

# Article

## Seizure and Obtaining Possession of Secured Assets in Vietnamese Law

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### ABSTRACT

*Seizure and obtaining possession of the collateral play an important role in extrajudicial realization. However, it poses a risk to a host of interests: public order, interests of creditors and debtors. As such, there should be ways to equilibrate interests. Laws of countries may have their position in striking this balance. This paper shows that despite some progressions, the Vietnamese legal regime regarding obtaining possession of the collateral is frustrating in this task due to many inconsistencies and vagueness. This paper argues the need for harmonization as well as proposes some specific suggestions.*

**Keywords:** Obtain Possession, Seizure/Seize, Collateral, Secured Transactions, Vietnamese Law on Secured Transactions

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DOI : 10.53106/181263242022121702003

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We wish to thank the anonymous reviewers for their constructive critical comments. The authors are grateful to the Editorial Team, Yoming Lin, Yan-Cheng Lai, for their assistance during the process. Any errors are ours.

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## I. INTRODUCTION

To maximize welfare, people always need cooperation, exchange, and gathering capital since one person, in his short life and with his limited resources, cannot produce all the goods to satisfy his own needs, much less the needs of larger groups of people.<sup>1</sup> While an advanced society requires long-term and large-scale cooperation at both local and global levels, practically speaking, the process of the transaction cannot happen instantly and simultaneously. As such, cooperation requires trust. However, the trust in the person itself is not sufficiently secured. This requires the emergence and operation of institutions and instruments to facilitate trust and security.

Since Roman times, the famous Roman praetor Pomponius has asserted “Plus cautionis in re est quam in persona” which means collaterals are more secured than counter-personal rights.<sup>2</sup> In secured transactions, one party gives away its property or rights to the other party as a security or pledge and if the commitment is not fulfilled, the creditor should have some measures to ensure that the credit that he or she extends may be compensated, at least in part--this is what brings about the feeling of being secured. It is, therefore, understandable that, in the entire process of a secured transaction, the realization plays an important role to build trust, cooperation and ensure interests.

The realization can only happen if it is preceded, by any means, by the transfer of assets from the guarantor or the debtor to the secured party or the creditor so that the latter can actively realize the secured assets. Initiating a lawsuit has long commonly been accepted as a pathway to realize the secured assets by means of requesting coercive measures from public institutions; nevertheless, this pathway is often burdensome and time-consuming. To get rid of the potential burdens of engaging in lawsuits and as well as to boost the realization process, some states may permit creditors to seize or obtain possession<sup>3</sup> of secured assets by themselves. However, any permission as such should not imply that [private] seizure or obtaining possession is without risks. Seemingly, the risks of abuse or violence are not negligible. Some questions emerge: Normatively speaking,

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1. N. GREGORY MANKIW, *PRINCIPLE OF ECONOMICS* (8th ed. 2016).

2. PIERRE AQUARONE, *LES SURETES IMMOBILIERES EN INDOCHINE (ESSAI THEORIQUE ET CRITIQUE)* [REAL ESTATE SECURITIES IN INDOCHINA (THEORETICAL AND CRITICAL ESSAY)] (1936) (Ph.D. dissertation, University de Bordeaux, Faculty of Law).

3. The term ‘seizure’ is used in or by the 2010 UNCITRAL Legislative Guide on Secured Transactions and the 2017 UNCITRAL Model Law on Secured Transactions. The 2019 UNCITRAL Model Law on Secured Transactions, however, uses the term ‘obtain possession’ instead. There can be compelling reasons behind this replacement, but the paper at hand is not about shedding light on this nor offering a normative claim on the correctness of the use of terminologies. It should be noted that as ‘seizure’ has been consistently used by UNCITRAL documents and jurisdictions, putting it on par with ‘obtain possession’ is the recognition of the status quo of legislation worldwide.

should private seizure or obtaining possession be allowed? What is the policy rationale in favour of the right to seize property? How do states design an efficient process for this purpose? States' practices are indeed very diverse on these issues.

This paper aims at analyzing Vietnamese rules on the seizure and obtaining possession of secured assets. It points out that credit institutions enjoy the priority over others. It also points out that the Vietnamese legal system is fragmented that needs harmonization.

In the second part of this article, the authors shall show the overall picture of the variety of states' practices concerning the seizure of secured assets and the respective legal grounds giving rise to it. Some notable legal instruments and systems shall be studied, including the Model Law of UNCITRAL, the Cape Town Treaty of which Vietnam is a member, legal instruments from the continental civil law system which lay the foundation for the Vietnamese private law, Article 9 of the UCC (which stands as the stark contrast with the EU continental system), the law of Hong Kong--an Asian jurisdiction having a common-law tradition in a comparison view with the law of Japan, China, Taiwan--states influenced the Civil Law tradition and having similar culture traits with Vietnam.

In the third part, this paper begins by offering a socio-historical account to give a glimpse of the emergence of secured transaction law in the Socialist Republic of Vietnam as well as the causes of the non-uniformity between various legal instruments on secured transaction. In this regard, I make a distinction between civil law rules and banking regulations. Then, this paper gives an overview of the Vietnamese legal regime of secured transaction.

In the fourth part, this paper goes into rules regarding seizure and obtaining possession of security provided by civil codes (from the 1995 Civil Code--the first Vietnamese Civil Code--to the present) and shows how rules in this regard are diverse and inconsistent.

In the fifth part, this paper argues that the current approach of Vietnam regarding seizure and obtaining possession of security can be understood as a 'preferential policy' which offers a privilege exclusively to credit institutions while neglecting the interests of other actors. I also show shortcomings of the current approach and rules.

In the sixth part, this paper refutes the argument that the civil law tradition is the main cause of all frustrations concerning secured transaction. Instead, it argues that shortcomings are caused by fragmented legal thoughts and rules. It asserts the need for harmonization.

Finally, in view of the above analysis, this paper shall make some recommendations regarding the seizure and obtain possession of secured property towards a better balance of interests and workable institutions.

This paper restricts its scope to the law of the Socialist Republic of

Vietnam after the unification day in 30/4/1975.

