

224. Hybrid security interests pose a problem for the potential creditor. It cannot know conclusively when creditors using hybrid interests have obtained a priority in the collateral because they do not need to file in a public registry. There is not a registry that potential creditors can search to find all claims in the collateral that may exist. Finding all claims would require a creditor to incur extra costs of investigation, with much less certainty than one would find by searching an archive. The only situation in which such search methods are effective is where clients can deal only with one creditor. So a financial system with few creditors and little competition is the price for using such property as collateral.

225. The result is not healthy for debtors. A debtor could offer valuable property as collateral and demonstrate that no prior claims exist. However, until the debtor satisfies the prospective creditor that the government has no tax claims against the debtor, and that all labor claims are current, and that bankruptcy is only a remote prospect, the creditor could not safely accept the collateral offered by the debtor. Such a system places an enormous burden of proof on the debtor, which is particularly difficult for small and poor debtors to satisfy. It leads creditors to refuse credit to firms facing liquidity problems, even though the firms might have excellent collateral—such as primary commodities of identifiable quality in clearly marked storage facilities. When creditors will not refinance illiquid firms, illiquidity can turn into insolvency. Ironically, the measure designed to save illiquid firms helps drive them into bankruptcy in the first place.

VII. PROBLEMS IN PUBLICIZING SECURITY INTERESTS

226. A first-to-file priority system requires that the law designate the place or means by which the system publicizes the security interest. This requirement drives a policy of broad public registration. As the preceding section shows, both creditor and debtor need to be able to demonstrate the rank of a prospective security interest at a low cost and a first-to-file system satisfies this need most efficiently.

227. Examples of designated places and means are found in broad public registration in various countries today. For this study, the system in Quebec is of interest because that province relies on civil law, as do PRC, Indonesia, and Thailand. Quebec established a single province-wide computerized system in Montreal to register movable real rights. Registration is organized by the grantor's name, rather than type of collateral, or interest, or legal entity. The interests it encompasses are "transfers of property in stock, agricultural and forest pledges, commercial pledges, . . . assignment of receivables, privilege of lessor in commercial lease, corporate trust deed floating charges and charges on movables, movables under hypothecary loans that were immovables. . . , installment sales, right of redemption, . . . [and] financial lease. . . ." Security interests in automobiles, however, are registered by serial number.¹⁹⁸

228. In the absence of such a system, no practical way exists to determine who files first. Many other systems have been used over the years, including taking possession of collateral, public announcements, advertisements in newspapers, and other public postings. However, most modern systems revolve around registries or filing systems that let any potential creditor quickly determine whether the collateral offered by the debtor has prior security interests. Publicity by possession requires transfer of the collateral to the creditor, and thus, proves very inconvenient for most economically important transactions. For these transactions, the establishment and functioning of the filing system becomes crucial.

¹⁹⁸J. Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec* (1994), at 253-255.

229. The major issues are whether the registration system is inclusive, reliable, accessible, and low cost. Is the system divided? If there are multiple registries, are they linked? What information is filed and how good is it? Who can file, who can read the files, and how do they do so? What is the cost in time as well as money? Can one pre-register? Is the cost subsidized? The answers to these questions for the five RETA countries demonstrate great room for improvement.

A. Divided Registration Systems

230. Measured against the standard set by Quebec, for example, the registration systems of each of the five RETA countries are divided, using several different principles. The dominant basis for registering security interests is *by type of collateral*, as Table VII-1 shows. The blank column shows a basis that is not used in any of the five RETA countries (see below).

Table VII-1. Divided Registration Systems					
Country	Basis for Registration in Separate Registries				
	Collateral type	Security interest	Debtors/ Owners	Single Type of Debtor/Owner	Other
India	Intellectual property: patent, copyright, trademark, design			Company	General, optional
Pakistan				Company	Federal
Indonesia	Shares, aircraft, vessels, fixtures	Fidusia			
PRC	Trees, aircraft, ships, vehicles, non-vehicular equipment, intellectual property, shares ¹⁹⁹	Pledges and each type of mortgages have different registries			
Thailand	Aircraft, vessels, floating houses, beasts of burden, machinery				

A striking contrast exists between the inclusiveness of Quebec’s registry and the many different registries in the five RETA countries, each devoted to separate types of collateral. This is particularly so in the countries with a civil law tradition. Indonesia,²⁰⁰ PRC,^{201 202} and Thailand²⁰³ list separate registries for aircraft, vessels, company shares, and in some cases vehicles, trees, equipment, house boats, and beasts of burden. India has several registries for security interests

¹⁹⁹ PRC Local Lawyer, citing Guaranty Law Art. 78. §30.1.1.

²⁰⁰ Indonesia Local Lawyer and ILAG Reviewer #3, citing Company Law Art. 53(3) and Art. 43 (for ordinary limited liability company share pledge), Capital Market Supervisory Agency license to a Badan Administrasi Efek company – BAE (for publicly listed share pledge), Aircraft Registration Office in the Department of Transportation (for vessels), Indonesian Commercial Code (ICC) Art. 314 (for large ships), and Fidusia Law Arts. 11 and 12 (for fidusia). §30.1.1.

