**THE LEGAL ASPECT OF SECURITY OVER FUTURE RECEIVABLES IN JAPAN AND SUGGESTIONS FOR VIETNAM**

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**Abstract**:

Enabling the use of future receivables as collateral to access to credit is highly economically meaningful, as its development is for one thing to allow businesses and individuals to access the capital easily with movable assets to be accrued in the future, and for another thing to encourage lending by reducing the financial vulnerability of lenders. This article first of all aims to introduce and analyses the legal regime of security interests with respect to future receivables in Japan. Based on the result of the analysis, the author will give some possible suggestions drawing on Japanese experience for reforming Vietnam’s statutory.

**Tóm tắt:**

Việc cho phép sử dụng tài sản bảo đảm là những khoản thu hình thành trong tương lai mang lại nhiều ý nghĩa về mặt kinh tế. Một mặt, cho phép các doanh nghiệp và cá nhân có thể tiếp cận nguồn vốn một cách dễ dàng bằng những tài sản lưu động hình thành trong tương lai, mặt khác, khuyến khích hoạt động cho vay bằng cách giảm rủi ro của bên cho vay nhờ vào tài sản bảo đảm. Bài viết phân tích những cơ sở pháp lý cho việc bảo đảm bằng tài sản là khoản phải thu hình thành trong tương lai dưới góc độ pháp luật Nhật Bản. Từ kết quả phân tích, tác giả sẽ đưa ra những đề xuất cho pháp luật Việt Nam.

**Keywords**: security interest, future receivables, attachment, perfection.

Immovable assets, particularly land are probably the most commonly used form of collateral in the secured financing since the collateral realization upon default by the debtor is more often than not guaranteed. However, land, the important but limited natural resource of a country, is not always available for individuals or enterprises, especially small and medium-sized enterprises (SMEs), to utilize it as collateral for credit. In addition, because the recent crisis of credit market based on real estate has to some extent discouraged creditors to excessively rely on real estate as collateral, many countries start to recognize a wide range of asset selection of collateral rather than real estate, thereby granting chances for businesses to access to finance with the available movable assets, particularly receivable including existing and future, to expand their business and simultaneously to reduce the risk borne by lenders thanks to realisation of collateral in case of default.

In Vietnam, among other legal reforms, perhaps the adaptation of the future assets as a form of property capable of being secured, which is viewed as a milestone for the secured transaction legislation, hugely impacts on business financing ever since the shift from a centrally planned economy to a market economy in the Doi Moi reform in 1986. In fact, the use of the future assets as collateral to secure the civil obligation had been applied in Decree No. 165/1999/ND-CP[[1]](#endnote-1) and it was officially provided and reformed under the Civil Code No. 33/2005/QH11 and the Civil Code No. 91/2015/QH13 (the 2015 Civil Code) respectively. Despite many efforts and high expectation of lawmakers, the prevailing legal framework for the security interest in the future property, particularly the future receivable, is probably too incomplete and antiquated to resolve the shortcomings arising in practice.[[2]](#endnote-2) In fact, there are many underlying issues which have not regulated yet and incompatible with the international best practice’s approach, thereby causing lots of difficulties for the businesses in the course of implementation.

Whilst in Japan, although the security interest in the future property was not officially recognized in the Act No. 89 of April 27, 1896 (the Japanese Civil Code) and it was left to the interpretation of the legislation, a judicial precedent recognizing transfers of future receivables is viewed as a substantial breakthrough for the securitization of future receivables in 1999.[[3]](#endnote-3) Since then, it is possible for parties to make use of future receivables to be secured for obligations provided that they are able to individually identify and are not contrary to the public policy. Therefore, it is allowed the comparison of the security interest in the future receivable in Japan and Vietnam which have developed under the different legal regimes but share some similarities. Divergences such as third party effectiveness, the priority rule among competing claims, recognition of security made notwithstanding an anti-security clause resulted in comparison shall be essential to analysis and use to evaluate features, which would affect the feasibility of using the future receivables as collateral in Vietnam.

1. **Overview of security interests over future receivables in Japan**

In the context of Vietnam, the 2015 Civil Code defines and directly recognize the ability of future assets to participate in civil transactions.[[4]](#endnote-4) Japan law does not follow this approach. Accordingly, the existence of assets to be formed in the future is left to the interpretation of legislation by courts, rather than defining in the Japanese Civil Code. In fact, due mainly to the trading practice, the concept of future assets has been established unofficially in Japan by judicial precedents. That is, Case No. 219 (o) of 1997 by the Supreme Court marked the reorganization of the contract’s validity of a contract on the transfer of claims to be accrued in the future, provided that the claims to be transferred in the contract need to be specified and the claims need to clearly provide the period is to start and end.

