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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP FOR THE PREPARATION OF
UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT:

WORKING GROUP TO CONSIDER THE LEGAL AND TECHNICAL ISSUES
RAISED BY THE ESTABLISHMENT OF AN INTERNATIONAL REGISTER
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REVISED ARTICLES OF AN UNCITRAL DRAFT CONVENTION
ON ASSIGNMENTS IN RECEIVABLES FINANCING

(A/CN.9/WG.II/WP.93):

ANNEX (Registration)

Rome, May 1997

ANNEX

Registration

Meaning and purpose

1. Registration under the draft Convention means the non-mandatory entering into a data base of certain information about the assignment. The purpose of such registration is not to create or evidence property rights, but to protect third parties by putting them on notice about assignments, that have been concluded or will be concluded, and to provide a basis for settling conflicts of priority.

2. With regard to potential assignees, the effect of registration is that they are put on notice as to earlier or

later assignments. The notice gives only enough information for the searcher to be forewarned and thereby enabled to make such further inquiry and take such further action as it deems appropriate under the circumstances. If no transaction is registered, potential lenders may obtain priority by registering (in such a case, however, an earlier assignee, who has not registered, may not be able to obtain payment; for a discussion of the concept of "priority", see remarks 2-4 to draft article 5). If a transaction is registered, they may request more information from their potential borrower or from registered lenders, seek to negotiate with registered lenders a subordination agreement (i.e. an agreement settling priority conflicts), or avoid to provide financing on the basis of the receivables in respect of which an assignment has been registered.

Key features

3. Because of its limited function, and in marked contrast to classic registration, registration under the draft Convention requires the placement on public record of a very limited amount of data, i.e., identification of the assignor and the assignee and a brief non-specific description of the receivables to be covered, which may be existing or future. This means that a single notice can cover a large number of present or future receivables, arising from one or several contracts, as well as a changing body of receivables and a constantly changing amount of secured debt often involved in modern financing ("revolving credit"). In addition, such registration is inexpensive and simple, requires no formalities (such as notarial involvement) and requires no supervision by the registrar, who performs the non-discretionary service of receiving, archiving and disclosing the data submitted for registration for the appropriate fee.

4. Registration of the entire transaction cannot accommodate the needs of modern financing in that it does not permit the registration of a transaction before the actual transaction has taken place and in that it would require multiple registration for successive transactions between the same parties, which would serve no purpose, burden the registry and entail additional cost. In addition, such registration would raise difficult legal issues, such as authentication.

5. Another key feature of registration under the draft Convention is that the registration process, i.e. the submission of data by the registering party to the registry, the receipt of the data by the registry and the handling of the data by the registry so that the data become available to searchers, would need to be computerized.

6. With regard to the submission of data, two systems could be envisaged, the submission in paper and the submission in electronic form. Submission of data in paper form would require that the data be entered into the data base manually by the registry staff, which would increase the risk of error and the potential liability of the registry. A system that provides for direct electronic data entry, which is easily accommodated by existing telecommunication systems,

would eliminate this problem. Either system of data submission could accommodate electronic, remote access, searching.

7. A purely electronic system (electronic data entry and electronic searching) would maximize efficiency and minimize human involvement, thereby permitting speed, availability at all hours, freedom from the risk of data entry error on the part of the registrar (which reduces its potential liability) and reduction in cost of registration. Users could enter data or conduct a search through a simple desktop or even a laptop computer via secure, private communications networks ("Value Added Network" or "VAN"). In order to be able to make the data entered into the registry available to searchers, the registry needs to have software to convert the data entered to the format used by the registry and to archive and index the data.

8. A registration system could be based on an international registry/data base that could be linked to existing national registries. Countries that do not currently have such a registry would not need to establish one; registration could take place directly at the international registry. In countries that do have a registration system compatible with that of the draft Convention, registration could take place through the national registry. Such an approach would require, however, effective coordination between the several registration places, namely that all the data registered locally would be transmitted promptly to the international data base.