²⁰¹ PRC ILAG Reviewer, citing Guaranty Law Art. 42(4) and (5). §30.1.1.

²⁰² PRC ILAG Reviewer, citing Guaranty Law Art. 78. §30.1.1.

²⁰³ Thailand ILAG Reviewer #2. §30.1.1.

in intellectual property.²⁰⁴ These have the advantage of identifying the collateral, so that if a potential creditor wants to know if specific movable property is already subject to a security interest, it can go to the registry for that type of property, if such a registry exists. Of course, the creditor and debtor are out of luck if no registry exists for their type of collateral, and it may be too expensive to register certain interests. As one ILAG Reviewer said, “These are essentially title registration services. They do not work for small ticket collateral.”²⁰⁵

231. A second basis for registration is *by security interest*. PRC, for example, has different registries for pledges and each type of mortgage. This raises costs for the potential creditor, who may have to search in several registries to eliminate possible security interests in the offered collateral. Indonesia’s recent new law creates a registry for the fidusia, a form of security interest. Other types of security interests, however, have no registries.

232. The third major basis for registration is for security interests in all *assets owned by a single type of debtor/obligor*, the company. India²⁰⁶ and Pakistan²⁰⁷ use this approach. For Pakistan, the companies registry is the only registry.

233. Finally, a registry for *any written interest* exists for example in India,²⁰⁸ but it is optional and, as shown below, gives the potential creditor very little protection.

234. Missing is any registry system organized *for all debtor/owners*, as one finds in Quebec, for example. The systems that exist create a serious problem for a prospective creditor. For example, by recording security interests in corporate property in one registry and in individuals’ property in another, the current systems pose nearly insurmountable barriers to a creditor seeking to determine the value of collateral in the possession of an individual who does business both as a sole proprietor and a company. As one ILAG Reviewer said, “What is needed is a registry for filing notices of encumbrances only against the debtor/owner’s name, subject to a liberal collateral description requirement [by specific item or generic category].”²⁰⁹

235. The lack of integration has several consequences that make life difficult for potential creditors. There are *no registries for many possible types of security interests or obligors* (see Table VII-2). A debtor that is not a company has no registry in Pakistan. Hybrid security interests, such as lease, conditional sale, hire-purchase, trust, or lien, have no registries in Pakistan (even for companies),²¹⁰ Indonesia,²¹¹ PRC,²¹² or Thailand.²¹³ Nor do they have a registry if the debtor is not a company, in India. Pledges in Thailand have no registry, perhaps because the creditor’s possession of the collateral is seen to make registration of a pledge redundant. However, arrangements in which the debtor keeps the collateral as the creditor’s agent—improvised pledges, secret title arrangements, as well as hybrids—negate this theory. It is very costly for a potential creditor to check on each form of financing.²¹⁴

²⁰⁴ India ILAG Reviewer #3, citing the Patent Act, Copyright Act, Trade and Merchandise Act, and Design Act. §30.1.1.

²⁰⁵ Thailand ILAG Reviewer #3. §30.1.1.

²⁰⁶ India Local Lawyer and ILAG Reviewer #3, citing Registration Act. §30.1.1.

²⁰⁷ Pakistan Local Lawyer, citing Companies Ord.1984. §466. §30.1.1.

²⁰⁸ India ILAG Reviewer #3, citing the Patent Act, Copyright Act, Trade and Merchandise Act, and Design Act. §30.1.1.

²⁰⁹ Thailand ILAG Reviewer #3. §30.1.1.

²¹⁰ Pakistan Local Lawyer. §30.1.1.

²¹¹ Indonesia ILAG Reviewer #3, by inference. §30.1.1.

²¹² PRC ILAG Reviewer, by inference. §30.1.1.

²¹³ Thailand ILAG Reviewer #3, by inference. §30.1.1.

²¹⁴ Thailand ILAG Reviewer #3. §30.1.1.

Country	Diverse or Unified	Different administrative levels or districts	No registries for:
India	Diverse (but small number)	Yes	Non-corporate obligors
Pakistan	Not unified, but it is only one registry: for companies.	Provinces: four	Non-corporate obligors Intellectual property
Indonesia	Diverse	Harbor master (for vessels), Issuing companies, private firms (listed shares), Ministry offices	Hybrid interests Other mortgages and pledges
PRC	Diverse	Company for securities pledges; local for non-vehicular equipment	Hybrid interests Other mortgages and pledges
Thailand	Diverse	No, apparently	Hybrid interests Other mortgages and all pledges (in creditor's possession)

236. So each of the five RETA countries has a registration system that is diverse rather than comprehensive. In numbers, Pakistan has the fewest registries—one, a Companies Registry, but with separate units. Indonesia has three registries, plus a potentially large additional number because for a pledge of the shares of a limited liability company, the company itself is the registry, and for the pledge of listed share pledges, one of several firms, each referred to as a BAE, serves as the registry.²¹⁵ India has five types of registries,²¹⁶ as does Thailand.²¹⁷ PRC has eight registries, plus registries for pledges of shares.²¹⁸

237. The fact that the registries exist in various administrative districts and levels deepens the divisions in most of the registry systems. Each of Pakistan's four provinces has a Company Registry.²¹⁹ For each type in India, registries exist at the state level, and sub-registries at the district level.²²⁰ PRC places registries at the local level for non-vehicular equipment,²²¹ and the Securities Registration Agency (for pledged shares) and at the company level (for limited liability companies). To check for security interests in Indonesia, one may look to the Harbor master (for vessels), transportation department (for aircraft), justice ministry and regional governments (for fidusia), Share Administration Bureaus of BAEs (for joint stock companies' shares), or limited liability company (for its shares).²²²

238. These structurally divided registries are rarely linked (see Table VII-3). Two kinds of links may exist. First, when a registry has offices in more than one location, the offices could be linked

²¹⁵ Indonesia Local Lawyer and ILAG Reviewer #3, citing Company Law Arts. 43 and 53(3) for share pledges. §30.1.1.