Japanese law allows the pledge of claims and such pledge is deemed effective immediately upon the delivery of the instrument evidencing it is required for its assignment.[[5]](#endnote-5) Nevertheless, in case of future receivables, which do not accrue at the time of the transaction, it is impossible for obligors to use it for the pledge as the requirement for delivery of such instrument. The same with a mortgage, although the possession of the property is not transferred to the obligee,[[6]](#endnote-6) the Civil Code only limits the object of the hypothec to ownership of immovable and superficies and emphyteutic over land.[[7]](#endnote-7) In other words, the hypothec over the movable is not acknowledged by the Japanese Civil Code, except for certain limited movables.[[8]](#endnote-8)

Having said that, there have two additional types of securities so-called atypical real security, including title transfer security and preliminary registration security.[[9]](#endnote-9) These security interests have developed out of business practice and are recognized as security by both case law and academic views to fill the gaps in the Japanese Civil Code regarding security over the movable which allows a debtor to use the property until he repays the debt.[[10]](#endnote-10) As to the title transfer security (security assignment), it is a form of a mortgage arrangement, in which the ownership of secured property is transferred directly to the lender until the debt is discharged in full, but the possession of the property to use the secured assets remains with debtors.[[11]](#endnote-11) Given that, the security interest over future receivables, which has by nature not formed yet at the time of the transaction, may be created in form of security assignment because it is not obliged to transfer the possession of the collateral to the obligee.[[12]](#endnote-12)

On the other hand, legal normative documents, that is, the Act on Special Provisions, etc. of the Civil Code Concerning the Perfection Requirements for the Assignment of Claims is in conformity with the judicial precedent by recognizing the transfer of future claim and provided the registration of the transfer claim as a kind of perfection requirement. Given that, once again, although the Japanese Civil Code does not directly acknowledge the future property, the transaction of the future property is, in practice, left to the interpretation of the legislation and the judicial precedents recognizing transfers of future receivables.[[13]](#endnote-13)

1. **Current legal framework for taking security interests over future receivables in Japan**
   1. The identification requirement

The future property is usually regarded as uncertainty and high risk in practice because it is by nature a property which has not existed yet at the time of transaction. That explains why the future property, to become collateral, often needs numerous documents proving its future appearance and it will be owned by the securing party.

In Japan, the security assignment over the future receivable has recognized since the Japanese Supreme Court’s Judgement on January 29, 1999. In this case where A-a physician entered into a contract with Y-Leasing Company, of which A transferred to Y his right to claim medical fees owed to A from B- the Social Insurance Medical Fee Payment Fund for the period of eight years and three months. Notice of this assignment was given to B by a deed bearing fixed date.[[14]](#endnote-14) Nevertheless, the validity of this contract was later challenged by the X – the State of Japan for the reason that part of the contract pertaining to those claims to payment of medical fees was to fall due more than one year after the transfer started. Under this case, the Supreme Court of Japan denied the one-year time limitation by permitting an assignment of future receivables for the eight years term from the execution date of the assignment provided that the future receivables were sufficiently specified regarding the commencement and the termination of the period during which the receivables were assigned.[[15]](#endnote-15) To some extent, this judicial precedent has laid down the essential requirements for a future receivables to be specified, for example, by the grounds for their accrual or the amount to be transferred and clearly provide for either the commencement and expiration of the claim accrual in case of several claims are to be transferred that is to accrue or fall due for payment within a stipulated future period.[[16]](#endnote-16) Also, the Supreme Court also ruled that the validity of the future claim will not be affected by the low likelihood of accrual of a claim.[[17]](#endnote-17) Also, the judicial precedent also implied that it may deny all or part of the validity of a security interest in future claims as being against public policy. More specifically if the granting contract effectively restricts the obligor’s business activities in a manner that materially deviates from the socially accepted standard (for example, if the relevant period is too long) and if the transfer would unjustly disadvantage other creditors.[[18]](#endnote-18)

* 1. Ban on non-assignment or security clause

In practice, parties in the receivable contract, particularly large companies with sufficient credit strength do not want to use rights under the contract to transfer or to be secured for other obligations. Therefore, the contracting parties usually put a non-assignment and security clause which prohibits the security of the contract right, such as rights to payment, for the other obligation as the obligor may not wish to change obligee. In such case, whether the security interest of a right to the payment of a monetary sum is effective notwithstanding an agreement between the obligor and the mortgagor? In Japan, the Civil Code recognizes the validity of the anti-assignment clause. That is, the anti-assignment will be ineffective against a third party assignee who did not know of the existence of the anti-assignment clause.[[19]](#endnote-19) However, some argue that this provision is excessive because a contract between the obligee and obligor can deprive a right of other third parties.[[20]](#endnote-20) For this reasoning, under the recent Amendment of the Japanese Civil Code, the transfer of a receivable will be valid and effective notwithstanding of any contractual provision that prohibits or restricts a transfer of a right, receivable or claims thereunder.[[21]](#endnote-21)