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Article 1. Establishment of a registry

At the request of not less than one third of the Contracting States, the depositary shall convene a conference for designating a registry or registries and enacting[, revising or amending] registration regulations for the registration of data about assignments under this Convention.

Remarks

1. In the absence of an international registration system, draft article 1 of the annex provides for a mechanism to trigger the application of the registration provisions of the draft Convention, i.e. the appointment of an organization to act as registry and the preparation of registration regulations by Contracting States (i.e., States in respect of which the draft Convention has entered into force).

2. While the basic principles applying to registration are set out in the text of the draft Convention, the mechanics of the registration process that may need to be amended from time to time to fit changing needs and changing technologies are better dealt with in a separate body of rules, the regulations. Under draft article 1 of the annex, the initial set of regulations would need to be prepared by the Contracting States appointing an organization to act as registry. The Working Group may wish to consider whether the authority to revise or amend the regulations should stay with the Contracting States or be delegated to the registry. Under the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as "the draft Convention on Mobile Equipment"), the Governing Council of UNIDROIT is to determine the location of and manage the international registry envisaged, as well as promulgate from time to time the regulations necessary for the operation of the registry (UNIDROIT 1996, Study LXXII - Doc. 30, draft article 16(2)).

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Article 2. Duties of the registry

(1) The registry receives data registered under this Convention and the regulations and maintains an index by the name of the assignor [and the registration number] in order to be able to make the data available to searchers upon request.

(2) Upon receipt of data, the registry shall assign a registration number and issue and send to the assignor and the assignee a verification statement in accordance with the regulations.

(3) Upon receiving a search request, the registry shall issue a search result in writing listing all data registered with regard to the receivables of a particular person.

(4) Upon expiration of the period of effectiveness of a registration, or receipt of a notice by the assignee or a court order issued under article 5 of the annex to this Convention, the registrar shall remove data registered from the public records of the registry.

Remarks

1. Draft article 2 of the annex describes in general terms the duties of the registry. The verification statement referred to in paragraph (2) is aimed at allowing the assignor and the assignee to verify that the data entered into the registry correspond with the data that they wished to have entered and to correct any errors.

2. The Working Group may wish to consider the additional questions of court jurisdiction and liability. Registration-related disputes would normally involve priority conflicts between competing parties, or occasionally requests to the courts to issue orders binding on the registry. With regard to priority disputes, they could be left to be resolved by courts having jurisdiction with regard to the parties to such disputes. However, in order to avoid that conflicting orders are addressed to the registry, it may be desirable to have only one court with jurisdiction over the registry (e.g., a court in the country where the registry might be located, although if all that is established is a data base, it might be difficult to determine its "location"). Alternatively, the international registry could be exempted from the jurisdiction of any national court and registration-related disputes could be referred to alternative methods of dispute resolution. The draft Convention on Mobile Equipment vests the international registry with the privileges and immunities of an international organization and exempts it from the jurisdiction of national courts, subject to agreement to the contrary between the registry and the host State (UNIDROIT 1996, Study LXXII - Doc. 30, draft article 16(3)).

3. With regard to the liability of the registry, it should be noted that national registration systems similar to that envisaged by the draft Convention have worked well with and without a liability rule. In jurisdictions in which the registry is liable for errors in the operation of the system, there have been very few liability suits. In some of those jurisdictions, a percentage of the registration fee is directed to a fund, the proceeds of which may be used to pay liability claims. Such an approach is considered as increasing the confidence of the users in the system. However, the risk of errors (and, therefore, the cost of insurance) would be significantly reduced in a fully electronic system, in which the only role of the registrar would be to maintain an operational system.

4. The determination of the issues of jurisdiction and liability depend to some extent on whether a governmental or private organization would run the registry. A governmental organization would normally enjoy sovereign immunity, while a private organization would be subject to the jurisdiction of a court and could be made liable more easily.

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Article 3. Registration

(1) Any person may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall include the legal name and address of the assignor and the assignee and a brief description of the assigned receivables.

