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2016 – Study Question (General)

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Security interests over intellectual property

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I. Current law and practice

You are reminded that **IPRs** refers to patents, trademarks and registered designs only.
If more than one type of security interest is available under your Group's current law, please answer the questions for each type of security interest, as applicable.

Availability of security rights

1) Does your Group's current law provide for the possibility of creating security interests over IPRs?

yes

Please explain:

Security interests over Intellectual Property Rights (the "**IPR**") is regulated by the Movable Guarantees Law No. 115 of 2015 (the "**Movable Guarantees Law**"). It shall be noted that the said Law was issued on November 14, 2015 and will come into force three months following its publication in the Official Gazette, i.e. on February 16, 2016 and its Executive Regulations will be issued during the following three months, by no later than May 15, 2016.

According to Article 1 of the Movable Guarantees Law, movable assets are defined as the existing or future tangible movable assets and the existing intangible assets owned by the debtor, the security provider or the creditor, and provided as a guarantee for an obligation, debt, loan or facility. In this respect, movable assets include, among other things, all types of intellectual property rights (e.g. patents, trademarks and other IPR).

Also, pursuant to Article 2 of the said Law, the provisions of the Movable Guarantees Law shall be applicable on the rights guaranteed by a movable asset in the possession of the debtor or the security provider, including the rights resulting from the usage or the authorization to use the IPR. It is worth noting that the security interests shall be effected by virtue of a guarantee contract entered into between the parties and after being registered in the special registry kept by the Egyptian Financial

Supervisory Authority (the "EFSA").

Further, the Movable Guarantees Law provides certain conditions for the creation of security interests over IPR, which includes, the requirement to execute a guarantee contract between the parties - whether in written or electronic form and whether it is an official or non-official document -, the right of the security provider to create security interests over the assets and the obligation of the creditor to provide the agreed loan or facility.

If yes, please answer Questions 2) to 14) inclusive before proceeding to question 15) and following.
If no, please proceed directly to question 15).

- 2) Are the available types of security interests defined by specific provisions relating to security interests over IPRs or by general commercial law principles (e.g. specific provisions in your Group's patent legislation rather than general commercial provisions that are applicable to tangible personal property as well as to patents)?

yes

Please explain:

The available types of security interests over IPRs are defined specifically by the Movable Guarantees Law, which regulates the registration, rules and execution/enforcement of the guarantees on movable assets. Before the issuance of the Movable Guarantees Law, the IPR were subject to the possessory lien.

- 3) Under your Group's current law, what types of security interests are available for IPRs?
In addressing the questions in sub-paragraphs a) to c) below, please specify briefly the main characteristics and differences of the available types of security interests.

- a) Does your law provide for security interests which are characterized by the full assignment of the underlying IPR to the security taker? For example, an assignment of the IPR for the purpose of security or authorization to dispose/use fully in the event of default.

no

Please explain:

The main characteristic of the Movable Guarantees Law is that it permits the debtor to get credit by presenting current or future movable assets as guarantee, **without compromising their possession**. In other words, as a general rule, the debtor has the legal right to retain possession and use the IPR assets subject to the guarantee for the entire duration of the said guarantee. However, the security taker shall have a full assignment of the underlying IPR in case the debtor defaults by selling the guaranteed movable assets. It should be noted that the enforcement of the guarantee by the creditor/security taker is subject to certain conditions and formalities (as discussed hereunder).

- b) Does your law provide for security interests that authorize the security taker to realize the security interest only in the event of default? For example, a pledge over an IPR that authorizes the pledgee to liquidate the pledged IPR in the event of default (but not to otherwise dispose of the IPR).

yes

Please explain:

Please refer to our answer in 3 (a) above. The principle set out by the Movable Guarantees Law is that the IPR subject of the guarantee shall remain in the possession of the debtor for the entire duration of the guarantee. The creditor has the right to enforce the guarantee in case the debtor defaults.

