoms and the EU's Mandate for Legislation. – H. Eidenmüller, E.-M. Kieninger (eds.). *The Future of Secured Credit in Europe*. – European Company and Financial Law Review, Special Volume 2, 2008, p. 1; J. Rutgers. Secured Credit and the Internal Market: The Fundamental Freedoms and the EU's Mandate for Legislation. *Op. cit.* p. 76.

<sup>3</sup> See H. Beale. The Future of Secured Credit in Europe: concluding remarks. – H. Eidenmüller, E.-M. Kieninger (eds.). *The Future of Secured Credit in Europe*. – European Company and Financial Law Review, Special Volume 2, 2008, p. 376, 379–381.

<sup>4</sup> Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements. – OJ L 168, 27.06.2002, pp. 43–50.

<sup>5</sup> Article 1 (2). The Directive applies also where one party is not within those groups provided it is a non-natural person; but article 1 (3) allows Member States to exclude such cases from its operation. In the UK, the implementing legislation applies the same rule where both parties are non-natural persons: Financial Collateral Arrangements (No. 2) Regulations 2003, SI 2003/3226.

<sup>6</sup> See article 2.

<sup>7</sup> Article 3.

<sup>8</sup> Article 4.

<sup>9</sup> Article 8.

<sup>10</sup> See Action Plan on A More Coherent European Contract Law, COM(2003) 68 final (OJ C 63, 15.03.2003), paragraph 41.

<sup>11</sup> I have used the version of 16 March 2007, A/CN.9/631.

<sup>12</sup> E.g., Ontario Personal Property Security Act 1967 and (representing a more modern version) Saskatchewan Personal Property Security Act 1993.

of those acts adopted in New Zealand.\*<sup>13</sup> Lastly, there are consultation papers and a report issued by the Law Commission for England and Wales.\*<sup>14</sup> The Law Commission recommended extensive reforms, though these have not been implemented by the national government.

## 2. General aims and scope

The general aims of the scheme can be set forth quite concisely:

1. The scheme for security rights should be flexible and simple, and taking of effective security rights should be quick and inexpensive.
2. There should be effective means of enforcing the security rights. This obviously benefits secured creditors but also, in the same way as other aims of the system, will benefit debtors also: the more effective the security rights are, the lower will be the costs of enforcement and therefore the cost of credit.
3. There should be adequate warning to other potential secured parties, to unsecured creditors, and to persons who may wish to buy or lease the debtor's property when it is or may be subject to a security right.
4. The scheme may need to provide some protection for the debtor, particularly when security is taken over property that is not used by the debtor for business purposes (i.e., the debtor is acting as a consumer). It may also need to protect some classes of creditor, such as employees who have not been paid their wages.
5. There may need to be safeguards against fraud, for example, to prevent fraudulent claims that a security right was created in favour of a particular creditor at some time in the past.

These objectives are stated here in my own words, but they seem to be fully compatible with the 'Key Objectives' listed in the UNCITRAL guide.\*<sup>15</sup>

Let me explore some of these points in a little more detail.

### 2.1. Flexibility as to the secured obligations

The scheme should be flexible in three ways. First, there should be flexibility as to the obligations secured. It should be possible to take security over moveable property in order to secure any kind of obligation. Most secured obligations will be monetary — obligations to repay money lent or to pay for goods or services received — but it should be possible to secure any form of obligation. It should be possible to secure not only the debtor's current obligations but also obligations not yet incurred — future advances under fluctuating accounts or loans to be made in the future — without the need for a fresh security agreement. It should be possible to secure all of the obligations a debtor may have to the creditor.