## II. SEIZING AND OBTAINING POSSESSION OF SECURED ASSETS --A GLOBAL VIEW

From a comparative view, ‘seizure’ or ‘take/obtain possession’ are legal terms that are self-explanatory, viz., there is not any definition and explanation as offered internally by the respective legal documents. For example, under the provisions of the United States Uniform Commercial Code (herein and after ‘UCC’), there is no formal definition for this term. Through the reading of provisions of UCC, property seizure can be understood as a course of action that a secured creditor can perform when there is a breach of the debt repayment obligation. Seizure and obtain possession are distinct and need not go along with disposition under the UCC.<sup>4</sup> Similarly, there is no definition for ‘seizure’ and ‘obtain/take possession’ of secured assets under the Cape Town Treaty<sup>5</sup> and the UNCITRAL Model Law.<sup>6</sup> There is also no general definition under Article 2 of the UNCITRAL Model Law for these terms. According to Article 77 of the UNCITRAL Model Law “Subject to the rights of a person, including a lessee or licensee, with a superior right to possession, the secured creditor is entitled to obtain possession of an encumbered asset after default either by applying or without applying to [a court or other authority to be specified by the enacting State]”. According to the Legislative Guidance of the United Nations Commission on International Trade Law, when a default event occurs (the obligor fails to pay the debt as agreed or violates the terms of the security contract), the secured creditor has the right to enforce the right to realize of the security through a judicial or extrajudicial proceeding.<sup>7</sup> With extra-judicial procedures, secured creditors have the right to proactively--without resorting to public authorities, e.g., the court--seize and possess secured assets for debt settlement and recovery. It can be seen that asset seizure is an active action of the secured creditor in the process of realizing secured assets without going through judicial proceedings. There is also a distinction between ‘seizure’ and ‘obtain possession’ versus ‘disposition’ in the UNCITRAL Model Law.<sup>8</sup>

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4. U.C.C. §§ 9-609 versus 9-610 (AM. L. INST. & UNIF. L. COMM’N 2010).

5. Article 8 of the Cape Town Treaty only provides that “1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies: (a) take possession or control of any object charged to it . . . ”.

6. MODEL LAW ON SECURED TRANSACTIONS (UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 2019).

7. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, LEGISLATIVE GUIDE ON SECURED TRANSACTIONS 283 (2010) [hereinafter UNCITRAL].

8. UNCITRAL MODEL LAW ON SECURED TRANSACTIONS: GUIDE TO ENACTMENT, §§ 77, 78

Often, the approach of countries on the degree of freedom which the parties in the security contract enjoy vary significantly.<sup>9</sup> Some countries strictly prohibit the self-enforcing of security rights by means of seizure or taking possession of the secured assets. Some allow parties to agree on an effective private enforcement mechanism within the framework of the contract (with or without legal provisions) but require that such agreements would not affect competed priority rights and interests, e.g., rights of judgment creditors, rights of the third party, public order, or any 'paternalist rights' as imposed by relevant law, e.g., rights of consumers.<sup>10</sup> Some states allow the self-enforcement of security rights to the extent of what is prescribed by the law, i.e., the right to seize security is a statutory right (in the absence of or even notwithstanding relevant contractual provisions).

According to the regulations of the UCC, after default, a secured party may extrajudicially take possession of the collateral, if it proceeds without the use of force<sup>11</sup> and the breach of the peace<sup>12</sup> in commercially reasonable manner.<sup>13</sup> The secured party may record in the office in which a record of the mortgage is recorded: (1) a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and (2) the secured party's sworn affidavit in recordable form stating that: (A) a default has occurred with respect to the obligation secured by the mortgage; and (B) the secured party is entitled to enforce the mortgage nonjudicially.<sup>14</sup> If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.<sup>15</sup> If the secured party, or a third-party repossessing for the secured party, causes a breach of peace while repossessing the collateral, the repossession will be wrongful for torts, e.g., trespass conversion, assault and battery, and the debtor may sue the secured party in conversion for return of the collateral or damages.<sup>16</sup> A breach of peace precludes self-help repossession.<sup>17</sup> A breach of peace is understood as a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others to

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(UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 2017).

9. UNCITRAL, *supra* note 7.

10. Catherine Walsh, *A Transnational Consensus on Secured Transactions Law? The 2016 UNCITRAL Model Law*, in *TRANSNATIONAL COMMERCIAL AND CONSUMER LAW CURRENT TRENDS IN INTERNATIONAL BUSINESS LAW* 63, 63-89 (T. Kono, M. Hiscock & A. Reich eds., 2018).

11. *McCall v. Owens*, 820 S.W.2d 748, 752 (Tenn. App. 1991).

12. U.C.C. § 9-609 (AM. L. INST. & UNIF. L. COMM'N 2010).

13. U.C.C. § 9-607 (c) (AM. L. INST. & UNIF. L. COMM'N 2010).

14. U.C.C. § 9-607 (b) (AM. L. INST. & UNIF. L. COMM'N 2010).

15. U.C.C. § 9-609 (AM. L. INST. & UNIF. L. COMM'N 2010).

16. *McCall v. Owens*, 820 S.W.2d 748, 752 (Tenn. Ct. App. 1991).

17. *Marcus v. McCollum*, 394 F.3d 813, 820 (10th Cir. 2004).

break the peace, or, as is sometimes said, it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence,<sup>18</sup> all violations of public peace, order or decorum”<sup>19</sup> A mere trespass, without more, does not constitute a breach of peace.<sup>20</sup> It can be observed that the US law gives quite a broad leeway for the secured party to self-obtain possession.

In the opposite polar, continental civil law is hostile against seizure and obtaining possession. To prevent any abuse by the creditor and treat the debtors humanely by not appropriating their assets which play as a means of production,<sup>21</sup> continental civil law, e.g., the French and Portuguese Civil Code, used to forbid seizure and obtaining possession and still retain the forbidden in most of the cases except for some exceptions. The *pacte comissoire* or *pactum commissorium* (“*pacto comissório*”)--the agreement under which there is an automatic appropriation in the context of a mortgage in the event of a default--was used to be prohibited, nevertheless, today it is allowed as for the pledge.<sup>22</sup> It is the same with Italy, and the Netherlands.<sup>23</sup> This hostility is one of the reasons why the Netherlands chose not to accede to the Cape Town Convention with the effect over the European part of the Kingdom.<sup>24</sup>

In Hong Kong, the nature of the security device and the agreement, if any, made between the creditor and the debtor determine whether or not the creditor has the right to take possession.<sup>25</sup> If the creditor is a legal mortgagee, legally speaking, it is more than clear that the creditor has the right to seize and take possession of the property.<sup>26</sup> “There is no need for the insertion of a clause purporting to give such power”.<sup>27</sup> However, it is not legally clear if the security device is an equitable mortgage.<sup>28</sup> There are two

18. *Morris v. First Natl. Bank & Trust Co.*, 254 N.E.2d 683 (Ohio 1970).