- c) Does your law provide for security interests that authorize the security taker to use the underlying IPR? For example, *usus fructus* rights that authorize the creditor to use and/or realize proceeds from the exercise of the IPR only during the term of encumbrance. Is any right to use the encumbered IPR conditional upon default of the security provider?

no

Please explain:

The creditor does not have any right of use or any *usus fructus* rights to realize proceed, unless the debtor defaults.

- 4) If more than one type of security interest is available under your Group's current law, what types are commonly used for IPRs? Please also specify if certain types of security interests are exclusively used for certain types of IPRs in your country. For example, patents may commonly be encumbered with pledges, while trademarks may commonly be assigned to the security taker.

Please note that there is no certain types of security interests that are exclusively used for certain types of IPRs, since the Law is not yet applied. However, as the IPRs are considered movable assets, the pledge used on *fonds de commerce* is the type commonly used in such case. This type of pledge is regulated by the Law No. 11 of 1940 and include all movable assets related to the *fonds de commerce* including the commercial trademark.

Also, the commercial mortgage may be used on IPRs. It is regulated by the Commercial Law No. 17 of 1999 and is generally used on movables assets to guarantee a commercial debt. It is worth noting that in the commercial mortgage, the guaranteed movable asset shall be in the possession of the creditor for the entire duration of the guarantee.

Effects of security interests

- 5) Is the security provider restricted in their right to use their IPR after providing a security interest over that IPR? For example, in respect of their right to grant licenses, or the right to use the protected subject matter. Please answer for each available type of security interest.

no

Please explain:

Creating a security interest over IPR does not restrict the debtor or the security provider from their right to use their IPR. As previously mentioned, the main characteristic of the Movable Guarantees Law is that it allows the debtor or the security provider to make use of the IPRs that may be needed for his/her economic activities in an effective and efficient manner. Further, Article 17 of the said Law provides that the debtor may sell or rent the movable asset, subject of the guarantee, along with the guaranteed right, in which case the initial debtor shall remain responsible vis a vis the purchaser or the lessee in fulfilling his/her obligations in accordance with the guarantee contract.

- 6) May encumbered IPRs be assigned to third parties by the security provider?

no

Please explain:

Please note that the Movable Guarantees Law is silent in this regard. Regarding the assignment of the encumbered IPRs, Article 12 of the said Law only authorizes the creditor to assign the registered guaranteed right to third parties. Such assignment shall not be effective with regards to the debtor or the security provider unless the creditor notifies both, the debtor and the security provider, in

accordance with the guarantee contract.

As for the assignment of the encumbered IPRs by the security provider or the debtor, as previously mentioned above, the Law has authorized the debtor to sell or rent the IPRs along with the encumbrances to third parties, provided the fulfilment of certain conditions.

7) If yes:

a) under what conditions may an IPR be assigned (e.g. obligation to obtain consent from the security taker, public notification or registration)?

As previously mentioned, the debtor can assign the encumbered IPRs to third parties by selling or renting them, under the following conditions:

- i) The initial debtor remains responsible vis a vis the purchaser or the lessee in performing and fulfilling his/her obligation in accordance with the guarantee contract; and
- ii) The right of the creditors whose rights are registered with the EFSA to track the encumbered IPRs and to recover their rights from the debtors, the purchaser or the lessee.

b) does the IPR remain encumbered with the original security interest for the benefit of the security taker?

yes

Please explain:

According to Article 17 of the Movable Guarantees Law, the debtor can only sell or rent the IPRs along with its encumbrances.

8) What are the rights of the security taker before default (e.g. entitlement to damages, injunctions against infringers, or license fees)?

According to Article 22 of the Movable Guarantees Law, the security taker is entitled to sell the movable assets in case the debtor defaults. However, the said Article differentiates between two hypothesis:

1. In case the guarantee contracts states explicitly the creditor's right to sell the movables assets if the debtor defaults: the Law requires a notice of five days, starting on the day on which the debt is due, to be addressed to the debtor before the creditor is allowed to enforce the guarantee by selling the movable assets. Also, the creditor is required to notify the other creditors whose guaranteed rights over the same IPR asset are registered.