²¹⁶ India ILAG Reviewer #3. §30.1.1.

²¹⁷ Thailand ILAG Reviewer #2. §30.1.1.

²¹⁸ PRC ILAG Reviewer, citing Guaranty Law Art. 78. §30.1.1.

²¹⁹ Pakistan Local Lawyer. §30.1.1.

²²⁰ India Local Lawyer. §30.3.1.2.

²²¹ PRC ILAG Reviewer, citing Guaranty Law Art.42(4) and (5) and Regulation on Mortgaged Movables in Enterprises, promulgated by the State Administration Agency for Industry and Commerce, Oct. 18, 1995. §30.1.1.

²²² Indonesia Local Lawyer. §30.1.1.

Country	Linked inter-registry	Linked intra-registry
India	No	No
Pakistan	No	No (planned)
Indonesia	None	No
Thailand	Not inter-registry	Maybe intra-registry
PRC	No	No

(intra-registry). But no intra-registry links exist in India,²²³ Indonesia, PRC, or Pakistan. Pakistan, however, is computerizing the data bases of the four provincial Company Registry systems as a prelude to linking them.²²⁴ As an ILAG Reviewer observed, the lack of intra-registry links for individual registries can be a problem if the goods move. Interests in non-vehicular machines in Indonesia, for example, require filing with the local administrative agency for industry and commerce. Once registered in one locale, the collateral may then move from one area to another. Only in Thailand may some intra-registry links exist,²²⁵ centralizing each of the registries.²²⁶

239. Inter-registry links, as opposed to intra-registry links, connect registries of different kinds of collateral, e.g., linking a registry for equipment and one for patents. Indonesia,²²⁷ Pakistan,²²⁸ and PRC²²⁹ have no inter-registry links. India also does not have inter-registry links, even though the company registry (at least for floating security interests) overlaps with the others (e.g., intellectual property).²³⁰ Thailand does not have inter-registry links either.²³¹ In Thailand, according to an ILAG Reviewer, the regulatory philosophy seems to be that links are unnecessary. Only a few registries exist—aircraft, ships, machinery, beasts of burden, and floating houses. Anyone registering a ship, for example, should rarely need to know about interests registered in the others. “[T]he security regime in Thailand is essentially limited to the taking of security in presently owned specific assets, not generic categories of assets, not circulating assets, and not multiple categories of assets.”²³²

240. It would be very useful to a potential creditor and debtor to be able to turn to a registry organized as a single system and operating through a central database or network. Only Pakistan is developing a central database, though it does not have the system in place yet and when completed, the system will be intra-registry only.²³³

B. Uncertain Reliability of Registered Information

241. The potential creditor who turns to registries for information about other possible claimants to the collateral, and to protect its own security interest, needs to be confident that the data are reliable.

²²³ India Local Lawyer. §30.3.1.2.

²²⁴ Pakistan Local Lawyer. §30.3.1.1.

²²⁵ Thailand ILAG Reviewer #3. §30.3.1.1.

²²⁶ Thailand ILAG Reviewer #3. §30.3.1.1.

²²⁷ Indonesia Local Lawyer. §30.3.1.1.

²²⁸ Pakistan Local Lawyer. §30.3.1.1.

²²⁹ PRC Local Lawyer. §30.3.1.1.

²³⁰ India Local Lawyer, §30.3.1.2.

²³¹ Thailand Local Lawyer and ILAG Reviewer #3. §30.3.1.1.

²³² Thailand ILAG Reviewer #3. §30.3.1.1.

²³³ Pakistan Local Lawyer, §30.8.2.

It may be potentially devastating for the creditor to discover that although, when it made the search, the registry reported no prior secured interest, in fact one existed and is senior to the interest it took when it loaned against that same security. A registry's reputation for unreliability would undermine secured credit.