* 1. The attachment and the perfection

The security interest over the receivable, whether existing or future, is by nature not a bilateral relation, but a trilateral legal relationship between the mortgagor, the mortgagee and the underlying debtor of the receivable. Therefore, in the security agreement, if the attachment is to some extent viewed as the moment when a security interest enforceable against the debtors, the perfection of the security interest is an additional step required to be taken related to a security interest to make it effective vis-á-vis the third parties’ claim to the collateral.[[22]](#endnote-22)

In Japan, security assignment over receivables, whether existing or future, is deemed effective immediately as of the date of the execution of the security assignment rather than the date on which the receivables are created.[[23]](#endnote-23) As to the perfection of security interest, the method of perfection for the security assignment over the future claim is the same as for a pledge and a security assignment of accrued claims.[[24]](#endnote-24) That is, to perfect the security assignment of the receivable, whether existing or future, with respect to debtors, the securing party - assignor may give notice of the security assignment to the obligor, or obtaining an acknowledgment from, each obligor.[[25]](#endnote-25) Prior to giving notice, the debtor will only pay the debt amount to the original creditors (the assignor) on the ground of the debt claim. The requirement to give notice to the debtor is therefore purposely to make sure that the debtor will know whom to pay to. In Japan, the assignee is not entitled to give notice of the security assignment to the debtor.[[26]](#endnote-26) In other words, the assignee’s notice shall be ineffective. For instance, in the case where the assignor goes bankrupt prior to giving notice of the assignment to the debtor, subsequently, the assignee cannot perfect the assignment against the debtor.[[27]](#endnote-27)

Under the legal landscape of Japan, the requirements for perfection against the other parties other than obligors seem strictly than the perfection against debtors. As to the rules on perfection against the third parties (other than obligors), there are two systems coexisting in Japan. The first system is similar to the French system and is close to Article 9.1.11 of the UNIDROIT Principles.[[28]](#endnote-28) Accordingly, the assignor must use an instrument (a certificate) with a fixed date (certified date) for the notices or acknowledgments to achieve perfection against third parties (other than the obligors).[[29]](#endnote-29) Normally, the notary will either stamp a date on the document or notice or acknowledgment will be sent by certified mail accompanied by a certificate of receipt. Because the notarization was never an essential condition for perfection in receivables,[[30]](#endnote-30) especially when the assignor need to make the notice of the securitization too many debtors, it is very expensive and cumbersome effort costly.[[31]](#endnote-31) Thus, in 1993, the MITI Securitization Law[[32]](#endnote-32) was passaged which allowed the assignor to perfect the security assignment in relation to debtors and other third parties to be accomplished through the public notice in newspapers.[[33]](#endnote-33)

The second way for the successive security assignment of the claim, whether existing or future, in respect to the third parties other than relevant debtors set forth in the Perfection Law in 1998 required companies to simply file a simple electronic registration with the Legal Affairs Office of the Japanese government. In this context, the assignor can simply register for securitization assets, whether existing or future, once securitization assets are registered, the security assignment will perfect against the other third parties. Since the new provision is mainly designed for the business financial use,[[34]](#endnote-34) the registration regime set forth in the Perfect Law in 1998 was only applicable to the judicial person.[[35]](#endnote-35) Nevertheless, it is impossible to register for the claim arising in the future with respect to unspecified debtors in the 1998 Perfection Act. Therefore, the 1998 Perfection Law was amended by the Act on Special Provisions, etc. of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claims in 2004 which enabled to register for the future claim to unspecified debtors.[[36]](#endnote-36) As such, under Japanese law, it is possible to perfect a transfer of future receivable against unspecified debtors as well as the other third parties through registration. For the existing claim, the debtor’s name and address must be registered,[[37]](#endnote-37) however, for the future claim, the name and address of the debtor cannot be registered as the debtor of the future claim cannot specify at the time of registration. Instead, for the future receivable, details of the contract upon which the future receivable will accrue must be registered in order to specify the contract,[[38]](#endnote-38) and the period of the accrual (a commencement and termination date).[[39]](#endnote-39) Although it is quite cumbersome for the registration of the future claim, Japanese legislators believed that the registration of such details should nonetheless be required to specify the future property.[[40]](#endnote-40)

In a nutshell, Japan accepts both notification and registration regime for the perfection of security over future receivables, whether existing or future, with respect to the third parties other than obligors.