2. In case the guarantee contract does not provide the creditor's right to sell the movable assets if the debtor defaults: In addition to the five days notice as previously mentioned, the Law requires that the creditor, at the end of the said five days, requests the issuance of a court order from the competent court in order to sell the movable assets. Also, the creditor shall only enforce the order issued by the judge to sell the assets by notifying the debtor and the other creditors with said order and after the lapse of five days from the date of such notification. The said notification must include the place, date and time for selling the assets. It should be noted that the place and date for selling the assets shall be determined by the judge.

That being said, it should be noted that the Movable Guarantees Law permits the sale of the movable assets without abiding to the above procedures in case there are no other creditors holding

encumbrances rights on the assets and upon the debtor's consent, provided that the creditor maintains the assets as if they were his own assets.

- 9) Who of the security provider or the security taker is responsible for maintenance and defence of the IPR provided as collateral?

According to Article 8 of the Movable Guarantees Law, the guarantee contract may include the commercial terms set between the debtor and the creditor regarding the debtor's responsibility for maintaining the movable assets and their proper use of same. Also, Article 10 of the same Law provides that the asset is entrusted, for the entire period of the guarantee, to the debtor who must undertake the necessary efforts of a reasonable person to protect and maintain the asset.

- 10) What are the legal consequences if the underlying IPR expires or is revoked? For example, the security right lapses simultaneously; the creditor has a compensation claim against the security provider.

The Law is silent in this regard. However, the general provisions of the Civil Law will apply. Accordingly, the principle of good faith in dealings should apply with no intention to harm the creditor.

- 11) Can any of these effects of security interests over IPRs before default be modified by contractual provisions between the parties? If so, which effects?

no

Please explain:

The Law is silent in this regard.

Applicable law

- 12) Does your Group's current law provide for conflicts of laws as to the availability and effect of security interests over IPR portfolios containing foreign as well as national IPRs?

no

Please explain:

The Law is silent in this regard. However, as long as the IPR is registered in Egypt, whether owned by a foreign entity or not, it shall be subject to the Movable Guarantees Law.

- 13) Which national law applies as to creation, perfection and effect of security interests over foreign IPRs? For example, where a US patent is provided as collateral in respect of a financial transaction in Europe.

In light of the fact that the Movable Guarantees Law is silent in this regard and did not differentiate between a national or foreign IPR, we believe that the provisions of the said law will be applicable to foreign IPR, as long as they are registered in Egypt.

- 14) Can a choice of law provision in a security interest agreement over IPRs overrule the applicable law as to availability and effect?

no

Please explain:

The Movable Guarantees Law is silent in this regard. However, we believe that the choice of foreign law will not apply as long as the security interest (guarantee contract) is registered in Egypt with the EFSA.

Additional question

15) Regardless of your Group's current law relating to security interests over IPRs, is it possible to create a solely contractual regime for security interests over IPRs (i.e. beside the types of security interests defined by law) that is enforceable between the contracting parties?

yes

Please explain:

According to the Egyptian Civil Law, the contract is the law of the contracting parties as long as it does not violate public order or public morals in Egypt.

II. Policy considerations and proposals for improvements of the current law

16) Is your Group's current law regarding security interests over IPRs sufficient to provide certainty and predictability to the parties?

yes

Please explain:

We believe that the Movable Guarantees Law is sufficient to provide certainty to the parties especially that the said Law is based on the UNICTRAL Model Law regarding the security rights over IPRs. In addition, it is premature to decide on such question since the Executive Regulations of the Movable Guarantees Law is not yet issued and did not come into force.

17) Under your Group's current law, is there an appropriate balance between the rights between security takers and security providers? For example:

a) are there situations in which the rights of security takers should be limited or extended (e.g. if assignment of an encumbered IPR is possible by the security provider without involvement of the security taker)?

no

Please explain:

N/A

b) are there situations in which the rights of security providers should be limited or extended (e.g. if the security taker is authorized to dispose of existing licenses without involvement of the security provider)?

no

Please explain:

N/A

18) Are there any aspects of these laws that could be improved? Are there any other changes to your Group's current law that would promote transactions involving IPRs as collateral? If yes, please briefly explain.

no

Please explain:

N/A

III. Proposals for harmonisation

19) Does your Group consider that harmonization of laws concerning security interests over IPRs is desirable?

yes

If yes, please respond to the following questions without regard to your Group's current law. Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

Security system regarding IPRs

20) Should there be specific provisions regulating security interests over IPRs (i.e. separate from security interests over tangible property) generally?

yes

Please explain:

Because IPRs cover intangible rights such as copyright.