242. One solution would be for the government to guarantee the registry's reports, but they do not do so. A guarantee would be easier to justify for land, where title is critical, than for movables or in the case of government registries than for private ones, and many of the registries in the five RETA countries are government owned. However, the governments do not provide a guarantee in India,²³⁴ Pakistan,²³⁵ or the other countries (see Table VII-4). The government registry only matches the data in the submitted agreement to the data in the submitted form for fidusia in Indonesia.²³⁶ Registration "is deemed to be prima facie correct"²³⁷ in Thailand, but there is no guarantee from the government. The closest is the possibility of an implicit guarantee in PRC, even though the Guaranty Act does

Country	No Guarantee	Non-government registry	Not clear
India	No guarantee		
Pakistan	No guarantee		
Indonesia	Fidusia: not addressed	No guarantee for private registries for share pledge	
PRC			No basis in Act, but may be implicit guarantee
Thailand	No guarantee		

not give the registry authority to guarantee the accuracy of data.²³⁸ A government that will not guarantee its own registries will not do so for private registries. As a result, the private registries for share pledges in Indonesia are not guaranteed.²³⁹

243. Short of a guarantee from the government, the registry could raise creditors' confidence in the reliability of its data by reviewing the legality or authenticity of the data, but on the whole the registries in these five RETA countries do not do so (see Table VII-5). Generally, the registries review the submitted material to make sure it complies with the statutory or regulatory procedures, as is the case in India,²⁴⁰ Pakistan,²⁴¹ and Indonesia.²⁴² Some of these requirements are substantive, such as proving ownership to the registries in Thailand.²⁴³ Basically, they do not assess the truth or accuracy

²³⁴ India Local Lawyer, citing Registration Act. §30.2.1.

²³⁵ Pakistan Local Lawyer. §30.2.2.

²³⁶ Indonesia Local Lawyer, citing Fidusia Law Art. 13(3). §30.2.2.

²³⁷ Thailand Local Lawyer. §30.2.2.

²³⁸ PRC Local Lawyer and ILAG Reviewer, §30.2.2.3.

²³⁹ Indonesia Local Lawyer. §30.2.2.

²⁴⁰ India Local Lawyer, citing Registration Act, §27, and ILAG Reviewer #3, who presumes the Company Register is similar. §30.2.3.

²⁴¹ Pakistan Local Lawyer. §30.2.3.

²⁴² Indonesia Local Lawyer, citing Fidusia Law Art. 13. §30.2.3.

²⁴³ Thailand Local Lawyer, citing CCC §705, and ILAG Reviewer #3. §30.2.3.

of data submitted. Only PRC may go further, so that the registry perhaps examines the legal enforceability of each provision, but this is not clear.²⁴⁴ The registries also do not review the

Country	Legality	Authenticity
India	No: only the fact of execution	No
Pakistan	No	No
Indonesia	No	No (not permitted)
PRC	Yes?	Yes?
Thailand	Some	No

authenticity of the information submitted in India, where registration proves only the fact of registration,²⁴⁵ or in Pakistan,²⁴⁶ Thailand,²⁴⁷ or in Indonesia, where such a review is not explicitly permitted.²⁴⁸ PRC may review authenticity.²⁴⁹

244. We do not have information about parties, if any, to whom the government would be liable when a correctly registered security interest does not appear in a later search by a possible buyer or secured creditor, assuming that the registry staff was at fault or negligent.

245. A full legal review of the legality and authenticity would not be useful. It does not obligate the government to take responsibility for error in its own reporting by giving a financial guarantee. It would place broad discretion in the hands of the officials who carry out the review, allowing them to dismiss the application to register for reasons other than compliance with the filing procedures. This increases uncertainty about the secured transaction, and cost.

246. A notice filing system, the practice in other countries, eliminates the need to file the entire agreement and so protects privacy. It is the creditor and debtor, not the government or registry, that should file, electronically if possible, and ensure the agreement and filing is legally valid. The government simply provides access.

C. Limited Access to Filing

247. Ease of filing would encourage potential creditors and their debtors to use a registry. Law can raise barriers to easy access in several ways. One is to prohibit the party giving or taking the security interest from using agents to go to the registry, and instead requiring it to go itself (see Table VII-6).

²⁴⁴ PRC ILAG Reviewer, noting that it is not clear whether the registry reviews to determine if the documents submitted are genuine or, more thoroughly, if the provisions are legally enforceable and consistent with policy. The PRC Local Lawyer says, however, that the review is “substantial.” §30.2.3.

²⁴⁵ India Local Lawyer, citing Registration Act, §27, and ILAG Reviewer #3, who presumes the Company Register is similar. §30.2.3.

²⁴⁶ Pakistan Local Lawyer. §30.2.3.

²⁴⁷ Thailand Local Lawyer and ILAG Reviewer #3. §30.2.3.

²⁴⁸ Indonesia Local Lawyer and ILAG Reviewer #3, citing Fidusia Act Art. 13.

²⁴⁹ PRC ILAG Reviewer, noting that it is not clear whether the registry reviews to determine if the documents submitted are genuine or, more thoroughly, if the provisions are legally enforceable and consistent with policy. The Local Lawyer says, however, that the review is “substantial.” §30.2.3.

Four countries—Indonesia,²⁵⁰ Pakistan, PRC,²⁵¹ Thailand²⁵²—do permit the use of agents. India

²⁵⁰ Indonesia Local Lawyer, citing Fidusia Law Art.13(1). §30.6.1.

²⁵¹ PRC Local Lawyer, citing General Principles of Civil Law of 1986, Art. 63. §30.6.1.