19. *Makepeace v. Chrysler Motors Corp.*, 403 N.E.2d 348 (Ohio Ct. App. 1981).

20. *Geslin v. Nissan Motor Acceptance Corp.*, 1998 WL 433932 (N.D. Miss. 1998), *aff’d*, 228 F.3d 408 (5th Cir. 2000). *See also* *Butler v. Ford Motor Credit Co.*, 829 F.2d 568, 570 (5th Cir. 1987); *Pantoja-Cahue v. Ford Motor Credit Co.*, 872 N.E.2d 1039 (Ill. App. Ct. 2007).

21. AQUARONE, *supra* note 2.

22. *See* 1804 Napoleon Code, §§ 2078, 2088, subsequently modified under Article 2348 of the French Civil Code Ordinance No. 2006-346 of 23 March 2006; Portuguese Civil Code, §§ 675, 678, 694.

23. Souichirou Kozuka, *The Cape Town Convention and Its Implementation in Domestic Law: Between Tradition and Innovation*, in *IMPLEMENTING THE CAPE TOWN CONVENTION AND THE DOMESTIC LAWS ON SECURED TRANSACTIONS* 15-56 (Souichirou Kozuka ed., 2017).

24. *Id.*

25. MARK WILLIAMS, HAITIAN LU & CHIN AUN ONG, *SECURED FINANCE LAW IN CHINA AND HONG KONG* 330-31 (2010).

26. *Four-Maids Ltd v. Dudley Marshall (Properties) Ltd.* [1957] Ch 317, 320. Nevertheless, in practice, for the business rationale, that is to enable the debtor to use the property to make money for the repayment, the right is postponed and only exercisable upon the occurrence of special events that have been agreed between the parties in advance; WILLIAMS, LU & ONG, *supra* note 25, at 331.

27. EDWARD I. SYKES & SALLY WALKER, *THE LAW OF SECURITIES* 607 (5th ed. 1993).

28. WILLIAMS, LU & ONG, *supra* note 25, at 331.



opposing views on this:<sup>29</sup> from an orthodox view, there is no right of possession unless there is a special agreement;<sup>30</sup> in contrast, from the liberal view, though rationale is not consistent, the equitable mortgagee has such a right:<sup>31</sup> according to Wade, the Judicature Act 1875 by fusing the procedural aspect of common law and equity, gave the equitable mortgagee such a right,<sup>32</sup> whereas, Sykes and Walker argued that based on the maxim 'equity regards that as done that ought to be done',<sup>33</sup> equitable mortgagee is entitled to the same rights and remedies as the legal mortgagee.<sup>34</sup> In the case of bills of sale granted by non-corporate debtors, the creditor of the bill of sale has an implied power under the Bills of Sale Ordinance; however, the creditor of a bill of sale has to comply with the strict conditions of §14 of the Bills of Sale Ordinance before it can exercise the implied power of seizure.<sup>35</sup>

Japan and China do not allow the possibility of seizure and obtaining possession of security, whereas, Taiwan allows this practice in some scenarios.

Hitherto, Japan still does not provide a method to create a security interest in a movable without depossession (a non-possessory security interest in a movable).<sup>36</sup> For immovable property, there are two methods to enforce security interests that are auction (*Tanpo-fudousan-keibai*) and receipt of proceeds from a secured asset (*Tanpo-fudousan-shueki-sikkou*), which are yielded by a court-elected administrator.<sup>37</sup>

According to Article 412 of the 2020 Chinese Civil Code, seizing and obtaining possession of mortgaged property is the authority of the people's court that must be carried out in accordance with law in an event where a debtor fails to perform his obligation due or upon the occurrence of which the mortgage is to be enforced as agreed upon by the parties occurs.

In Taiwan, though enforcement against mortgaged real estate is usually achieved through court proceedings,<sup>38</sup> there are alternatives as well. First,

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29. *Id.* at 331-32.

30. C. H. M. WALDOCK, *LAW OF MORTGAGES* 55 (2nd ed. 1950).

31. WILLIAMS, LU & ONG, *supra* note 25, at 331-32.

32. *Id.* at 331.

33. *Walsh v. Lonsdale* (1882) 21 Ch D 9.

34. SYKES & WALKER, *supra* note 27, at 161-63.

35. WILLIAMS, LU & ONG, *supra* note 25, at 333.

36. Haruna Fujisawa, *The Security Interest in Transport Vehicles in Japan*, in *IMPLEMENTING THE CAPE TOWN CONVENTION AND THE DOMESTIC LAWS ON SECURED TRANSACTIONS* 273, 273-80 (Souichirou Kozuka ed., 2017).

37. Minji shikkō hō [Civil Execution Act], § 180 (Japan).

38. The mortgagee must first obtain a foreclosure order granted by the district court in the jurisdiction where the mortgaged property is located. First, the mortgagee must provide the court with relevant documents, including the mortgage agreement, the mortgage registration certificate, and evidence showing that the secured debt is due and unpaid. After reviewing the application, the supporting materials, and comments submitted by the mortgagor, usually, the court will issue a foreclosure order without further investigation. The court may order a court clerk to secure the property and put up a notice of the attachment on the real property and/or take the title deed to the real



the TCC permits the mortgagor and mortgagee to enter into an agreement in advance that if the debtor defaults, the collateral can be disposed or its ownership will be transferred to the mortgagee, provided this is not detrimental to the interests of other security holders.<sup>39</sup> However, if after such agreements the mortgagor contests the transfer of the security, the mortgagee shall start court proceedings against the mortgagor to request the transfer of the security on the basis of the transfer agreement.<sup>40</sup> To reduce the risk of bringing a case to court proceedings and prolonging the process, a mortgagee can ask the mortgagor to seal or sign transfer documents in advance at the time of entering into the mortgage agreement as a precaution measure; once the debtor is in default, the mortgagee fills the date and files the transfer documents with the relevant land office.<sup>41</sup> Second, if a debtor defaults on a chattel mortgage, the mortgagee can obtain possession of the movable asset immediately. Normally, the debtor has ten days to redeem the property and pay the mortgagee's costs; otherwise, the mortgagee can sell the property at court or public auction (auction attested by a notary public, police authority or certain other institutions).<sup>42</sup> However, if the asset is perishable or is likely to depreciate to such an extent that the mortgagee's interest will be damaged, or if the costs of taking possession are excessively high, the mortgagee can immediately dispose of the asset.<sup>43</sup> It seems that Taiwanese law, in receiving transplanted rules from other legal systems, has tailored rules to make a uniform and coherent regime on seizing and obtaining possession of security which has struck a fair balance between various interest.