Thus the draft scheme\*<sup>16</sup> provides as follows in article 2:104, 'Secured Obligation':

- (1) The secured obligation
  - (i) may be present or future; conditional or unconditional; and specific or fluctuating;
  - (ii) may also comprise all obligations of the debtor [or a third party] towards the creditor;
  - (iii) may be for money or any other performance which has a monetary value.
- (2) The security right covers, up to a maximum amount, if any, apart from the principal, also the debtor's ancillary obligations towards the creditor, especially:
  - (a) contractual and default interest;
  - (b) damages, a penalty or an agreed payment for non-performance by the debtor of the secured obligation;
  - (c) reasonable costs of extra-judicial recovery of those items;
  - (d) and the reasonable cost for legal proceedings and enforcement proceedings against the debtor and the security provider, if a person other than the debtor.

<sup>13</sup> Personal Property Security Act 1999. There have been a number of subsequent amendments.

<sup>14</sup> Company Security Interests: a consultative report (LC CP No. 176, 2004); Report on Company Security Interests (LC No. 296, 2005).

<sup>15</sup> UNCITRAL Guide, p. 3.

<sup>16</sup> References are to the draft available in November 2007. Obviously the final version will differ.

## 2.2. Flexibility as to the kinds of collateral that may be taken as security

Secondly, there should be flexibility as to the types of property that may be used as ‘collateral’. It should be possible to take security rights over any form of collateral, at least so far as business debtors are concerned. It should not matter whether the property is tangible or intangible. Thus, it should be possible to take security over goods, over investment securities, over monetary claims — whether in the form of bank accounts or that of receivables — and over intellectual property rights. It should also be possible to take it over ‘documentary intangibles’ such as negotiable instruments.

It should not matter whether the property can be surrendered into the creditors’ possession or whether the debtor needs to retain possession so that he can use the property — in other words, non-possessory security should be possible over any kind of property. This is very different from what is stated in the law of some states.

More contentiously, perhaps, it should be possible to take security over not just property that the debtor owns at the time but (at least for business debtors) property that the debtor may acquire in the future, again without the need for a fresh security agreement or other form of transfer. This should be possible even if the parties cannot identify precisely what the collateral will be, provided that they can give a generic description, such as ‘all the debtor’s future receivables or future inventory’, that will make it possible to say whether or not an asset falls within the security right’s scope. The possibility to cover future property also means that a security right can attach to the proceeds of disposition of the original collateral — whether rightful or wrongful — without any fresh transaction between the parties. Article 1:102 provides that

(3) If the security provider purports to encumber rights in future, generic or untransferable assets, the security right arises only if and when the assets come into existence, are specified or become transferable.

It should be possible to take a ‘global’ security over all of a business’s assets (the so-called ‘enterprise charge’). Not only does this allow the debtor to offer the widest form of collateral to a single creditor, if it so wishes, but it enables assets that are not recognised property rights — for example, the good will of a business — to be used as collateral. Provided that the secured creditor will be able to ‘sell’ the good will should the debtor default, for example, by selling the debtor’s business as a going concern, it may be prepared to lend against the value of the good will, and there is no reason to prevent it being used as a form of collateral.

## 2.3. Flexibility as to the collateral subject of the security right

It follows from the point about ‘global’ security rights that it should be possible to take security over ‘circulating assets’. For many businesses, it will not be feasible to seek the consent of the secured creditors each time the debtor needs to sell an item (for example, when it sells stock-in-trade) or to make a payment to its employees or suppliers. Again, there is no need to prevent the stock-in-trade or the cash funds being used as security. Rather, it is necessary to create the possibility that the security agreement may permit the debtor to dispose of at least some assets free of the security right without obtaining the creditor’s consent on each occasion. To put this in the terms used in the common law world, it should be possible to create a security right that includes a ‘licence to deal’ with the collateral, under what is known in the common law as a ‘floating lien’<sup>\*17</sup> or a ‘floating charge’.<sup>\*18</sup>

## 2.4. Protection of the debtor and of some other creditors

It may be necessary to protect some debtors from giving ‘too much’ security. For example, it is widely thought that consumers may well not understand or appreciate the danger of giving security. If they hand over goods as a possessory pledge, they will probably understand that they may lose the item of property if they do not repay the sum secured. However, they may be less conscious of the risks involved in giving non-possessory security, particularly when it is given over their assets in general, as opposed to specified items, or over assets they do not yet own. Thus, many systems require that, for ‘consumers’, non-possessory security may be taken only if each item is listed in a written document signed by the consumer and that attempts to take security rights over the consumer’s future property shall be ineffective.<sup>\*19</sup>

<sup>17</sup> Cf. UCC § 9-205, Official Comment 2.