²⁵² Thailand Local Lawyer. §30.6.1.

requires that the agent appear with a power of attorney, which imposes a formality that may reduce fraud but also raises the cost to the registrant.²⁵³

248. A second, and potentially major, barrier to access is to require a personal appearance in order to register a security interest, thus prohibiting remote filing. Requiring a physical presence increases the cost and time to file. The physical presence of an individual is required in India,²⁵⁴ in Pakistan (by practice, not law),²⁵⁵ and for a pledge of listed stock and possibly the fidusia, in Indonesia.²⁵⁶ We do not know if Thailand permits remote filing, but PRC does permit it.²⁵⁷

249. A third barrier to access would be to prohibit private persons not party to the transaction from registering the interest, because that rule would make it impossible for private companies to offer such a service. The prospect of competition should reduce costs and speed up the service. Unfortunately, three of the countries do limit direct entry in the register to companies or individuals who are party to the transaction. These are India,²⁵⁸ Pakistan,²⁵⁹ and Thailand.²⁶⁰ We do not know Indonesia's rule. PRC, however, permits non-parties to enter data.²⁶¹

Table VII-6. Direct Creditor Filing and Private Filing

Country	Presence at Registry vs. Remote Filing	Use of Agent	Direct entry by private persons not party to the transaction
India	Presence	Permitted, with power of attorney	No
Pakistan	Presence by practice, not law	Permitted	No
Indonesia	Varies	Permitted	Do not know
PRC	Remote	Permitted	Yes
Thailand	Do not know	Permitted	No

D. Limited Access by the Public to Data About Registered Security Interests

250. Since the purpose of a registry is to notify potential creditors or buyers about existing security interests in property, broad access to the registered data would appear to be crucial. Low costs, remote access, fast delivery of the information, and openness to the general public would all make the data more broadly available. Table VII-7 presents the actual rules.

²⁵³ India Local Lawyer. §30.6.1.

²⁵⁴ India Local Lawyer. §30.6.1.

²⁵⁵ Pakistan Local Lawyer. §30.6.1.

²⁵⁶ Indonesia Local Lawyer, citing Fidusia Law Art.13(1). §30.6.1.

²⁵⁷ PRC Local Lawyer, citing General Principles of Civil Law of 1986, Art. 63. §30.6.1.

²⁵⁸ India Local Lawyer. §30.6.2.

²⁵⁹ Pakistan Local Lawyer. §30.6.2.

²⁶⁰ Thailand Local Lawyer. §30.6.2.

²⁶¹ PRC Local Lawyer. §30.6.2.

Country	Cost	Physical presence	Time	Access by private person
India	Nominal	Yes	Varies (immediate, for a fee)	Registration Act: Only by filer or beneficiary Companies: anyone
Pakistan	Nominal	Yes	2-4 days	Yes
Indonesia	Do not know	Pledge: no Fidusia: do not know	Do not know	Share pledge: varies Fidusia: do not know
PRC	Varies: not expensive, may be free	No	Same day	Do not know
Thailand	Minimal	Yes	1 day	Yes

251. Fees, an important part of the cost of obtaining data from a registry, are reported to be low for the most part in the five RETA countries. Four of the countries report that fees are nominal: India, Pakistan (\$3-\$4),²⁶² Thailand (below \$10),²⁶³ and PRC, where the standard of a “reasonable cost” varies by registry, but is “not very expensive” and no fee is imposed for patent or trademark registries.²⁶⁴ Of course, even these amounts could discourage small businesses and farmers. We lack data for India²⁶⁵ and in Indonesia the law does not say if a company should or may charge a fee if the security interest is a pledge of unlisted shares. For a pledge of listed shares, a fee may be charged by the BAE, a private entity set up to register these interests. For fidusia, no data were available yet.²⁶⁶

252. As with filing, a person must go physically to the registry to obtain data in India (to the Companies Registry),²⁶⁷ Pakistan (in practice, but not required by law),²⁶⁸ and Thailand.²⁶⁹ In these countries, a remote search is not possible, which raises costs perhaps enough to discourage use of registries by creditors and debtors. On the other hand, Indonesia allows one to use correspondence to get information about a pledge (no policy was set for fidusia during the research for this report)²⁷⁰ and PRC allows remote searches.²⁷¹

253. The length of time it normally takes to get data from the time they are needed is measured in days in each country. PRC reportedly makes the data available the same day, during working hours, so there is apparently no delay.²⁷² Thailand takes only one day.²⁷³ Pakistan’s two to four days²⁷⁴ may seem fast, but when finance is needed immediately that delay could impede lending.

254. The access of private unaffiliated *parties* to the data would seem essential, given that publicity is the purpose of the registry, but in several important cases a country restricts access. Two

²⁶² Pakistan Local Lawyer. §30.7.1.

²⁶³ Thailand Local Lawyer. §30.7.1.

²⁶⁴ PRC Local Lawyer. §30.7.1.

²⁶⁵ India Local Lawyer. §30.7.4.

²⁶⁶ Indonesia Local Lawyer. §30.7.1.

²⁶⁷ India ILAG Reviewer #3. §30.7.4.

²⁶⁸ Pakistan Local Lawyer. §30.7.2.

²⁶⁹ Thailand Local Lawyer. §30.7.2.

²⁷⁰ Indonesia Local Lawyer. §30.7.2.

²⁷¹ PRC Local Lawyer, citing interviews with officials in the registries. §30.7.2.