The UNCITRAL's Legislative Guide and Model Law as a soft law aiming to harmonize various perspectives and gather consensus to the voluntary adoption among states have taken an eclectic and egalitarian

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property into custody. Then there takes an auction procedure (Minfa (民法) [Civil Code] § 873-2 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended Jan. 20, 2021) (Taiwan)). If the security cannot be sold during the auction process (after three auctions), the title to the property will normally pass to the creditor. (Minfa (民法) [Civil Code] § 873 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended Jan. 20, 2021) (Taiwan), Hsin-Lan Hsu, *Lending and Taking Security in Taiwan: Overview* (Thomson Reuters Practical Laws 2020), [https://uk.practicallaw.thomsonreuters.com/8-630-2870?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co\\_anchor\\_a923779](https://uk.practicallaw.thomsonreuters.com/8-630-2870?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a923779).)

39. Minfa (民法) [Civil Code] § 878 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended Jan. 20, 2021) (Taiwan).

40. Hsu, *supra* note 38.

41. Minfa (民法) [Civil Code] § 873 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended Jan. 20, 2021) (Taiwan); Hsu, *supra* note 38.

42. The mortgagee must publicly announce the intended sale at least five days in advance. If the debtor refuses to relinquish possession of the movable asset, the mortgagee must apply to the court for a provisional attachment of asset. Hsu, *supra* note 38.

43. Minfa (民法) [Civil Code] §§ 871, 872 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended Jan. 20, 2021) (Taiwan); Hsu, *supra* note 38.

approach. They recognize that while as a general principle of debtor-creditor law of some states, it is a requirement for judicial procedures for the realization of secured assets.<sup>44</sup> Nevertheless, as court proceedings can be slow and costly, these proceedings are less likely to produce the highest possible amount upon the disposition of the assets being sold.<sup>45</sup> Delays and expenses involved in enforcement are also anticipated.<sup>46</sup> They notice that [as such] some states entitle secured creditors to make exclusive use of extrajudicial procedures which go hand in hand with several mandatory requirements, e.g., the requirement to send a notice of default or notice of intended disposition,<sup>47</sup> the requirement to act in good faith and commercially reasonable manner. It reminds us the need for balancing between flexibility, humanness and justice.

Following these well-considerations, Article 72 of the UNCITRAL Model Law provides that

“1. After default, the grantor and the secured creditor are entitled to exercise: (a) Any right under the provisions of this chapter; and (b) Any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law. 2. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible”.<sup>48</sup>

Article 77 of the UNCITRAL Model Law provides that:

“2. If the secured creditor decides to exercise the right provided in paragraph 1 without applying to [a court or other authority to be specified by the enacting State], all of the following conditions must be satisfied: (a) The grantor has consented in writing to the secured creditor obtaining possession without applying to [a court or other authority to be specified by the enacting State]; (b) The secured creditor has given the grantor and any person in possession of the encumbered asset notice of default and of the secured

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44. UNCITRAL, *supra* note 7.

45. *Id.*

46. *Id.*

47. Such notification should be made around 10 or 20 days before the seizure; nevertheless, it is also noted that some states do not require such formal steps, at least, in some special cases, e.g., considering a risk that a grantor in default may then seek to hide or transfer the encumbered assets, or in cases where the encumbered assets are perishable or likely to decline rapidly in value. *Id.* at 292.

48. MODEL LAW ON SECURED TRANSACTIONS, §§ 72, 77 (UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 2019).

creditor's intent to obtain possession; and (c) At the time the secured creditor attempts to obtain possession of the encumbered asset, the person in possession of the encumbered asset does not object. 3. The notice referred to in paragraph 2 (b) need not be given if the encumbered asset is perishable or may decline in value speedily. 4. If a higher-ranking secured creditor is in possession of the encumbered asset, a lower-ranking secured creditor is not entitled to obtain possession of the asset".<sup>49</sup>

All the conditions set out in Article 77(2) are said to have been designed to protect the public interest and to ensure that the interests of the grantor or other person in possession are not unduly prejudiced.<sup>50</sup> According to UNCITRAL, there is a two-fold rationale for Article 77.(4): (i) to ensure that the lower-ranking secured creditor cannot interfere with the exercise of the enforcement rights of the higher-ranking secured creditor; (ii) to ensure that the security right of a higher-ranking secured creditor that was made effective against third parties by possession does not cease to be effective against third parties or lose its priority status.<sup>51</sup>

### III. OVERVIEWING VIETNAMESE SECURED TRANSACTION LAW AND ITS TASKS

#### A. *Societal Background and the Overall Legal Framework Concerning Secured Transaction Law in Vietnam from 1975 to Đổi mới*

Right after the reunification in 1975, the official name of Vietnam was changed to the Social Republic of Vietnam to redeclare the recognition of--or at least the orientation towards--being a socialist state.<sup>52</sup> The Resolution of the 4th Party Congress claimed that the decisive conditions for the successful transition from the society dominated by small-scale agricultural production households straight to socialism (without the stage of accumulating capital) of Vietnam are to establish and continuously strengthen the dictatorship of the proletariat and to exercise and constantly promote the collective mastery of the working people over the economy.<sup>53</sup>

49. *Id.*

50. UNCITRAL, *supra* note 8, at 135.

51. *Id.*

52. Doan Thanh Hai, Doan Thi Phuong Diep & Nguyen Nu Hong Duong, *Can Feminist Legal Theory Transcend Vietnamese Legal Education and Legal Research Towards the Goal of Addressing Women's Issues?* 9(2) ASIAN J. LEG. EDUC. 185, 186 (2022).

53. Đảng Cộng sản Việt Nam [Communist Party of Vietnam], *Toàn văn Nghị quyết Đại hội IV của Đảng [Full text of the Resolution of the 4th Party Congress]* (1976), <https://tulieuvankien.dangcongsan.vn/ban-chap-hanh-trung-uong-dang/dai-hoi-dang/lan-thu-iv/nghi-quyet-cua-dai-hoi-dai-bieu-toan-quooc-lan-thu-iv-cua-dang-1522>.

The collective mastery over the economy comprises of (i) collective mastery over the primary means of production, (ii) collective mastery over the labor force, and (iii) collective mastery over the organization and management of production and distribution. In order to build the collective mastery over the economy, it is necessary to abolish the capitalist ownership regime and the private ownership system and establish a socialist ownership regime having two sectors: (i) ownership of the entire people and (ii) collective ownership. These orientations were legislated into the 1980 Constitution (Article 15-18). Soviet-based legal and economic structures and mechanisms were adopted nationwide.