* 1. The enforcement of security interest over future receivables

In Japan, the security assignment, rather than pledge and hypothec, is attractive to the creditors because it can help the creditor avoid the inefficient procedure for the enforcement contemplated in the Japanese Civil Code and the possibility of enjoying a forfeiture of the collateral upon borrower’s default.[[41]](#endnote-41) As a general rule, the future receivable may enforce only if the securing party has actually become the owner of the right to the debt claims. In case of the claims do not accrue as it anticipated, the transferee will be settled by way of the transferee’s pursuit of the transferor for contractual liability.[[42]](#endnote-42) For the realization of the security assignment in commercial transactions, the law permits the creditor to enforce its security interest out of court. As such, the Japanese law grants the creditor a right to enforce the security interest simply by retaining the retaining ownership of the collateral or by proceeding with a private auction.[[43]](#endnote-43) Particularly, for the enforcement for the receivables, the step is quite simple that the assignee may directly claim against the relevant debtor.[[44]](#endnote-44) It should be noted that if the amount of debt (or the appraised amount in case of movable assets) is less than the obligation, the obligee credits the debt amount to the obligor’s obligation. If the debt amount exceeds the obligation-duty, the obligee must return the excess to the obligor. [[45]](#endnote-45)

1. **Analysist the possible hurdles and suggestion for improvement in Vietnam**
   1. The lack of guidance on the identification of future debt-claims

In Vietnam, the changes in the Decree 163/2006/ND-CP, amended and supplemented by Decree 11/2012/ND-CP (Decree 163)[[46]](#endnote-46) and the 2015 Civil Code[[47]](#endnote-47) require that collateral may be generally described but must be identified in security agreements. Therefore, it could be reasonably assumed that the debt claim, whether existing or future, must be identified to be enforceable under the law. These changes make the mortgage agreement possible to be void in case of unidentified collaterals.[[48]](#endnote-48) But for the future debt-claim, it may be cumbersome for the contracting parties to depict the collateral to identify as well as the registrars for the registration purpose because we most often than not cannot identify specific debtors. In the event of the description of the future claim is insufficient to identify, the mortgagee, as the secured party would likely suffer from the damages due to the invalidity of the mortgage agreement. From the Japanese legislation and judicial precedents, the Vietnamese law should recognize the validity of mortgages over future debt-claims provided that at the time of entering into the mortgage, the future debt-claims can be identifiable. Recommended elements to identify the future debt-claim for the contracting parties and the registration agency may include the cause and time of accrual of the claims, including the commencement and expiration of the claim accrual, or the amount and the payment of the subject claims.

* 1. The need for the notification obligation to the debt claim

In Vietnam, it is not required either the mortgagee or mortgagor, at the time of execution the security agreement, to notify debtors of the security interest in a debt claim, whether existing or future.[[49]](#endnote-49) However, it is legally required the mortgagee to supply information on the mortgage agreement over the debt claim when so requested by the debtor,[[50]](#endnote-50) and in return, the debtor has the right to request the mortgagee to supply information on the mortgage agreement of the debt claim. If no information is supplied by the mortgagee, the debtor may refuse to pay the debt to the mortgagee.[[51]](#endnote-51) As such, unless the mortgagee proactively notices debtors, there is no way for the relevant debtors to acknowledge the existence of the security interest in the debt claim, even after the future debt-claim has officially become the accrued claim. Consequently, many cases where the debtor could not know to whom they should pay the debt to and subsequently the debtor will likely discharge the amount of debt to the mortgagor, as the original creditor. For example, in the Judgment No.89/2016/KDTM-PT dated July 14, 2016, of the Hanoi High Court, the Court agrees that the debtor (Cienco1 Company) is not acknowledged the security transaction over the debt claim because of the lack of notification from the mortgagee (the SCB Bank), subsequently, the payment of the debtor (Cienco1 Company) to the mortgagor (Nguyen Trai Company) is still effective. Therefore, the mortgagee could not require the debtor to repay the debt to the mortgagee.[[52]](#endnote-52) In doing so, the mortgagee will likely suffer from being an unsecured creditor if the mortgagee does not notify the relevant debtors about the secured transaction in advance, although it is not a compulsory step under the Civil Code.

Japanese law provides that the security assignment deems as ineffective against the applicable obligor or any other third parties unless the assignor gives a notice thereof to the obligor or the obligor has acknowledged the same.[[53]](#endnote-53) Hence, the relevant debtors would likely know about the existence of the security interest, and thus they will not discharge the debt by paying the debt to the securing party (the assignor) upon the notification of the assignor. Having said that, this provision still cannot resolve the shortcoming arising from the practice, where the assignor does not want to notify the debtor about the security assignment because it may prejudice the securing party’s reputation or creditability, and the assignee is not entitled to send the notification to the debtor. Consequently, the assignor still reserves the right to collect the debt.[[54]](#endnote-54) To prevent such situation from occurring, the other countries experience such as France[[55]](#endnote-55) or Germany,[[56]](#endnote-56) where both the assignor and the assignee can give notice of the assignment to the debtor to be perfected the secured transaction.

