

Endnotes

A. INDIA

1. In India, as in many unreformed common law derivative systems, there is no single comprehensive legal framework regulating secured transactions. The legal regime is instead built on a body of common law rules and principles derived from case law intersecting with a diversity of specific statutes enacted in an ad hoc fashion over many years. The overall result is considerable fragmentation and uncertainty in the sources of the applicable law(s).

2. Some forms of security are regulated wholly by general principles of contract and property law, mainly of common law origin, others by a relatively detailed and comprehensive statutory regime, still others by a mix of common law cases and specific statutory sources.

3. Where legislative intervention has occurred, the application of the relevant act typically depends on a complex combination of one or more of the following factors:

- (i) the category of collateral (e.g. immovables and intangibles in the form of actionable claims are subject to the Transfer of Property Act, 1882; immovables in their registration aspects are governed by the Registration Act; negotiable instruments are subject to the Negotiable Instruments Act 1872; intellectual property rights are subject to the Copyright Act 1957, the Patent Act 1970, the Design Act 1911 and the Trade and Merchandise Act 1958; rights under insurance policies are under the Insurance Act 1938);
- (ii) the formal nature of the security device (e.g. a pledge of tangible movables is subject to the Contract Act 1872)
- (iii) The status of the debtor (e.g. security over immovables and most forms of movables given by a limited company is regulated by Chapter 5 of the Companies Act 1956; debtors who are Hindu, Muslim Buddhist or members of other recognised special status groups are subject to special regulation under the Transfer of Property Act as regards the enforcement aspects of security).

4. None of the acts, which address secured transactions, purport to do so comprehensively even in respect of the limited categories of transactions, which they cover. Some are concerned only with registration and limited aspects of the priority of the relevant security interest (e.g. Registration Act, Chapter V of the Companies Act). Others are concerned only with the constitutive and enforcement aspects of the particular security device (e.g. Contracts Act). The Transfer of Property Act 1882 is the most comprehensive, covering creation, registration and priority but primarily only in respect of security in immovables. [Prof. C. Walsh memorandum, India, at No. 27.1].

See also, Civil Procedure Code 1908.

B. PAKISTAN

5. The principal statutes on security interests in movable property include:

- (i) Contract Act, 1872: this law applies to all contracts. Specifically, it deals with liens, bailments, pledges, indemnities and guarantees.
- (ii) Sale of Goods Act, 1930: this law deals with the voluntary transfer of ownership in movable property. It includes, inter alia, absolute and conditional sales, sale by installments and hire-purchase contracts in addition to detailed provisions on the rights of unpaid sellers. This law also creates statutory security interests such as the unpaid seller's lien and right of stoppage of goods in transit.
- (iii) Transfer of Property Act, 1882: this law defines and amends a selective area relating to transfer of property (primarily of the immovable nature) which regulates the transactions of voluntary transfer of property between different persons, for example, sale, mortgage and lease. This law applies to immovable property and only certain general principles are applied to movable property. There also exist certain territorial limits in the application of the detailed provisions of this law. The provincial governments were given the authority to extend the application of this law in whole or in part of the respective province, but which did not completely exercise the said authority. Except for the Province of Sindh where the detailed provisions of this law have application, the courts of law apply the general principles of this law to the other provinces. Within the above limits, this law provides the conceptual basis for security interests such as mortgages and charges (for immovable property) and transfer of actionable claims. This law does not cover the charges created over personal property.
- (iv) Companies Ordinance, 1984: this law, generally, deals with the incorporation, management, regulation and winding up of all limited liability companies and foreign companies registered in Pakistan for business. Particularly, it provides for the regulation of certain security interests created by companies and their priority inter se and vis-a-vis other claims. A detailed procedure is also provided for registration of security interests with a special registry, the registrar of joint stock companies and the effects of non-registration. Certain restrictions have also been imposed upon creation of security interests among the companies associated with each other. However, no specific rules for the possession of collateral are provided. Importantly, a detailed mechanism has been provided for the reorganization and winding up of the companies and about dealing with the assets of the companies involved in the foregoing processes.
- (v) Provincial Insolvency Act, 1920: this law is relevant to determine the order of priority of secured creditors and other claims against a debtor of any type. This law is in addition to and supplements the priorities given under the companies ordinance, 1984. This law applies to the whole of Pakistan except Karachi division where the insolvency (Karachi division) act, 1909 applies in almost the same manner.
- (vi) Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997: is the most recent and important procedural law that applies to the enforcement of security interests and recoveries by and against the banking and leasing companies. This law provides for a summary procedure for the attachment and sale of debtors' properties of any type that are subject to any security interest(s).