²⁷² PRC Local Lawyer, citing Guaranty Law Art. 45 that no waiting period is required. §30.7.3.

²⁷³ Thailand Local Lawyer. §30.7.3.

²⁷⁴ Pakistan Local Lawyer. §30.7.3.

questions arise. First, who can copy the data: only the parties or a person with an existing interest, or anyone? All people have access to all registries in Thailand,²⁷⁵ the company registries in India²⁷⁶ and Pakistan,²⁷⁷ and the intellectual property registries in India. For the pledge of shares in Indonesia, it varies by company and BAE (for fidusia, the rule was not set yet).²⁷⁸ For PRC, it is not clear whether access is limited to interested parties or open to all.²⁷⁹ However, India limits access to registry data filed for the Registration Act to only the filer or the beneficiary.²⁸⁰ This “would seem to eliminate any public notice value [for] . . . the optional practice of registering security in movables,” noted an ILAG Reviewer.²⁸¹

255. Second, can only the registry copy the data for whomever is allowed to receive it? For the most part, no such limit exists. In Pakistan, the private person usually makes copies itself, but the registry is obliged to give a certified copy, for a fee.²⁸² In Thailand, the information is presumed to be correct, but fraud or dishonest act rebut the presumption.²⁸³ In Indonesia, however, the private companies that act as registries may impose such a limit on copying.²⁸⁴

256. Together, these restrictions on access raise the cost of the transaction. A rule that one needs an interest in collateral would force the creditor to bear the cost of negotiating with the debtor just to establish a right to search. Physical presence at the registry adds costs of the trip. Reliance on public officials to search raises risk because they and their employer, the government, appear not to be accountable for any mistakes they make. The ability to search filing archives from anywhere in the world on a desktop computer connected to the Internet eliminates these costs. More and more countries around the globe are moving in this direction.

E. Cost and Speed of the Registries

257. The higher the cost of using a registry and the longer it takes to get information, the less useful is the registry to a potential creditor and its debtor.

258. The cost of registration varies with the type of collateral or the size of the loan being secured, and can be quite high in some cases. These rules make the user's fees a revenue source for the government rather than a payment related to the cost of providing the service. The type of collateral affects registration costs in three countries. In PRC, the registering agency sets its own fees. A pledged patent is \$110, the highest fixed fee. A pledged trademark bears no fee. A pledged copyright fee depends on the value of the copyright.²⁸⁵ In Thailand, the fee varies with the collateral. A mortgage, or a sale with right of redemption, of machinery is based on the amount of the debt, up to a ceiling of about \$2,700. In Indonesia, the pledge of unlisted shares bears no fee but the fee to register the pledge of listed shares is generally 0.5% of the shares' nominal value (fidusia fees were not yet set).²⁸⁶ By way of contrast, high stamp fees are a barrier to registration in India and Pakistan. In India, the stamp tax by federal government is very low but states impose a “very stiff” 4%-8% of value of the transaction.²⁸⁷ In Pakistan, fees are nominal but stamp tax can be high.²⁸⁸

²⁷⁵Thailand Local Lawyer. §30.7.4.

²⁷⁶India Local Lawyer, citing Companies Act, §144. (§30.2.1) and ILAG Reviewer #3 (§30.7.4.).

²⁷⁷Pakistan Local Lawyer. §30.7.4.

²⁷⁸Indonesia Local Lawyer. §30.7.4.

²⁷⁹PRC ILAG Reviewer. §30.7.4.

²⁸⁰India Local Lawyer, citing Registration Act, §55 (§30.2.1) and ILAG Reviewer #3 (§30.7.4.).

²⁸¹India ILAG Reviewer #3. §30.7.4.

²⁸²Pakistan Local Lawyer. §30.7.4.

²⁸³Thailand Local Lawyer. §30.7.4.

²⁸⁴Indonesia Local Lawyer. §30.7.4.

²⁸⁵PRC Local Lawyer. §30.5.1.

²⁸⁶Indonesia Local Lawyer. §30.5.1.

²⁸⁷India Local Lawyer and ILAG Reviewer #3. §30.5.3.

Country	Cost varies with collateral	Fees pay Registry costs	Time to register
India	State stamp tax is high, Federal is low.	Do not know	Hours to register, 3 months to get registered deed back
Pakistan	Nominal registry fees, but some high stamp taxes	No data published	21 days by regulation, but proper filing can be in 7 days
Indonesia	Fees vary	Yes for private, no for government registry	Fidusia: same day
PRC	Fees from \$0-\$110 or more	Yes for private and government registries	5 days, by law
Thailand	Fees vary, reaching \$2,700	Varies, but revenues go to the finance ministry, which budgets for each.	Not clear: reported as fast and very slow

259. The result is that registry fees rarely pay for the costs of registration. Private registries do meet their own costs from fees, in Indonesia²⁸⁹ and PRC²⁹⁰ (where, although the Government runs most registries, the registry for pledges of securities is “non-governmental”²⁹¹). Government run registries, however, rely on Government financial support to meet their costs in Indonesia (the office in the justice ministry relies on the government budget²⁹²), Thailand (where the ministries run registries and the finance ministry sets each registry’s budget, funds any shortfall in fees and takes any fee surplus over that budget²⁹³), and perhaps PRC.²⁹⁴ Data are not available in Pakistan,²⁹⁵ where the federal government runs the registry,²⁹⁶ or India, where the state and federal governments run registries.²⁹⁷