From the above analysis, because the mortgagee usually has a major interest in avoiding that the debtor will perform in favour of the mortgagor notwithstanding the security transaction, they will initiate the performance of the notification, the Vietnamese law should provide the responsibility of the mortgagor to notify relevant debtors about the mortgage agreement promptly after the time of execution of the mortgage agreement. Moreover, also the mortgagee may, at its discretion, notify to the relevant debtor about the security interest over the debt claim. In addition, as to the future claim, in the case where it cannot identify the specific debtors at the time of execution the secured transaction, after the acquisition of the future debt claim, the mortgagor shall notify the relevant debtors immediately of the security transaction and the mortgagee also have the same right and obligation to notify relevant debtors about the security transaction over the claim like the accrued claims.

* 1. Perfection against third parties

In Vietnam, for the debt claim, whether existing or future, to be effective via-à-vis the third parties, there is no choice but to register the security transaction over the debt claim.[[57]](#endnote-57) In addition, the conflict of interests among the secured parties over the collateral which is used to secure many obligations shall be settled as follows: (i) If all types of security are registered, the priority rule shall be determined according to the registered order. (ii) If there is no registration of the security interest, the priority rule shall be subject to the time of the contract of the security.[[58]](#endnote-58)

Therefore, in the context of Vietnamese law, the rule on priority is that the mortgagee who first registers the secured transaction will gain priority over other mortgagees, rather than the order in which the debtor receives the notification of the respective security interest. Some argue that this approach seems ineffective and unfair as it does not consider the order of the notification to the debtor, which is regarded as a key factor to determine the priority of the security interest in claims.[[59]](#endnote-59) To illustrate, he invokes the case where the mortgagor uses the claim to secure for two separate loans including the first one having registration of the security interest but no notification and the later one without registration but notification to the debtor. In such a case, the debtor will likely discharge the amount of debt for the second mortgagee due to lack of notification of the first mortgagee, even though the first security interest has already registered. Subject to the Vietnamese law, the debtor must continuously make the payment for the first mortgagee and recourse the money from the second mortgagee via litigation. With the existing regime, he believes that the interest of the debtor shall be suffered seriously. Therefore, the law, from his point of view, should provide the priority rule between the competing claims should be determined on the basis of the chronological order of notification to the debtor, rather than the order of registration or execution the secured transaction.[[60]](#endnote-60) Although the priority rule based on the time of notification of security agreement is widely seen in some jurisdictions such as France[[61]](#endnote-61), Korean[[62]](#endnote-62) and even Japan,[[63]](#endnote-63) in the case of Vietnam, the priority rule should be subject to the order of registration for the secured transaction. The rationale is, as analysis, to avoid the case where the debtor will discharge the debt in favour of the second mortgagee notwithstanding the first security transaction, the law should provide that either mortgagee or mortgagor must send the notification to the debtor of the security transaction immediately. In such case, the debtor can determine easily to whom to pay to by checking in the Registration Agency for Secured Transactions of the Ministry of Justice in just a few minutes. Besides, as the nature of future receivables which usually cannot identify the debtors in the security agreement until the right to payment arises, it may be considered as an obstacle for the mortgagor and mortgagee to give the notification to underlying debtors about the mortgage agreement since there is no debtor to notify. In such a case, the registration system, rather than notification seems effective to perfect the security transaction over the third parties.

* 1. The unbalancing of interests between debtors and mortgagees

Under Vietnamese law, the security interest made in violation of a non-security clause is highly effective. Previously, subject to Article 22 para.1 of the Decree 163, it allows the person who holds the right to the debt claim to mortgage part or the whole of that claim, including also future debt-claims[[64]](#endnote-64) without the consent of the debtor. If such provision refuses the validity of non-security clause, it will to some extent be unequal to debtors with respect to the future debt-claim. As to security interests in future debt-claims, normally a contractual prohibition of security is effective subsequent to the security interest over the future receivable, in such case, if we just protect the mortgagee by way of acknowledging the validity of the security agreement between the mortgagor and the mortgagee, the debtors’ interests will be left, and it can be seriously harmful. For instance, the obligor may bear additional costs due to the fact that performance has to be rendered to the mortgagee instead of the original mortgagor in case of international transfers.

In case of absence of the notification, it is high a chance that the debtor could not know the security agreement between the mortgagor and the mortgagee. Moreover, the mortgagor, in such case, would try to seduce the obligor (the debtor) to enter into the contract by adding or accepting the anti-security claim although he had taken the security interest over the future claim with the lender already. In this context, the Vietnamese law just protects the mortgagee from the anti-security clause, and it still does not resolve the unequal interest of the debtors and mortgagee.

Therefore, in order to balance the interest between the debtors and mortgagee, the Vietnamese law should protect the mortgagee from the anti-security clause by recognizing the effectiveness of the mortgage agreement. This approach will provide greater certainty to the mortgagee as to the mortgage. Furthermore, as the mortgagor acts contrary to its contractual duties, it is liable for compensatory damages arising from the obligor for non-performance of the contract, for instance, the arising fee for transferring the money to the mortgagee in case of the enforceable of the security interest in the future receivables.