With this background in mind, it is unclear whether lending between individuals was legal and what rules regulating lending between individuals were<sup>54</sup> though certainly, lending activities between individuals might take place underground and be carried out per rooted customary practices. In reality, due to bureaucratic delays in distributing the public budget, even organs at the district level had to borrow from citizens to operate economic plans: those organs announced publicly the need for the state to borrow from citizens and the interest rate could be up to 15% per month (annual interest could be up to 180%). This, however, was made in the absence of regulations and permission from higher authorities, e.g., provincial or central authorities.<sup>55</sup>

In 1951 the National Bank of Vietnam which was later renamed 'the State Bank of Vietnam' (SBV) was established under decree 15/SL signed by President Ho Chi Minh as the successor of the Production Credit Office which was founded on February 3, 1947 to replace the Indochina Bank – La Banque de l'Indochine.<sup>56</sup> In addition to the role of administering the macro-fiscal policy and economic policy, the State Bank of Vietnam also assumed functions and duties of both a policy and a commercial bank: it financed state-owned and collective businesses.<sup>57</sup> However, it is reported

54. After the Independence Day--September 2 1945, President Ho Chi Minh passed Ordinance 50 dated November 16 1945 and then Ordinance 97/SL dated May 22 1950 whose purpose was to maintain the validity of French civil codes and regulations to the extent that such rules would not be explorative or restrictive to freedom; otherwise, they shall be abolished and invalidated. Nevertheless, the Resolution of the 4th Party Congress and the 1980 Constitution, in view of their ideology and content, would certainly abolish or invalidate these above Decrees. The situation was in liminal.

55. Đặng Phong, PHÁ RÀO TRONG KINH TẾ VÀO ĐÊM TRƯỚC ĐỔI MỚI [FENCE-BREAKING: THE EVE OF DŌI MỚI IN VIETNAM] 298 (2022).

56. The State Bank of Vietnam, *History and Development of the Central Bank*, [https://www.sbv.gov.vn/webcenter/portal/en/home/rm/museum/hadotcb?\\_afzLoop=56940259056623224#%40%3F\\_afzLoop%3D56940259056623224%26centerWidth%3D80%2525%26leftWidth%3D20%2525%26rightWidth%3D0%2525%26showFooter%3Dfalse%26showHeader%3Dfalse%26\\_adf.ctrl-state](https://www.sbv.gov.vn/webcenter/portal/en/home/rm/museum/hadotcb?_afzLoop=56940259056623224#%40%3F_afzLoop%3D56940259056623224%26centerWidth%3D80%2525%26leftWidth%3D20%2525%26rightWidth%3D0%2525%26showFooter%3Dfalse%26showHeader%3Dfalse%26_adf.ctrl-state).

57. The Council of Government, Decision No. 32/CP dated February 11, 1977 of the Council of Government on the Credit Renovation and Expansion and Credit Guideline on Working Capital and Provisions for Infrastructure Investment Lending for State-Owned Enterprises of the SBV General

that there was no rule on mortgage or pledge applicable to lending activities of SBV and as such there lacked a measure to ensure the recovery of loans upon due from debtors.<sup>58</sup> It would follow from this that finding measures to recover debts from debtors was a puzzle for state agencies.

B. *Societal Background and the Overall Legal Framework Concerning Secured Transaction Law in Vietnam Since Đổi mới*

Around 1985, the Vietnamese central-planned economy nearly collapsed with hyperinflation, food shortages, and structural imbalances. Some political-economic initiatives, notably, the Giá-Lương-Tiền (Price-Salary-Money) plan (Directive 326/CT dated 29/9/1985 of President of the Council of Ministers), that inclined to reserve some traits of the Soviet structure--that is, a resistance to a complete and drastic economic reform--were all failed.<sup>59</sup> Consequently, the 6th Party Congress in 1986 decided to implement Đổi Mới policy to transform the central-planned economy into a socialist-oriented market economy.<sup>60</sup> Major changes have been made concerning the legal system and the economy gradually. Political orientation was incorporated in the 1992 Constitution which was amended in 2001 following the 9th Party Congress and the 2013 Constitution.

In March 1988, the Council of Government issued Decree No. 53/HDBT laying the foundation to ‘transform the banking system to commercial operations.’<sup>61</sup> Four specialized state-owned banks were separated from SBV. Around 1988-1990, the Industrial and Commercial Bank of Vietnam (VietinBank) and the Bank for Investment and Construction of Vietnam (BIDV) were detached and first organized not as commercial banks; then they were restructured after 1992 as state-owned commercial banks (SOCBs).<sup>62</sup> In 1992, the Agricultural Development Bank (AgriBank) and the Bank for Foreign Trade of Vietnam (Vietcombank)

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Director.

58. It should be noted again that French Colonial Civil codes and Civil Code of Republic of Vietnam (South Vietnam) have rules concerning secured transactions and secured transactions had long been a common practice in the banking sector under these regimes.

59. T.H & V.D, *Vĩnh biệt chuyên gia Huỳnh Bửu Sơn--‘Người mở khóa’ đặc biệt của nền kinh tế* [Farewell to Expert Huỳnh Bửu Sơn--The Special “Unlocker” of the Economy] (SaigonTimes, June 3, 2022), <https://thesaigontimes.vn/vinh-biet-chuyen-gia-huynh-buu-son-nguoi-mo-khoa-dac-biet-cua-nen-kinh-te/>.

60. Đảng Cộng sản Việt Nam [Communist Party of Vietnam], *Toàn văn Nghị quyết Đại hội VI của Đảng* [Full text of the Resolution of the 6th Party Congress] (1986), <https://tulieuvankien.dangcongsan.vn/ban-chap-hanh-trung-uong-dang/dai-hoi-dang/lan-thu-vi/nghi-q-uyet-dai-hoi-dai-bieu-toan-quoc-lan-thu-vi-cua-dang-1493>.