- (vii) Banking Companies Ordinance, 1962: is the special law that deals with the organization, management, regulation and winding up of banking companies, that is, the companies engaged in banking activities. In particular, in a limited manner, it provides for the creation of charges by the banking companies over their assets and restrictions thereon. It provides for a detailed mechanism on the distribution of assets of banking companies in winding up to both secured and unsecured creditors and other claimants.
- (viii) Code of Civil Procedure, 1908: is the fundamental procedural law that provides for the repossession, attachment and sale of collateral or enforcement of security interests. It generally applies to all secured transactions, parties and collateral except for cases covered by the special laws where it has limited application such as, banking companies (recovery of loans, advances, credits and finances) act, 1997.

C. INDONESIA

6. The principal statutes on security interests in movable property include:

- (i) Indonesian Civil Code ("ICC"), Kitab Undang-undang Hukum Perdata (Burgerlijke Wetboek voor Indonesie), Stbid. 1847-23, and Indonesian Commercial Code, Kitab Undang-undang Hukum Dagang (Wetboek van Koophandel voor Indonesie), Stbid. 1847-23. The Civil and the Commercial Codes contain the general provisions on priority rights and the rankings of claims among creditors, and all liens or other preferred rights.
- (ii) Law No. 4 of 1996 regarding Hak Tanggungan, dated 9 April 1996, State Gazette No. 42 of 1996, and Supplement No. 3632 Teak Tanggungan Law"). The Hak Tanggungan Law replaced the provisions on hypothec in the ICC insofar as related to land and other assets related to land.
- (iii) Law No. 42 of 1999 on fiducia Security, dated 30 September 1999, State Gazette No. 168 and Supplement No. 3889 ("Fiducia Law"). Please note, however, that although the Fiducia Law has become effective, the Registration Office, to which the registration of the fiducia must be made, is not yet established.
- (iv) Registration system over ships and aircraft: Art. [314-316] Commercial Code and Art. [49] Law No. 21 of 1992 on Shipping; and Art. 12 Law No. 15 of 1992 on Aviation [and Decree of the Minister of Communication and Transportation No. SK. 131S/1971].
- (v) Registration system for mortgages in land (hak tanggungan): the registration is kept and maintained by the National Land Agency (Badan Pertanahan Nasional - "BPN"), which also manages registration of land titles.
- (vi) Registration system for the Fiduciary transfers: such regulations have not been enacted yet.
- (vii) Registration system for pledges of shares: the share registry of the company whose shares are pledged (Art. 53(3) of the Company Law). The company's management

(Art. 43 of the Company Law) maintains this registry. In the case of a publicly listed company, registration is with the Share Administration Bureau (Badan Administrasi Efek -"BAE"), selected by the public company concerned. The BAE is a company licensed by the Capital Market Supervisory Agency to administer share registration of public companies.

(viii) Indonesian Code of Civil Procedure.

D. PEOPLE'S REPUBLIC OF CHINA

- (i) Guaranty Law of 1995 of People's Republic of People's Republic of China, adopted at the 14th Meeting of the Standing Committee of the Eighth National People's Congress on June 30, 1995.
- (ii) Negotiable Instruments Law of 1995
- (iii) Chinese Civil Code (for the possessory pledge, see Article 89)
- (iv) Contract Law of 1999 (financial leasing, assignment of account receivables).
- (v) Regulations Concerning Mortgaged Real Estate, promulgated by the Ministry of Construction on May 9, 1997
- (vi) Regulations Concerning Mortgaged Movables in Enterprises, promulgated by the State Administration Agency for Industry and Commerce on October 18, 1995.
- (vii) Civil Procedure Law of 1991

E. THAILAND

- (i) Civil Code
- (ii) Commercial Code
- (iii) Machinery Registration Act 1971.
- (iv) Act on Mortgage of Vessels and Maritime Liens 1994.
- (v) Beasts of Burden Act 1939.
- (vi) Public Companies Act.1992.
- (vii) Securities and Exchange Act 1992.
- (viii) The Bankruptcy Act 1940, 5th Amendment 1999 and 4th Amendment 1998.
- (ix) Machinery Registration Act (It governs registration at the Central Machinery Registration Office is under the Ministry of Industry).

- (x) The Vessels Registry is under the Harbor Department, Ministry of Transport and Communication.
- (xi) Ministerial Regulation (No.47) 1998, issued under the Land Code
- (xii) Ministerial Regulation (No.7) 1989, issued under the Machinery Registration Act
- (xiii) Civil Procedure Code