<sup>18</sup> This is the term used in English (and Scottish) law.

<sup>19</sup> E.g., UCC § 9-204 (b); Saskatchewan Personal Property Security Act 1993, § 10 (3). In England, a consumer cannot charge after-acquired goods as the result of the various Bills of Sale Acts: see H. Beale, M. Bridge, L. Gullifer, E. Lomnicka. *Law of Personal Property Security*. Oxford University Press (OUP) 2007, Chapter 9.

Normally, the ‘protection’ offered to other creditors is simply the publicity involved when the debtor surrenders the asset to the creditor or proceeds from the requirement that the security be registered. However, many systems provide that some classes of unsecured creditor (for example, unpaid employees or the tax authorities) should be protected in insolvency — or they may provide for a certain amount of protection for unsecured creditors in general, by establishing an ‘unsecured creditors fund.’<sup>\*20</sup> This may be achieved by way of special rules about the priority of payment in insolvency, but a similar effect may be achieved by limiting the percentage of the debtor’s assets that may be made subject to a global security right. The project will not address this issue, since it does not deal with insolvency, but the point must be borne in mind.

## 2.5. Simplicity

Simplicity in the law of security rights can take many forms. One lies in the simplicity of any registration requirements; this is discussed below. A second is by having as few different forms of security right as possible — or, to the extent that different forms are needed, as far as possible subjecting them to similar rules. This makes the scheme easier to understand and reduces the number of ‘boundary disputes’. One feature of the scheme found in article 9 of the Uniform Commercial Code (UCC) and the Personal Property Security Acts is that the distinctions among the different types of security right — pledge, mortgage, etc. — are done away with. Rather, there is one form of security interest, which may be ‘perfected’ (made effective in insolvency, etc.) in a number of different ways: by the taking of possession of the collateral (unless it is intangible), via registration, or (for financial collateral and also ‘letter of credit rights’) by the taking of ‘control’.<sup>\*21</sup>

A third form of simplicity overlaps with the aims of speed and cheapness.

## 2.6. Speed and cheapness

The aim of making it easy and cheap to take security rights argues for a scheme that is simple to understand, thus obviating the need for legal advice on an everyday basis. It also means keeping formalities down to a minimum. Thus formal requirements such as signed written documents should be required only where this is seen as essential — for example, to make the parties ‘stop and think’ before they act (the ‘cautionary function’) or to prevent fraud such as pretending that a security interest was created at a date in the past (the ‘evidentiary function’). For example, the UCC does not require a signed writing in order for the business debtor to be bound to provide security. It does, however, prevent the security right coming into existence (‘attaching’) until there is some signed document, as a way of preventing fraud against other creditors.<sup>\*22</sup> English law, by contrast, requires a signed writing only in very limited circumstances.<sup>\*23</sup>

Ease and cheapness also argues for keeping publicity requirements to a minimum. Later it will be argued that registration can be made very cheap, but even so it should not be required unnecessarily. Most systems, for example, do not require registration when a possessory security right is created over goods — the fact that the debtor no longer has the goods in its possession is thought to be sufficient warning to third parties.

We saw earlier that the Financial Collateral Directive already specifies that security over financial collateral does not need to be registered, provided that the secured creditor has possession or control of it — for example, where investment securities are held for the debtor by an intermediary when the intermediary has agreed to hold them to the order of the secured creditor and not to allow the debtor to deal with them. We may note in passing that, in this case, it cannot really be said that ‘possession or control’ itself provides adequate publicity. It will be quite hard for unsecured creditors, for example, to discover whether or not the investment securities are subject to a security. In this case, the reasoning seems to be different: registration would slow down the financial markets and therefore it is dispensed with.