61. The State Bank of Vietnam, *supra* note 56.

62. PHẠM MINH CHÍNH & VƯƠNG QUÂN HOÀNG, KINH TẾ VIỆT NAM: THĂNG TRẦM VÀ ĐỘT PHÁ [VIETNAM’S ECONOMY: UPS AND DOWNS AND BREAKINGS] 116-20 (2009).

were formed.<sup>63</sup> These four banks dealt with providing credit to the industry and trade sectors, investment and construction, agriculture and fishing and overseeing all aspects of foreign payments.<sup>64</sup> Notwithstanding the aforementioned, until the end of 1989, the state still retained the system of ordinances on quota (chỉ tiêu pháp lệnh) and the one-tier banking system that served the state-owned sector only.<sup>65</sup> In May 1990, the Ordinance on the State Bank of Vietnam and ordinance on banking, credit co-operatives and finance companies, were enacted, thereby officially transforming the Vietnamese banking system into a two-tier system. Since then, credit extension, currency trading, payment, foreign exchange and banking services have been the business of commercial banks and credit institutions.<sup>66</sup> The first Joint-Stock Commercial Banks were licensed in 1991.<sup>67</sup> The number of joint-stock commercial banks increased rapidly in the following years. In 2007, the equitization of the 'Big Three Banks' took place; VietcomBank was the first SOCB being chosen for the pilot equitization, followed by BIDV and VietinBank (AgriBank is still a full SOCB).<sup>68</sup>

In the wake of the legal-economic reform, the already-forgotten law on secured transactions was resurrected. The number of legal documents on this matter passed since Đổi mới to now is mountainous and it seems pointless to merely list these documents. In this section, I only point out the core features and components of law on secured transactions as well as give an overview of the operation of the secured transaction system in Vietnam.

### 1. Core Features and Components of Law on Secured Transactions

Secured transactions in Vietnam may have two distinct aspects: a civil

63. *Id.*; The State Bank of Vietnam, *supra* note 56.

64. Actually, the Vietnamese banking system was made and renovated after the Soviet-based banking system. The Soviet banking system basically consisted of a single state bank (Gosbank) which combined the roles of a central bank and a commercial bank. Gosbank also controlled StroiBank, the bank for financing state investment, and Vneshekonombank, the bank for foreign trade. Then there were also some other specialized banks. However, no competition among banks was allowed. ADAM ZWASS, MONEY, BANKING, & CREDIT IN THE SOVIET UNION & EASTERN EUROPE 87-89 (2017); Pekka Sutela, *Banking System, Soviet* (2022), <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/banking-system-soviet>.

65. ĐÀO XUÂN SÂM & VŨ QUỐC TUẤN, ĐỔI MỚI Ở VIỆT NAM-NHỚ LẠI VÀ SUY NGẪM [ĐỔI MỚI IN VIETNAM-RECALL AND REFLECT] (2008).

66. The State Bank of Vietnam, *supra* note 56.

67. The State Bank of Vietnam, *Joint - Stock Commercial Banks: By December 31, 2015* (2015), [https://www.sbv.gov.vn/webcenter/portal/en/home/fin/socins/bks/cbks/jsb?dDocName=SBVWEBAPP01SBV082250&\\_afriLoop=56974733912404224#%40%3F\\_afriLoop%3D56974733912404224%26centerWidth%3D80%2525%26dDocName%3DSBVWEBAPP01SBV082250%26leftWidth%3D20%2525%26rightWidth%3D20%2525%26](https://www.sbv.gov.vn/webcenter/portal/en/home/fin/socins/bks/cbks/jsb?dDocName=SBVWEBAPP01SBV082250&_afriLoop=56974733912404224#%40%3F_afriLoop%3D56974733912404224%26centerWidth%3D80%2525%26dDocName%3DSBVWEBAPP01SBV082250%26leftWidth%3D20%2525%26rightWidth%3D20%2525%26)

68. Le Ngoc Dang, Dinh Dung Nguyen & Farhad Taghizadeh-hesary, *State-Owned Enterprise Reform in Viet Nam: Progress and Challenges* (No. 1071), at 8 (Asian Development Bank Institute, 2020), <https://www.adb.org/sites/default/files/publication/562061/adb-wp1071.pdf>.



and a banking one; nevertheless, Vietnamese lawmakers, scholars, and the judiciary have not yet addressed the interrelation between these two aspects. Following this, rules regulating secured transactions can also be sorted into three categories or components: civil law rules, banking law rules, and technical rules concerning registration.

**Civil legal rules:** Secured transactions between individuals or organizations except for credit institutions are regulated by primarily Civil Codes (since Đổi Mới, three Civil Codes have been passed--the 1995, 2005, and 2015 Civil Codes) and by-law regulations implementing a Civil Code or specifying rules on secured transactions (e.g., Decree 165/1999/ND-CP; Decree 163/2006/ND-CP amended by Decree 83/2010/ND-CP and Decree 11/2012/ND-CP; Decree 21/2021/ND-CP). Vietnam has embraced the "civil law legal system" tradition since the colonial period. The re-establishment of the Vietnamese legal system was also made after the 'civil law legal system tradition after Đổi mới, evidence in grand civil codes. There are many reasons for this approach. First, civil law countries such as Japan (JICA), Sweden (Swedish International Development and Cooperation Agency (SIDA)), and France are major donors to not only projects on making civil codes but also projects on funding Vietnamese students to study abroad.<sup>69</sup> Second, it would follow from the aforementioned that Vietnamese legal scholars and government officials involved in drafting the Civil Code were trained in civil law countries such as France, Germany, and Japan.<sup>70</sup> Third, mindful of the influence of French law on the Vietnamese legal system, international financial institutions that provide legal assistance in respect of specific areas of the law, specifically secured transactions, can incline to offer experts and consultants from Civil Law jurisdictions.<sup>71</sup> For example, in 1998, ADB launched a programme<sup>72</sup> of legal assistance focusing on the establishment of laws and a registration system for non-possessory pledges over movable property which can be set up against third parties in which consultant lawyers from the Province of Quebec in Canada were invited to take part in.<sup>73</sup> ADB also organised a study tour for Vietnamese officials in charge of drafting government decrees on secured transactions to the Canadian Provinces of British Columbia, New Brunswick, and Quebec to see the registries for secured transactions over personal property.<sup>74</sup>

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69. Shiro Muto, *Reforming the Secured Transactions Regime in Vietnam Using Foreign Law as a Model: A Critical Appraisal*, 7 UNIF. L. REV. 1031, 1034 (2002); JOHN GILLESPIE, TRANSPLANTING COMMERCIAL LAW REFORM: DEVELOPING A 'RULE OF LAW' IN VIETNAM 67, 236-39 (2006).