21) If no, should there be general commercial law principles that also apply to IPRs? If not, why?

no

Please explain:

N/A

22) What types of security interests should be available as minimum standard in all countries?

N/A

23) Should the law be applied differently depending on the type of IPR? For example, should patents be encumbered exclusively with pledges, should trademarks be assigned to the security taker for the purpose of security?

no

Please explain:

N/A

Effect of security interests

24) Should the security provider be restricted in their right to use their IPR after providing a security interest over that IPR (e.g. in respect of their right to grant licenses, or to use the protected subject matter)? If so, how?

no

Please explain:

See 3 (a) above.

25) Should the security provider be able to assign encumbered IPRs to third parties?

yes

Please explain:

See 5 above.

26) What should the rights of the security taker be before default (e.g. entitlement to damages, injunctions against infringers, or license fees)?

N/A

27) Should the security provider or the security taker be responsible for maintenance and defence of the IPR provided as collateral?

yes

Please explain:

The security provider shall be responsible for maintenance and defence of the IPR as a collateral.

28) What should the legal consequences be if the underlying IPR expires or is revoked (e.g. the security right lapses simultaneously; creditor gains a compensation claim against security provider)?

Creditor will be entitled to claim compensation.

29) Should it be possible to modify these effects of security interests over IPRs before default by contractual provisions?

yes

Please explain:

By including same in the contract.

Applicable law

30) Which law should apply as to the availability and the effects of security interests where a foreign IPR is provided as collateral? Why?

The law under which the security interest is registered.

31) Should a choice of law provision in a security interest agreement over IPRs overrule the applicable law? If yes, why?

no

Please explain:

See 12 and 14 above.

Additional considerations and proposals

32) To the extent not already stated above, please propose any other standards your Group considers would be appropriate to harmonize laws relating to security interests over IPRs.

None

33) Please comment on any additional issues concerning any aspect of security interests over IPRs you consider relevant to this Study Question.

It is premature to decide on the harmonization question since the Executive Regulations of the Movable Guarantees Law did not yet come into force. Also, the Movable Guarantees Law takes into account the best international practical as it is based on the UNICTRAL Model Law and after consulting WIPO. However, as a general principle, it is preferable to consider the harmonization of security interest laws since we believe that such harmonization will largely stimulate economic growth.

Please indicate which industry sector views are included in part “**III. Proposals for harmonization**” of this form:

All IPR sectors, industrial property, copyright and plant varieties.

Summary

Security interests over Intellectual Property Rights (the “**IPR**”) are regulated in Egypt by the Movable Guarantees Law No. 115 of 2015 (the “**Movable Guarantees Law**”). It shall be noted that the said Law was issued on November 14, 2015 and will come into force three months following its publication in the Official Gazette, i.e. on February 16, 2016 and its Executive Regulations will be issued during the following three months, by no later than May 15, 2016. According to the Movable Guarantees Law, movable assets are defined as the existing or future tangible movable assets and the existing intangible assets owned by the debtor, the security provider or the creditor, and provided as a guarantee for an obligation, debt, loan or facility. In this respect, movable assets include, among other things, all types of intellectual property rights.

The main characteristic of the Movable Guarantees Law is that it permits the debtor to obtain credit by presenting current or future movable assets as guarantee, **without compromising their possession**. In other words, the debtor has the legal right to retain possession and use the IPR assets subject to the guarantee for the entire duration of the said guarantee.

The said Law provides that the debtor may sell or rent the movable asset, subject of the guarantee, along with the guaranteed right, in which case the initial debtor shall remain responsible vis a vis the purchaser or the lessee in fulfilling his/her obligations in accordance with the guarantee contract.