260. In addition to out-of-pocket expenses, delays in the time it takes to register add to the cost of registration. Immediate registration protects newly secured creditors and potential creditors who search the records carefully. On paper, at least, registration is fast in one of the countries. Indonesia’s Fidusia Act requires same day registration²⁹⁸ PRC’s regulations give the registry five days to accept and register (or reject) an application for a mortgage of movables in enterprises.²⁹⁹ Pakistan’s law requires registration to be completed in 21 days, although in practice a complete filing

²⁸⁸ Pakistan Local Lawyer. §30.5.1.

²⁸⁹ Indonesia Local Lawyer. §30.5.2.

²⁹⁰ PRC Local Lawyer. §30.5.2.

²⁹¹ PRC ILAG Reviewer, noting that the Guaranty Law Art. 78 is silent about the legal form of the registry for securities pledges. §30.8.4.

²⁹² Indonesia Local Lawyer. §30.5.2.

²⁹³ Thailand Local Lawyer. §30.5.2.

²⁹⁴ PRC Local Lawyer. §30.5.2.

²⁹⁵ Pakistan Local Lawyer. §30.5.2.

²⁹⁶ Pakistan Local Lawyer. §30.8.4.

²⁹⁷ India Local Lawyer. §30.8.4.

²⁹⁸ Indonesia Local Lawyer and ILAG Reviewer #2. §30.5.3.

²⁹⁹ PRC Local Lawyer and ILAG Reviewer, citing Regulations Concerning Mortgage Moveables in Enterprises (1995), Art. 8. §30.5.3.

may be registered in 7 days.³⁰⁰ However, prescriptions in the law are not the full story. India registers in only a couple of hours, but preparing documentation takes a long time and it takes 3 months, on average, to get the registered deed back from the registry.³⁰¹ The impact of these delays on publication of the security interest could be severe. In Thailand, the time to register is not clear. The Thai Local Lawyer reports that registration normally takes one day, but takes longer if 30 day public notice is required, as it is for machinery. An ILAG Reviewer reports that registration, particularly when notice is required, can take 6 to 12 months and, if new machinery must be classified, even longer.³⁰²

261. Adding to the cost of registration are the types of data that one must file. Filing a form allows more efficient registration than filing the entire agreement. It also protects the parties by allowing them to keep private the details of the agreement that are not relevant to fixing priority and would, if released, compromise the parties' competitive position in their markets. Higher cost and reduced privacy would discourage registration. In the five RETA countries, however, the tendency is to require the full agreement rather than simply a form (see Table VII-9). PRC requires the agreement,³⁰³ as does India, where the Registration Act requires the original agreement³⁰⁴ and the Companies registry requires a copy of the agreement,³⁰⁵ Pakistan's law does so also. There, the parties file both a form they complete and a copy of the agreement.³⁰⁶ For a debenture, Pakistan requires more detail, including the names of any trustees for the debenture holders.³⁰⁷ They must do so within 21 days after creating the security interest.³⁰⁸ Indonesia's Fidusia Law requires a detailed form³⁰⁹ and each company's register records the notice of a pledge received by the company.³¹⁰ Of course, the form must meet creditors' needs. Some countries use a form that has not proved adequate to the parties. Thailand requires a form signed by the debtor, but the person registering may attach the security agreement³¹¹ because, apparently, the information on the form is not adequate.³¹²

Table VII-9.
Data That Are Filed: Form or the Agreement

Country	Generally	Specialized Registry
India	Original agreement	Companies Registry: copy of agreement
Pakistan	Not applicable	Companies Registry: Detailed form plus agreement
Indonesia	Fidusia: form	Company's register: form
PRC	Agreement	Not applicable
Thailand	Not applicable	Form plus, in practice, agreement

³⁰⁰ Pakistan Local Lawyer, citing Companies Ordinance, 1984, §§121,127, 466. §30.5.3.

³⁰¹ India Local Lawyer and ILAG Reviewer #3. §30.5.3.

³⁰² Thailand Local Lawyer and ILAG Reviewer #2, citing Ministerial Regulation No. 2 under MRA of 1971, Art. 2, concerning public notice. §30.5.3.

³⁰³ PRC ILAG Review, citing Guaranty Law Art. 44. §30.2.1.

³⁰⁴ India Local Lawyer, citing Registration Act. §30.2.1.

³⁰⁵ India Local Lawyer. §30.2.1.

³⁰⁶ Pakistan Local Lawyer. §30.1.1.

³⁰⁷ Pakistan Local Lawyer. §30.2.1.

³⁰⁸ Pakistan Local Lawyer. §30.1.1.

³⁰⁹ Indonesia Local Lawyer, citing Fidusia Law Art. 13. §30.2.1.

³¹⁰ Indonesia Local Lawyer, citing Company Law, Art. 43(1)(d). §30.2.1.

³¹¹ Indonesia ILAG Reviewer #2. §30.2.1.

³¹² Thailand ILAG Reviewer #3. §30.2.1.