70. GILLESPIE, *id.* at 161, 236-39.

71. Muto, *supra* note 69.

72. Asian Development Bank, TA No 2823-VIE, Registration System for Secured Transactions for Vietnam.

73. Muto, *supra* note 69.

74. *Id.*



**Banking regulations:** To fix loopholes concerning lending activities of credits institutions, a year before a promulgation of the 1995 Civil Code, in 1994, the Governor of the State Bank enacted Decision 217 on mortgages, pledges and guarantees of credit institutions. In 1999, Decision 217 was replaced by Decree 178/1999/ND-CP on Security Interests of Credit Institutions. There are also some supporting legal documents such as Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCĐC-BTC.

Though officials of the State Bank of Vietnam claimed that banking regulations, e.g., Decree 178/1999/ND-CP, can be regarded as regulations implementing the Civil Code, banking regulations and their ideology differ significantly from civil law rules and their spirit that makes banking regulations should be deemed as independent and distinct from the civil law rules. Though one of the principles of the Civil Codes is the principle of self-determination,<sup>75</sup> there are paternalistic rules to prevent ‘exploitative acts’ of one party over other parties; For example, Article 468(1) of the 2015 Civil Code provides that the rate of interest for a loan shall be agreed by the parties but not exceed 20% per year.<sup>76</sup> Meanwhile, banking regulations are primarily about simultaneously broadening the freedom of credits institutions, ensuring the recovery of loans, and safeguarding the financial system by restricting or even intervening rights and interests of other actors; for example, though banking regulations allow banks not to be hindered by the Civil Code to set interest rates upon their assessment of credit,<sup>77</sup> they used to permit an asset to be used as collateral for a single credit institution only, except otherwise prescribed by laws, so as to prevent the creation of subsequent secured transactions that may hinder the enforcement of the prior secured transaction created over the asset.<sup>78</sup>

75. See, e.g., Article 3.2 of the 2015 Civil Code “Each person establishes, exercises/fulfills and terminates his/her civil rights and obligations based on freely and voluntarily entering into commitments and/or agreements”.

76. There is a convergence between Vietnamese thought and civil law tradition in this regard. See President of The Democracy Republic of Vietnam, Ordinance 97/SL on Revising civil law regulations, Ministry of Justice, Report on the draft Ordinance 97/SL of the Ministry of Justice to President Ho Chi Minh, Nguyễn Xuân Tùng, *Cải cách quyền dân sự năm 1950: Trách nhiệm của Ngành Tư pháp trước quyền lợi của nhân dân* [Civil Rights Reform in 1950: Responsibility of the Justice Sector concerning the Interests of the People] (Công Thông tin Điện tử Bộ Tư Pháp [Portal of the Ministry of Justice], 2014),

[https://moj.gov.vn/qt/cacchuyenmuc/70TuPhapVietNam/Pages/tu-lieu-nganh.aspx?ItemID=44&fbclid=IwAR1uEFtUbAE9Zqblz184EMnrM2zEgZuo7VDIYNNLDLJI\\_8pn40As6SavtU](https://moj.gov.vn/qt/cacchuyenmuc/70TuPhapVietNam/Pages/tu-lieu-nganh.aspx?ItemID=44&fbclid=IwAR1uEFtUbAE9Zqblz184EMnrM2zEgZuo7VDIYNNLDLJI_8pn40As6SavtU).

77. See, e.g., The State Bank of Vietnam, Circular No. 39/2016/TT-NHNN Prescribing Lending Transactions of Credit Institutions And/or Foreign Bank Branches with Customers, § 13.

78. Article 11 of Decree 178/1999/ND-CP of Vietnamese Government on Credit Institution’s Loan Security prescribed that the property must be registered in terms of ownership right and the value of the loan-security property must be higher than the total value of all secured obligations. Article 13 of Decree 85/2002/ND-CP of the Government Amending and Supplementing Decree No. 178/1999/Nd-Cp of December 29, 1999 on Credit Institutions Loan Security set conditions as follows: ‘The following conditions must be fully met:

1. The security transactions related to that property have already been registered at the security

The gap and disparity between civil law rules and banking regulations seem to be bridged in light of the promulgation of Decree 163/2006/ND-CP on security transactions replacing Decree 165/1999/ND-CP on security transactions and superseding Decree 178/1999/ND-CP on security for loans of credit institutions, Decree 85/2002/ND-CP amending and supplementing Government Decree 178/1999/ND-CP.<sup>79</sup> Nevertheless, this uniformization was not long-lasting. The 2008 banking and financial crisis and global economic slump and the series of scandals in the banking sectors<sup>80</sup> which continue until now have resulted in bad debts; this requires the state to act to restructure the banking sector and is of the priority, to recover bad debts. The state has passed several documents for this purpose, including Decision 254/QĐ-TTg,<sup>81</sup> Decision 1058/QĐ-TTg,<sup>82</sup> Resolution 02/NQ-CP on a Number of Solutions to Remove Difficulties for Business Production, Market Support, Handling of Bad Debts, and Resolution 42/2017/QH14 on Pilot Settlement of Bad Debts of Credit Institutions. The titles of these instruments express clearly the legislative intent of the Vietnamese legislators which is about finding a way to settle bad debts of credit institutions. Though the state is happy because the average bad debt ratio of the whole credit institution system has gradually decreased,<sup>83</sup> the state's measures complicate the already-opaque relationships between the civil law rules and banking regulations.

**Rules concerning registration:** Whether credit institutions are involved

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transaction registry.

2. The credit institutions that accept the same security property must reach written agreement with one another on nominating a representative to keep the originals of papers related to the security property, and on the disposal of the security property to recover debt if the borrower is unable to repay it.

3. The security property value determined at the time of signing the security contract must be larger than the total value of the secured debt-repayment obligations, except otherwise prescribed by law.<sup>7</sup> Though these two regulations are now expiry, they can be continuously practiced by credit institutions to ensure the expeditious realization and recovery of loans.

Civil law rules, often, allow a debtor to use the asset as collateral for subsequent creditors, however.

79. Vietnamese Government, Decree 163/2006/ND-CP on Security Transactions, § 72.

80. Tùng Lâm, *Những đại án làm rung động ngành ngân hàng 20 năm qua* [The scandalous cases shaking the banking industry in the past 20 years] (Cafef.vn, 2017), <https://cafef.vn/nhung-dai-an-lam-rung-dong-nganh-ngan-hang-20-nam-qua-20170909111435611.chn>; Thân Hoàng & Danh Trọng, *Xét xử đại án Ngân hàng BIDV thất thoát 1.700 tỉ đồng* [Trialing grand BIDV case that caused a loss of 1,700 billion VND] (Tuoi Tre, Oct. 26, 2020), <https://tuoitre.vn/xet-xu-dai-an-ngan-hang-bidv-that-thoat-1700-ti-dong-20201026071959868.htm>.