1. The first definition of the future property was recognized in Decree No. 165/1999/ND-CP. Accordingly, “assets formed in the future” are movables and/or immovables which are formed after the signing of the security transaction and would be owned by the securer, such as yields, profits and/or assets formed from loan capital, projects under construction and other assets that the securer has the right to receive. See: Article 2.7 of Decree No. 165/1999/ND-CP. [↑](#endnote-ref-1)
2. In the research of Xuan, Thao Nguyen and Bich T. Nguyen, they criticized that the current secured transaction law in Vietnam contemplated in the 2005 Civil Code did not follow the international best practices. Consequently, Vietnam transplanted an antiquated, opaque, and incomplete body of secured transactions law. See Xuan-Thao, Nguyen and Bich T. Nguyen. 2014. Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries. North Carolina Journal of International Law and Commercial Regulation, 40 (1). [↑](#endnote-ref-2)
3. Case requesting to declare the existence of the right to retrieve the deposit, 53 Minshu 1, 151 (Sup. Ct., Jan. 29, 1999) (the “Case 53 Minshu 1, 151”). Retrieved from <http://www.law.tohoku.ac.jp/kokusaiB2C/case/pdf/h110129e.pdf> [↑](#endnote-ref-3)
4. The property in Vietnam is categorized into movable and immovable assets, including land use rights, buildings and other properties attached to the land. Both movable and immovable assets may exist at the present or to be formed in the future. Moreover, the future assets are broadly defined as non-formed property or formed property that the entity has established his ownership rights after the time of transaction establishment. See: Article 105.2 and Article 108.2 of the 2015 Civil Code. [↑](#endnote-ref-4)
5. See: Article 363 of the Japanese Civil Code.

   In Japan, there are two kinds of security interests including personal securities and real securities in the Japanese law context. In general, the major types of personal securities include suretyship, joint and several suretyships, and joint and several obligatory. Real securities, which are based on a specific property owned by the obligor or the third person in, include four major types of statutory real rights being the right of retention, preferential right, pledge, and hypothec (mortgage). See Hiroshi Oda. 2009. Japanese Law. Oxford University Express, 3ed, at 174. [↑](#endnote-ref-5)
6. See: Article 369 of the Japanese Civil Code. [↑](#endnote-ref-6)
7. The reason for this limitation is because there is no way to publicize the existence of a mortgage over movables, and in case that the mortgages over movables were allowed, the interest of those who purchase movables could be seriously harmed (Hiroshi, 2009, at 176). [↑](#endnote-ref-7)
8. In fact, at present, although there are certain types of movables can be mortgaged according to the specific laws such as the Law in Hypothec over Automobiles, and the Law on Hypothec over Factories, future receivables still cannot be mortgaged under the prevailing Japanese Civil Code. [↑](#endnote-ref-8)
9. At the present, the preliminary registration security has been introduced by the statue in 1987 (Preliminary Registration Security Contract Act – Law No 78, 1987). See Zentaro Kitagawa. 2017. Doing Business in Japan. LexisNexis, at 5-6. [↑](#endnote-ref-9)
10. Hiroshi, 2009, at 177. [↑](#endnote-ref-10)
11. Frank G. Bennett Jr. 2009. Getting Property Right: “Informal” Mortgages In The Japanese Courts. Pacific Rim Law & Policy Journal Association, 18.

    However, it should be noted that in the context of Vietnam, although there is the controversy of assignment as a form of security, the judicial precedents and academic views are considered assignment is not a form of security assignment subject to the current law and consequently the assignee would not be viewed as a secured creditor. Do Van Dai. 2017. Law Of Obligations And Security Obligation Performace Security: Judgments With Comments: Chapter 2 (Luật Nghĩa Vụ Và Bảo Đảm Thực Hiện Nghĩa Vụ Việt Nam: Bản Án Và Bình Luận Bản Án: Tập 2). Hong Duc Publisher, at 872-886. [↑](#endnote-ref-11)
12. Subject to the Judgment of the Osaka High Court on January 26, 1996, the Osaka High Court allowed the obligor to use the collective receivables consisting of present and future receivables to hypothec for the creditors over the obligation. This case again asserted that the future claim can be secured for the obligation by security assignment in Japan. See the Case 53 Minshu 1, 151. [↑](#endnote-ref-12)
13. Hajime Ueno. (2018). Japan: Civil Code reform and how it affects securitisation transactions in The Securitisation & Structured Finance Handbook 2018. Capital Markets Intelligence. [↑](#endnote-ref-13)
14. See the Case 53 Minshu 1, 151. [↑](#endnote-ref-14)
15. Masaru Ono. 2018. Unique Aspects of Japanese Securitization Relating To The Assignment Of Financial Assets. Duke Journal of Comparative & International Law, 12, at 469. [↑](#endnote-ref-15)
16. See the Case 53 Minshu 1, 151. [↑](#endnote-ref-16)
17. Notably, this principle later was abided by the Osaka High Court in the Judgment of 26 January 1996. That is “the amount of receivables secured by the Promise may increase or decrease in the future but it will be finally determined at the time when its intention to cause the promise to be fulfilled is declared. Therefore, the fact that the amount of receivables was not determined at the time when the Promise was made does not affect the validity of the Promise”, as the judgment states. See the Case 54 Minshu, at 1563. [↑](#endnote-ref-17)
18. See the Case 53 Minshu 1, 151. [↑](#endnote-ref-18)
19. See: Article 466 para.2 of the Japanese Civil Code. [↑](#endnote-ref-19)
20. Takashi Uchida, 2011, Contract Law Reform in Japan and the UNIDROIT Principles. Uniform Law Review, 16 (3). [↑](#endnote-ref-20)
21. Id. [↑](#endnote-ref-21)
22. Subject to Article 297 of the Vietnamese Civil Code in 2015, a secured transaction shall take effect against a third party from the time of registration of such security or the secured party keeps or possess the collateral. When the security takes effect against a third party, the secured party is entitled to reclaim the collateral and the payment prescribed in Article 308 of this Code and relevant laws*.* [↑](#endnote-ref-22)
23. Masaru Ono, 2018. [↑](#endnote-ref-23)
24. Hajime Ueno. 2013. Lending and taking security in Japan: overviewinMulti-Jurisdictional Guide 2013. Retrived from (<https://www.jurists.co.jp/sites/default/files/tractate_pdf/en/plc_finance.pdf>).