262. The time and cost to make a registered security interest available to all separate entities or offices of the registry will also affect registration. While multiple offices of registries exist in all countries except, perhaps, Thailand, the only set of registries organized as a single network exists in the single state of Andra Pradesh, in India. No network exists in Pakistan,³¹³ Indonesia,³¹⁴ PRC,³¹⁵ or Thailand.³¹⁶

263. With one exception in one country (one state in India), all registries maintain paper-based records. Registration Act records, for example, are manually kept in India.³¹⁷ Compared to modern electronic archives, paper-based systems increase the costs of filing and retrieving information, limit remote access to the registry, and provide less than optimal security, compared to electronic based archives.

264. Finally, advance filing that can block later filings would protect creditors by speeding the time to register. In no country, however, can one register a secured interest before the debtor acquires rights in the collateral (see Table VII-10). The debtor must own the collateral in Thailand³¹⁸ and

Country	Before debtor acquires rights	Pre-register before creditor acquires rights
India	No	No (not useful, either)
Pakistan	No	No
Indonesia	No: pledge Yes: fidusia, but not useful	No
PRC	No	No
Thailand	No	No

the ownership papers must be filed³¹⁹ to register in PRC.³²⁰ In India, where both the Registration Act and Companies Act require filing of the actual security documents, priority dates from the execution of the agreement, not filing, so pre-registration would not be useful.³²¹ An interest in a debtor's after-acquired property is permitted, but it takes effect when the property comes into existence or acquired. The security interest in a floating charge only attaches when the creditor crystallizes it.³²² Pakistan's legislation simply does not provide for advance registration.³²³ Indonesia does not allow advance registration for a pledge, because the debtor needs title to convey the interest. Under the Fidusia Law, acquisition of rights before the fidusia is created is not practicable. The law does permit registration

³¹³ Pakistan Local Lawyer. §30.8.1.

³¹⁴ Indonesia Local Lawyer. §30.8.1.

³¹⁵ PRC Local Lawyer. §30.8.1.

³¹⁶ Thailand Local Lawyer. §30.8.1.

³¹⁷ India Local Lawyer. §30.8.4.

³¹⁸ Thailand Local Lawyer. §30.3.1.2.

³¹⁹ PRC Local Lawyer and ILAG Reviewer. §30.4.1.

³²⁰ PRC Local Lawyer, citing Guaranty Law and Contract Law of 1999, Art. 51, and ILAG Reviewer, citing Guaranty Law, Art. 44(2), which requires ownership certificates to register a mortgage.

³²¹ India ILAG Reviewer #3. §30.4.1.3.

³²² India ILAG Reviewer #3. §30.4.1.3.

³²³ Pakistan Local Lawyer. §30.3.1.2.

of an interest in after-acquired property³²⁴ and that registration determines priority.³²⁵ The fidusia must exist, however, and only registration brings it into existence.³²⁶

265. As a result, one may not file for an advanced ranking of priority and then later file the security interest in any of the countries.

266. In most cases, a state monopoly supplies the registry services. Typically, monopoly service, public or private, has less incentives for providing better service than would competing providers. This basic rule may extend to registry or filing office services. Reform often takes the form of allowing private operation or competing operators.

F. Economic Consequences of Problems in Publicity

267. The registration systems add great cost to secured credit in the five RETA countries. Those requiring permission of the authorities delay filing, which increases the risk of loss of priority. In principle, a guarantee by the authorities might offset cost. As a practical matter, however, this amounts to little more than the right to sue the state for damages. The rarity of such suits testifies more to their likely fruitlessness than to the rarity of errors. The typical privately secured party benefits more from having a lawyer, with an immediate financial interest in doing a good job, check the accuracy of papers underlying a filing. Broadly, this feature of registries produces costs with no offsetting gains.

268. Registration lies at the heart of a non-possessory secured lending system. Without a good filing system, no law of security interests, no matter how modern, can have an economic impact.

VIII. PROBLEMS IN ENFORCING SECURITY INTERESTS

269. The prospective creditor, and therefore the debtor, needs to know that a secured creditor could enforce its rights in the way best suited to protect them. In some circumstances, perhaps the creditor should sell the collateral. For example, the market value of the collateral may be declining. Other circumstances may require the creditor to supervise the continuing use of the collateral. Suppose a machine serving as collateral is half built, for example. To revert briefly to the Quebec law as an illustration of how one jurisdiction approaches this,³²⁷ a secured creditor may exercise its rights in a broad range of movables in one of several ways:

- take possession of the collateral (if an enterprise owned it) and administer its use or disposal;
- take the collateral in full payment of the debt;
- sell the collateral (if an enterprise owned it) by public auction, bids, or private sale;
- have the court sell the collateral;
- take possession and administer the collateral temporarily, conserving it but not disposing of it.

³²⁴The Fidusia Law permits advance registration for assets that can be described, when a maximum value of the loan can be set. Indonesia ILAG Reviewer #2, citing Fidusia Law, Art. 14(3). §30.3.1.2.

³²⁵Indonesia Local Lawyer. §30.4.1.

³²⁶Indonesia ILAG Reviewer #2. §30.4.1.3.

³²⁷J. Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec* (1994) at 145-147.