# 3. Registration

It is generally agreed that, where a non-possessory security right is taken over assets other than financial collateral, a warning should be given to other people who may deal with the debtor. If that is not done, it may well be hard to discover whether there is a security interest; and this may discourage financiers from coming forward who cannot find out in other ways whether the debtor has created security over its property. Thus

<sup>20</sup> E.g., the UK’s Enterprise Act 2002, § 252, inserting a new § 176A into Insolvency Act 1986.

<sup>21</sup> See UCC §§ 9-308–9-316. The Canadian Acts do not yet provide for perfection of security rights over financial collateral by taking control.

<sup>22</sup> UCC § 9-203.

<sup>23</sup> When the collateral is an equitable interest, Law of Property Act 1925, § 53 (1) (c). It does not appear that this requirement is aimed at security rights in particular.

there is broad (though not universal) agreement that such non-possessory security rights should have to be registered. Normally the sanctions are threefold. First, a security interest that has not been registered should not be opposable to an execution creditor. Secondly, it should not be effective in the debtor's insolvency. In other words, the property (if not otherwise encumbered) should be available to be sold for the benefit of all creditors. Thirdly, lack of registration will have consequences for the priority of the security right against the rights of other secured creditors and possibly also against those of buyers of the property.<sup>\*24</sup>

The team also assumes that, for security over moveable property, it makes little sense to have local registers in each jurisdiction when the property may end up in a different jurisdiction. It would be much simpler to have a single, computerised register that would cover security rights over property anywhere in the EU.

There may be some exceptions to the requirement to register. For example, the UCC provides that when a receivable is supported by a personal guarantee, a security right over the receivable confers also a right over the 'supporting obligation', and registration of the right over the receivable is enough for both. Likewise, rights over proceeds do not always have to be registered. But registration is otherwise central to most (but not all<sup>\*25</sup>) schemes of non-possessory security rights.

However, a balance has to be struck between the degree of publicity and that of speed and efficiency. Even if modern information technology is harnessed, it may be inefficient to require the secured creditor to include in the register every detail of the security right. First, it might take quite a bit of effort to assemble all of the associated documentation. Second, unless the documentation used is highly standardised, there is a danger that something will be omitted by accident and that the omission will render the security right ineffective for want of proper registration. Therefore, there is strong feeling in favour of requiring only a brief notice. This will not provide all information a third party might want but still will serve as a warning that the property may be encumbered and will provide information about whom to ask or more information — in other words, about who the secured creditor (or his registration agent) is. Thus the register might simply list, for each debtor (say, each registered company or business), any security right that has been created, giving the name and address of the secured creditor and a brief description of the property subject to the security right.

A second question is who should actually perform the registration, and who should be held responsible if an error is made — for example, if some collateral that is in fact subject to the security interest is not listed. A traditional approach is to say that this should be the responsibility of the registry staff. Thus in England a company that creates a charge over its property (or in practice the secured creditor notionally acting on behalf of the company) is obliged to send to the Companies Register a set of 'particulars' of the charge (on a prescribed form), together with the charge documents. The staff are supposed to check the particulars for accuracy before entering them in the register and returning the charge document along with a 'Certificate of Registration'.<sup>\*26</sup> This certificate is conclusive proof that the charge has been duly registered, and therefore the charge will be fully effective, even if in fact some item has been missed out. The secured creditor is fully protected, and it is a nice (and disputed) question whether the registrar might be liable to a subsequent creditor who takes security over an asset of the company that is not listed as being subject to the first charge when in fact the first charge does apply to it.<sup>\*27</sup>

Most people think that such systems not only are very wasteful in terms of the staff needed but place the risk with the wrong person. In effect, the risk is borne by enquirers who are misled by the incorrect information in the register, while the secured creditor who made the mistake is safe. It would be better to have a simple system that allows the secured party to effect a simple registration itself and to bear the risk of any mistake or omission — but to make it so simple that mistakes are unlikely and will have limited effect. For example, if an item of collateral is omitted, the charge should not be effective in relation to that item but should remain effective as regards the collateral that was listed properly.