    In addition, from the legal perspective, there is no difference between the assignment and security assignment in determining the validity of the assignment of an assignment of future receivables (Masaru Ono, 2018). [↑](#endnote-ref-24)
25. See: Article 467 para. 1 of the Japanese Civil Code. [↑](#endnote-ref-25)
26. See: Article 467 para. 1 of the Japanese Civil Code. [↑](#endnote-ref-26)
27. In this case, the assignee cannot claim the debt directly against the debtor but can only participate in the distribution procedure of the bankruptcy assets as an unsecured creditor. See Jon Woo-Jung. 2012. The Assignment of Receivables under the Chinese Contract Law and Some Suggestions. Peking University Journal Of Legal Studies. Retrived from (http://en.pkulaw.cn/DisplayJourn.aspx?lib=qikan&Gid=022adefeafb8098ae99fd9373e315801bdfb&keyword). [↑](#endnote-ref-27)
28. Takashi Uchida, 2011, at 714. [↑](#endnote-ref-28)
29. See: Article 467 para. 2 of the Japanese Civil Code. [↑](#endnote-ref-29)
30. Arnold S. Rosenberg. Foreign Filing Systems: A Seven-Country Study. Consumer Finance Law Quarterly Report 66: 303. [↑](#endnote-ref-30)
31. See Jon Woo-Jung. 2012.

    In 1998, delivering such notice was costly and burdensome, as it requires notarial certification of individual loans and receivables one by one (Hideki Kanda. 1998. Securitization In Japan. Duke Journal of Comparative & International Law, 8, 359-380). As such, in order to satisfy the Civil Code, companies are required to send notice by certified mail accompanied by a certificate of receipt. As a result, as to the security interest of a large pool of financial assets, it was impeded by tremendous mailing costs and time consuming as well as the inconvenience suffered by debtors (Masaru Ono. 2018). [↑](#endnote-ref-31)
32. The Law for Regulating Business for Specific Claims, Act No 77 of 1992, enacted on 5 June 1992 and enter into force 1 June 1993 (herein after referred as the “MITI Securitization Law”). [↑](#endnote-ref-32)
33. Masaru Ono. 2018. [↑](#endnote-ref-33)
34. H.Ishikawa*.* 2013.Codification, Decodification, and Recodification of the Japanese Civil Code, in The Scope and Structure of Civil Codes. Springer, at 274. [↑](#endnote-ref-34)
35. Article 4 para.1 of the Perfection Law. [↑](#endnote-ref-35)
36. H.Ishikawa, 2013, at 275. [↑](#endnote-ref-36)
37. Article 11 para. 2 of the Perfection Law. [↑](#endnote-ref-37)
38. Woo – jung Jon. 2018. Cross-border Transfer and Collateralisation of Receivables - A Comparative Analysis of Multiple Legal Systems. Hart Publishing. [↑](#endnote-ref-38)
39. Article 8 of the Perfection Law. [↑](#endnote-ref-39)
40. Woo – jung Jon, 2018.