(2) Registration is effective from the time that the data referred to in paragraph (1) are available to searchers.

(3) Data may be registered before or after an assignment is made.

(4) Data registered may relate to one or more assignments and to receivables not existing at the time of registration.

(5) Any defect, irregularity, omission or error with regard to the legal name of the assignor that results in data registered not being found upon a search based on the legal name of the assignor renders the registration ineffective.

Remarks

1. Following the example of modern national legislation, paragraph (1) limits the information that needs to be entered into the registry to the absolutely necessary for the registration to fulfill its "warning" function (additional identification elements may be provided for in the regulations, e.g., the number given to a company by the company registry or another identification number, the date of birth of a person; "legal name" may be defined in the regulations).

2. The assignor's authorization is not part of the minimum data that need to be registered for the registration to be effective. Authorization is a matter between the parties and does not concern the registry in receiving data. In addition, parties may adequately protect their interests: lenders, by obtaining authorization from the assignor before extending credit; and assignors by demanding that data registered be removed from the public record of the registry (see draft article 5 of the annex; assignors are informed through the verification statement foreseen in draft article 2(2) of the annex). Additional remedies, e.g., for slander of title, may be provided in the draft Convention or left to national law.

3. The Working Group may wish to address the following questions: the effect of a change in the name of the assignor on the effectiveness of registration relating to receivables arising after the change (some statutes provide that the registration remains effective for a certain period of time after the assignee learns of the change of the name and the new name of the assignor); whether an all-encompassing description of the assigned receivables should be sufficient (e.g., "all present and future receivables") or whether a more specific description should be required (e.g., receivables arising in May, or receivables from sales of equipment or from sales to a particular debtor or from x, y, z contracts).

4. An additional question which the Working Group may wish to consider is the effect of a change in the place of business of the assignor with respect to receivables arising after the change. If the assignor's new place of business is in a Contracting State which has not declared that it will not be bound by the registration provisions of the draft Convention, no additional registration may be necessary. However, if the assignor moves to a non-Contracting State, the assignee may need to follow the process prescribed by the law of that State in order to ensure priority (although, under draft article 1(1)(a), the draft Convention is applicable as long as the assignor has its place of business in a Contracting State at the time of assignment, even if subsequently the assignor moves to a non-Contracting State).

5. Normally only assignments with an international element would be entered into the international registry. However, a domestic assignee of domestic receivables should be able to register ("opting into" the priority rules of the draft Convention). In jurisdictions with a registration system, the question might arise whether both local and international registration would be required. Local registration in the jurisdiction in which the assignor is located would sufficiently protect the assignee towards the insolvency administrator. However, for the assignee to ensure priority towards international assignees, international registration would be required. Problems might be overcome if the two registration systems were linked so that data registered locally would be transmitted to the international data base. In such a case, local registration would amount to international registration (see remark 5 to draft article 23 and introductory remark 8 to the registration provisions).

6. Paragraph (2) provides that registration is effective when the data become available to searchers. In a fully electronic system, the data would become searchable upon receipt by the registry. On the other hand, in case of a paper notice where the data would need to be entered into the data base by the registry staff, the registration would become searchable and, therefore, effective only after the entry of the data in the computerized index. In such a case, the registering party could protect itself from the risk of losing its priority by withholding credit until the registration becomes effective.

7. Under paragraph (3), if A registers and receives an assignment subsequently, A will have priority from the time of registration, not the time of assignment. Such pre-registration is aimed at addressing the time-gap between the time of financing and the time of registration, during which uncertainty would prevail as to the rights of an assignee towards third parties.

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Article 4. Duration, continuation and amendment of registration

(1) A registration under this Convention is effective [for a period of five years after registration] [for the period of time specified by the registering party].

(2) A registration may be renewed for successive additional periods if it is requested six months before expiry of the period of its effectiveness for an additional period of [five years] [time specified by the registering party].