It is true that such a scheme will not give enquirers so much information as might be provided if fuller particulars, or even the entirety of the charge documentation, has to be included in the register. Enquirers who want more detail will have to ask the debtor or the secured creditor to supply it. In practice, not all searchers will want it — they probably search to be sure that there is no security right over the relevant assets, and, if they find that there is one, they may not be interested in discovering its details, because they will simply not be prepared to lend against a second-ranking security right. Moreover, if they are seriously thinking of taking a second security right over the same asset, they will need to contact the debtor or the secured creditor in any event, in order to discover the amount of the secured debt. (The amount due will fluctuate from time to time and thus is not something whose registration can be required.) It is thought that the extra cost to the few enquirers who will want more information is more than outweighed by the savings in the vast majority of cases in which extra information need not be placed in the register.<sup>\*28</sup>

<sup>24</sup> See for example the Saskatchewan Personal Property Security Act 1993, § 20; UCC § 9-317.

<sup>25</sup> German law is a notable exception to this.

<sup>26</sup> Companies Act 2006, Part 25.

<sup>27</sup> See H. Beale et al. (Note 19), paragraph 12.

<sup>28</sup> In practice, because the registration system will be on-line, there may be nothing to stop a secured creditor including the additional information if it wished to do so, for example so that it will not have to answer so many questions from enquirers.

In most cases, the debtor — who, after all, wants the new credit on offer — will be willing to provide information. The problem is that the new creditor may not trust the debtor to supply full and correct information. It would be better to have the registered creditor's word for the matter — and, under most systems, a creditor who gives the enquirer wrong information, for example, in saying that less is owed by the debtor than is in fact the case — will be prevented from acting inconsistently with what he has said. But the creditor may not be willing to give out information. Following broadly Revised Article 9 of the UCC<sup>\*29</sup>, the draft provides that the debtor can require the creditor to supply information directly to a third party. There will be severe sanctions if the creditor fails to comply with such a request.

It is planned to make this kind of registration both fast and cheap by making the register wholly electronic and allowing the secured party to register online. The secured party can print off a record of the registration should it feel the need for documentary proof. Such a system was introduced in New Zealand in 2000<sup>\*30</sup> and seems to be working very well. It requires minimal upkeep, and, even with its very modest registration fees, the registration system paid for itself after six months. The fees subsequently were reduced to NZ\$3. Searching is also available online and is very inexpensive.

A major question is that of whether registration should be possible only once the security agreement has been made. Obviously, this must be the case if registration is seen as a constitutive element of the non-possessory security. An alternative is the UCC/PPSA system of 'notice-filing'.<sup>\*31</sup> This allows registration in advance, so that in effect the registration is merely a notice that a security interest has been created or that it may be in the future. This is of particular value if it is likely that there will be a string of security agreements between the same two parties. That will often be the case in the North American jurisdictions, because their schemes provide for registration of not only traditional security interests but also such functional equivalents as the supply of goods under retention of title and outright sales of receivables. Thus a single registration can cover a string of such transactions even if each is a separate contract and thus creates a new security interest. The team is also thinking of including at least registration of retention-of-title clauses, and therefore it also favours notice-filing.

A scheme that depends on registration by the secured creditor entrains two further problems. First, the registration may become out of date, typically because the secured loan has been paid and the security agreement has come to an end. Secondly and more seriously, it may have been wrong in the first place. It might be accidentally incorrect — for example, listing the security right as applying to property that is not in fact within its scope — or it might even be deliberately fraudulent. Obviously, merely filing does not give the creditor rights if, in fact, there is no security agreement with the debtor. The filing is likely to be an attempt to harm the debtor's business or reputation by making him appear seriously indebted. What can be done to prevent these problems?