    Arguably, the people suggested that Japan should unify these two systems on the assignment of receivables by making a new registration system to respond the contemporary demands of corporate finance in respect of the assignment of receivables (Takashi Uchida, 2011, at 714). However, the practitioners criticize that the registration system seems impractical. In fact, it is not easy to set up a new system enables people to register their assignment of the claim due to the cost and privacy concerns. See Akira Kamo. 2010. Crystallization, Unification, Or Differentiation? The Japanese Civil Code (Law Of Obligations) Reform Commission And Basic Reform Policy (Draft Proposals). Columbia Journal of Asian Law, 24 (1). [↑](#endnote-ref-40)
41. Frank G. Bennett Jr, 2009, 464. [↑](#endnote-ref-41)
42. See the Case 53 Minshu 1, 151. [↑](#endnote-ref-42)
43. See Hajime Ueno, 2013. [↑](#endnote-ref-43)
44. In this case, the Court allows the Assignee - jokoku appellee may immediately cause the promise of assignment of receivables to be fulfilled and collect the assigned receivables from the garnishees that Company A currently holds or will hold in the future by reason of sales transactions in respect of kotatsu (electric heater-equipped table), woolen or down quilts, and combination thereof upon the Company A’s stopping payment or experiencing any other event affecting its credit. See Case 54 Minshu 4, at 1563. [↑](#endnote-ref-44)
45. In the past, a creditor was entitled to receive full ownership of the assets regardless of its value. Therefore, the creditor could get the ownership of the collateral even with a higher value than that of the loan. It seemed unfair to the debtors whose obligation was secure, the judgment of the Supreme Court, 25 March 1971 (minshu 25-2-208) established the rule that the difference between the amount of the secured loan and the price of the property should be returned to the debtor (Hiroshi, 2009, at 178-179). [↑](#endnote-ref-45)
46. Previously, Article 10 para. 2 of the Decree 163 provided that the general description of security assets did not affect the validity of security transactions. However, since the amendment of Decree 163 in 2012, this provision was removed. [↑](#endnote-ref-46)
47. See: Article 295 para. 2 of the 2015 Civil Code. [↑](#endnote-ref-47)
48. Bui, D. Giang also agrees that, upon the 2015 Civil Code providing on the requirement for the collateral (Article 295 para. 2), the description of the collateral become one of the conditions to be affect the security agreement. See Bui Duc Giang. 2016. Establishing security measures based on assets in the Civil Code 2015 (Xác lập biện pháp bảo đảm bằng tài sản theo Bộ luật Dân sự 2015). Banking Jounal, 18. [↑](#endnote-ref-48)
49. There is no requirement to give notification to relevant debtor of the mortgage agreement over a debt claim in Article 22 of the Decree 163. [↑](#endnote-ref-49)
50. See: Article 22 para. 2 (b) of the Decree 163. [↑](#endnote-ref-50)
51. See: Article 22 para. 3 (b) of the Decree 163. [↑](#endnote-ref-51)
52. See Do Van Dai, 2017, at 139. [↑](#endnote-ref-52)
53. See: Article 467 para. 1 of the Japanese Civil Code. [↑](#endnote-ref-53)
54. See Jon Woo-Jung, 2012. [↑](#endnote-ref-54)
55. The French Civil Law provides that where, before the debtor has been given notice by the assignor or the assignee, the debtor has paid the assignor, he is lawfully discharged. See: Article 1691 of the French Civil Code. [↑](#endnote-ref-55)
56. The German Civil Law provides that If the obligee notifies the obligor that he has assigned the claim, he must allow the notified assignment to be asserted against him in relation to the obligor, even if it does not occur or is not effective. It is equivalent to notice if the obligee has issued a document relating to the assignment to the new obligee named in the document and the latter presents it to the obligor. See Article 409 (1) of the German Civil Code. [↑](#endnote-ref-56)
57. See: Article 319 para. 2 of the 2015 Civil Code. [↑](#endnote-ref-57)
58. See: Article 308 of the 2015 Civil Code. [↑](#endnote-ref-58)
59. See Bui, Duc Giang. 2012. Priority Of A Secured Party In The Mortgage Over Debt Claims (Quyền Ưu Tiên Thanh Toán Của Bên Nhận Thế Chấp Quyền Đòi Nợ). Banking Journal, 17. [↑](#endnote-ref-59)
60. See Bui, Duc Giang, 2012. [↑](#endnote-ref-60)
61. See: Article 1690 of the French Civil Code. [↑](#endnote-ref-61)
62. See: Article 450 para. 1 of the Korean Civil Code. [↑](#endnote-ref-62)
63. See: Article 467 of the Japanese Civil Code. [↑](#endnote-ref-63)
64. In fact, if the obligee and the obligor agree that the debt claim may not be transferred, the anti-transfer clause is valid and consequently, if the obligee still transfers this debt claim, the contract of the debt claim transfer shall be invalid due to a breach of the prohibitory provisions of the law in the spirit of Article 123 of the 2015 Civil Code. Unfortunately, since the collateral is not the transfer or assignment of the right to the debt claim, the above-mentioned regulation will be likely inapplicable to the security interest in the debt-claim. See: Article 365 para. 1 (b) of the 2015 Civil Code. [↑](#endnote-ref-64)