(3) A registration may be amended at any time during the period of its effectiveness. The amendment is effective from the time it becomes available to searchers.

Remarks

Limiting the duration of the effectiveness of a registration is intended to ensure that the registration system is not over-burdened with data relating to non-existing rights. Often parties are not prepared to promptly cause the removal of data from the record of the registry, in particular if some cost is involved. Paragraph (1) presents two alternatives, one with a fixed time-limit and another, more flexible, that allows the parties to set the time during which a registration would be effective. In the large majority of cases, a 5-year time period might be sufficient. On the other hand, the ability of the parties to "buy" a longer time period ab initio would lessen the need for registering continuation statements.

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Article 5. Right of the assignor to remove or amend data registered

(1) The assignor may demand in writing that the assignee register a notice removing or amending the data registered. [The assignor shall state explicitly the nature of the action requested and the grounds for its request].

(2) If the assignee fails to comply with such demand within fifteen days of its receipt, the assignor may request a competent court to order that the data registered be removed or amended on the ground that they refer to receivables in which the assignee has no interest or has a different interest.

Remarks

1. Under paragraph (1), the assignor may request from the assignee to cause the removal or amendment of data that are on the public record. If the assignee does not comply with that request, the assignor has to go to court (there is no automatic deregistration). Automatic deregistration would expose the assignee to the risk of losing its priority position, if it does not act to respond to an erroneous or mischievous demand by the assignor. This risk would be even greater in case of a demand made on the eve of insolvency and could affect the cost of credit. On the other hand, in favour of automatic deregistration, it could be argued that placing on the assignee the burden of having to go to court would be more appropriate, since the assignee may register without having to prove authorization by the assignor or that an assignment has taken place.

2. The Working Group may wish specify the court with jurisdiction to issue the order referred to in paragraph (2).

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Article 6. Registry searches

(1) Any person may search the records of the registry and obtain a search result in writing.

(2) A search may be conducted according to the name of the assignor [or the registration number].

[(3) A search result in writing that purports to be issued from the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the data to which the search relates, including:

(a) the date and time of registration; and

(b) the order of registration as indicated in the registration number referred to in the written search result.]

Remarks

1. Paragraph (1) provides for a registry open to the public. In practice, a searching party will be either an actual or potential assignee or a third party acting on behalf of an assignee. In order not to exclude new methods of search, no method of search is specified in paragraph (1) (it is left to be addressed in the regulations). Paragraph (2) identifies two search criteria: the name of the assignor and the registration number (the number given to a company by the registry under draft article 2(2) of the annex). A search result may need to match only one of those criteria.

2. A search based on the name of the assignor may not reveal all prior assignments. For example, A (assignee) registers the assignment of receivables owned by B (assignor) after ensuring that B has not already assigned those receivables to someone else; B then assigns the

same receivables to C, who will be able to discover the existence of A's rights through a search using B's name. However, if C assigns to D, D will not be able to discover A's rights through a search based on C's name. The significance of this problem should not be exaggerated, since no registration system can provide absolute certainty. In the example given above, D will have to find the name of the initial assignor by relying on representations of its immediate assignor.

3. Another problem is the language to be used for the data entered into the international data base to be reasonably retrievable (in particular for the name of the assignor, since this would be the relevant search criterion). The experience gained at the national level indicates that it would be possible for the international registry to operate, at some cost, in more than one language. This would mean that certain languages would need to be identified as official languages of the registry. The Working Group may wish to consider whether the language problem may be addressed by the use of numbers (e.g., by using the registration number assigned by the registry as an alternative search criterion, or by using a number issued by a company registry or other authority to identify an assignor).

4. Paragraph (3), which appears within square brackets for the consideration of the Working Group, is intended to ensure that once a search result appears to be authentic, it should be admissible as prima facie evidence of the data it contains. However, a party may always challenge the authenticity of a search result. The Working Group may wish to consider whether paragraph (3) is necessary, since the admissibility and evidential value of a search result might be left to be freely evaluated by courts.

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