

## Chapter Y

### Proprietary Security Rights in Movable Assets

#### *Section I*

#### *General Rules*

**(Eleventh version, 12 May 2005)**

#### **Article y:101 Definitions**

*For the purposes of this chapter:*

*(a) A security right is a proprietary right in a movable asset that is effective against third parties and entitles the secured party to obtain preferential satisfaction of the secured claim from the encumbered asset;*

*[(b) A possessory security right is a security right that requires possession of the encumbered tangible asset by the secured party or a third person acting on its behalf;*

*(c) A non-possessory security right is a security right*

*(i) that does not require possession of the encumbered tangible asset by the [persons mentioned in the preceding paragraph] [secured party or by a third person acting on its behalf;]*

*(ii) or in an intangible asset];*

*(d) The security provider may be the debtor of the secured obligation or a third person;*

*(e) The secured party may be the creditor of the secured obligation or a third person who may hold the security right in its own name for the creditor;*

*(f) In the contract for proprietary security the security provider undertakes to grant or grants a security right to the secured party or the latter is allowed to retain a right as security;*

*[(g) The secured obligations*

*(i) may be present or future; conditional or unconditional; and specific or fluctuating;*

*(ii) may also comprise all obligations of the debtor;*

*(iii) may be for money or any other performance which has a monetary value.]*

### **Article y:102 Scope of Application**

*(1) This chapter applies to any proprietary right, however named, in movable assets which is based upon an agreement and which*

*(a) is of a type generally recognised as designed to serve as security, such as the pledge;*

*(b) or is either intended by the parties to the agreement to be used as a security right or has this effect under the agreement. Such intention or effect exists, in particular, in the cases of retention of ownership or acquisition leasing. It may also exist in appropriate circumstances in the cases of other proprietary rights such as transfer of ownership or of another right, consignment or trust.*

*(2) The rules of this chapter also apply to security rights in movable assets implied by law in a contractual relationship, when and insofar as this is compatible with the purpose of the law.*

### **Article y:103 Rights in Assets That May be Encumbered**

*(1) Security rights may be created in all transferable rights in movable assets, whether tangible or intangible, present or future and specific or generic. Rights of ownership that may be encumbered include legal and equitable as well as conditional ownership under a retention of ownership.*

*(2) Rights in assets that are not transferable cannot be encumbered. A contractual prohibition of transfer of a claim agreed upon by the security provider is effective as between the secured party and the claim debtor, except if it affects a contractual claim for money.*

*(3) A claim held by the security provider against the secured party may be encumbered by the security provider also in favour of the secured party.*

#### **[Article y:104 Security in an Enterprise**

*The present and future assets of an enterprise may be encumbered  
[ except.../up to a limit of ...per cent] .]*

#### **Article y:105 Coverage of Secured Obligations**

*(1) 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.*

*[(2) Any special rules which apply to security rights in the form of a retention of ownership or of another right for the financed acquisition of assets cover only secured claims arising from the financing of the direct acquisition of such assets.]*

*Section II*

*Creation*

(fourth version 9 May 2005)

Subsection I

Creation Between the Parties

**Article y:211 Form of Contract for Proprietary Security**

*(1) Subject to paragraphs 3 and [4], to be valid the contract for proprietary security must be in writing as well as dated and signed by the security provider by hand or electronic signature.*

*(2) The contract must contain at least*

*(a) the names and addresses of the parties and those of the debtor, if it is a person other than the security provider; and*

*(b) a description of the encumbered asset so as to identify it; and*

*(c) a description of the secured claim so as to identify it or generally circumscribe a plurality of claims indicating a maximum amount, if any;*

*(3) Paragraphs 1 and 2 do not apply*

*(a) to merchants who have continuous dealings with each other, except at the commencement of their relationship and to any amendment of the conditions affecting the security right;*

*(b) to all cases where ownership or a security right is retained according to article y:214.*

*[(4) Reserved are special rules on form for transactions in which persons are involved that require special protection like a consumer.]*

## **Article y:212 Creation of Security Right by Granting**

*(1) A security right is created by the security provider granting the security right to the secured party.*

*(2) A security right cannot be created according to the preceding paragraph, unless the security provider is entitled, by law or contract, to dispose of the right.*

*[(3) A security right in an asset for which the conditions of the preceding paragraph do not apply, can be acquired free of any other encumbrance only, if the conditions of Book VIII [on transfer of ownership] articles 3:101 and 3:102 are fulfilled.*

*(4) If the conditions of Book VIII article 3:101 are fulfilled but not the conditions of article 3:102, a security right is acquired which is subject to the existing and continuing limited proprietary right.]*