The North American systems deal with 'false filings' in two ways. First, penalties may be imposed on anyone who files without a genuine belief that the information filed is correct. Secondly, for both the case of filings that are wrong from the start and the case in which the filing has simply become out of date, there is a procedure by which the debtor can demand that the registration be removed or corrected. In essence, the registry will remove the filing, or correct it in line with the debtor's demand, unless within a certain amount of time the secured creditor (who will be notified of the debtor's claim) shows good reason that this should not be done — for example, via court proceedings.<sup>\*32</sup>

The team is considering a broadly similar correction procedure. But it also is considering a number of other approaches. The principal one is very simple: to require that the debtor consent to any filing before it is made. The debtor can do this in advance by itself enrolling with the register and stipulating that it consents (in advance) to registration by any or certain named creditors — for example, its normal financiers. Alternatively, the speed of modern communications via the Internet is such that it will nearly always be feasible to get the debtor's electronic signature attached to the creditor's application before the application is sent to the registry. I envisage the online application screen as having a facility for the creditor to enter the contact details of the debtor. Unless the debtor's advance consent has been given already, the system will contact the debtor and it will not actually register the security right until it has received a positive reply from the debtor. This would include a personalised electronic signature of some kind; it seems inevitable that, by the date on which our proposed scheme could actually become law, every business and probably every individual will have some such electronic identifier.

Many legal systems already require or permit registration of security interests over certain types of assets, often ones for which there is also a title register. Thus in the UK there are specialist registers for mortgages over ships, aircraft, and certain types of intellectual property rights. Obviously, thought will have to be given

<sup>29</sup> UCC § 9-210.

<sup>30</sup> Personal Property Security Act 1999.

<sup>31</sup> This is described in outline in H. Beale, M. Bridge et al. (Note 19), paragraphs 21.82 ff.

<sup>32</sup> See, e.g., Saskatchewan Personal Property Security Act 1993, § 50.

to whether it should be necessary to register in both the 'special' register and the general register. In the future, it might well be possible to create electronic links between the two, such that registration in one register automatically places the material involved in the other.<sup>\*33</sup>

## 4. Priority

Having a full registration system for non-possessory security rights also makes it very easy to create a simple scheme addressing the priority between competing rights: it can depend simply on the date of registration. As between a non-possessory and a possessory security right over the same asset, it would depend on whether the possessory right was perfected (by possession being taken) before or after the non-possessory right was registered. Thus the draft scheme provides as follows in its article 4:102, 'Priority: General Rules':

- (1) Subject to exceptions, the priority of a security right towards other security rights and other limited proprietary rights in the same asset is determined according to the order of the relevant time.
- (2) The relevant time is
  - (a) for security rights, the time of registration [...], if any, or the time at which the security right has become effective according to the rules of Chapter 3, whichever is earlier;
  - (b) for other limited proprietary rights, the time of creation.
- (3) Effective security rights have priority over any ineffective security right, even if the latter was created earlier.
- (4) The rank of two or more security rights which are not effective is determined by the time of their creation.

There is likely to be at least one major exception to this 'date of perfection or filing' scheme. This is the case of 'acquisition finance security' or 'purchase money security' — where the security right is only over property whose purchase by the security provider was financed by the credit secured. This will be particularly important if retention-of-title devices (such as the supply of inventory on terms by which the goods remain the property of the supplier until paid for, or finance leases) are included. But that is a matter that will be discussed in Professor Veneziano's paper.

## 5. Conclusions

I hope that I have said enough to show that the team working on proprietary security over moveable property is seeking to devise a scheme that would be much simpler and more flexible than what has been seen in many jurisdictions to date. This could then be used as a model for either harmonising measures or an optional instrument that would allow parties in different countries to create a 'European security instrument' that would be effective in all Member States. This would be a major step toward ensuring that secured credit is readily available throughout the European Union.

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<sup>33</sup> In England and Wales such a scheme is envisaged for mortgages created by companies over their land. See H. Beale et al. (Note 19), paragraph 8.62.