81. The Vietnamese Prime Minister, Decision 254/QĐ-TTg on Approving Scheme for “Restructuring System of Credit Institutions Associated with Settlement of Bad Debts in the Period of 2011-2015”.

82. The Vietnamese Prime Minister, Decision 1058/QĐ-TTg on Approving Scheme for “Restructuring System of Credit Institutions Associated with Settlement of Bad Debts in the Period of 2016-2020”.

83. This claim is made in light of a report by the Vietnamese Government. I shall not show specific figures here because it is not meaningful to show figures without understanding the methods from which figures are estimated. VIETNAMESE GOVERNMENT, Báo cáo của Chính phủ về tổng kết thực hiện Nghị quyết số 42/2017/QH14 về thí điểm xử lý nợ xấu của các tổ chức tín dụng [Report of the Government on Summarizing the Implementation of Resolution No. 42/2017/QH14 on Piloting Bad Debt Settlement of Credit Institutions], (2021).

in a secured transaction--hence, a party therein--or not, parties in secured transactions must always follow rules concerning registration. Most of those rules are Decrees of the Government<sup>84</sup> and Circulars or Joint-Circulars passed by the Ministry of Justice and relevant Ministries, e.g., the State Bank of Vietnam, Ministry of Construction, Ministry of Resources and Environment, for example, Circular 05/2011/TT-BTP of the Ministry of Justice,<sup>85</sup> Joint Circular 01/2014/TTLT-NHNN-BXD-BTP-BTNMT replaced by Circular 07/ 2019/TT-BTP Elaborating on Registration for Mortgage of Land Use Rights and Assets Attached to Land. In these legal documents, there are rules specifying if certain treatments and measures are equally applicable and available for credit institutions and other actors altogether or if and when some sorts of treatments and measures are available for credit institutions exclusively.

In case the security is a specific type of assets, notably, land use rights, sea-going vessels, aircraft . . . the secured transaction at stake shall also be subject to specialized rules regulating relevant fields, e.g., the (1987, 1993, 2003, 2013) Land Law. I shall keep this paper concise by not going into detail with respect to these specialized fields.

## 2. Overview the Operation of Secured Transaction Law

Secured transaction law is a complex and technical regime, covered by jargon and exceptions. Besides, in view of the separation between civil law rules and banking regulations, the number of Vietnamese political and legal documents is monstrous. Thoroughly addressing and analyzing all rules should require many research projects that this paper alone cannot do justice to. With this in mind, this paper shall serve only as a general brief with the purpose of helping readers to get an overview of the operation of Vietnamese secured transaction law.

**Forms/methods of secured transactions or security devices:** The most common forms of secured transactions are mortgage and pledge. The difference between mortgage and pledge is that the former is a non-possessory instrument and the latter is a possessory instrument. Though there is no explicit rule prohibiting pledging land use rights and assets attached to land, an orthodox view in Vietnamese jurisprudence is that these cannot be pledged as land law and law on housing do not explicitly permit

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84. E.g., VIETNAMESE GOVERNMENT, Decree 08/2000/ND-CP on Registration of Secured Transactions.

85. Ministry of Justice, Circular 05/2011/TT-BTP Guiding the registration of and provision of information about security transactions and contracts, and notification of assets attached to enforce a judgment directly, by post, fax, or email at registration centers of the National Office for Registration of Security Transactions under the Ministry of Justice.

such transactions.<sup>86</sup> Other forms of security interests are guarantees/performance bonds, securities by way of deposit, security collateral, escrow accounts, sales with retention of title, pledges of trust, and liens.<sup>87</sup> Guarantee, securities by way of deposit deposits and escrow deposits confer contractual rights on the creditor as against third parties but not enforceable rights over the assets (*jus in rem*). Guarantees and pledges of trust are third party security--that is, these measures are established not by means of encumbering assets but by undertaking made by a third person (a guarantor) to an obligee (hereinafter the creditor) to perform an obligation on behalf of an obligor (the principal debtor)<sup>88</sup> or made by a socio-political organization at the grassroots level with the purpose to help poor individuals and households to be able to borrow sums from banks or other credit institutions for purposes of production, business or provision of services.<sup>89</sup> Sales with retention of title and financial lease have just been categorized as a security measure in the 2015 Civil Code though they have been mentioned in the 2005 Civil Code as miscellaneous matters of contract law.

***Assets available for security:*** Vietnamese law does not recognise common law styled fixed and floating charge; except for liens and retention of title, secured assets must be under the ownership of the securing party and be identifiable.<sup>90</sup> Security can be existing or off-plan property.<sup>91</sup> Some most common Vietnamese ‘security packages’ and assets are:

Land use rights and assets attached to land  
Physical movable assets  
Shares and or capital contributions  
Bank accounts  
Receivables  
Contractual rights  
Aircraft and vessels

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86. Article 167 of the 2013 Land Law only endows land users (in Vietnam, there is proprietorship over land but only land use rights) the right to exchange, transfer, lease, sublease, inherit, donate, mortgage land use rights, and contribute land use rights as capital. Similarly, Vietnamese homeowners only have rights to conduct the following transactions: sale of housing or transferring the agreement on housing purchase, lease, lease and purchase, gifting, exchange, inheritance, mortgage, capital contribution, lending, permission for stay, or authorize housing management . . . (Article 10.(1).(d)). A contract of which essence is the mortgage of land use rights and assets attached to land can be invalidated if it is mislabeled as ‘pledge’ (contrary to technical legal rules, in custom, people, usually label both mortgage and pledge as ‘pledge’). Nevertheless, the outcome of such cases may be inconsistent between various courts.

87. Bộ luật Dân sự 2015 [2015 Civil Code] § 292 (promulgated Nov. 24, 2015, effective Jan. 1, 2017) (Vietnam).

88. *Id.* § 335.

89. *Id.* § 344.

90. *Id.* § 295.

91. *Id.*

Though civil codes prescribe that the value of collateral can be greater, equal or smaller than the value of the secured obligation, in practice, credit institutions may not extend credit if the value of the collateral is smaller than the credit.

***Creation and perfection of security:***

*Notarisation and registration requirements:* Notarization and registration are not conditions for a security measure to become valid, except otherwise prescribed by law.<sup>92</sup>

The creation of security over certain types of assets such as land use rights, assets attached to land (including off-plan real property), ships, and aircraft, requires registration and notarization for the security to become valid.<sup>93</sup>

A registered security shall take effect against a third party from the time of registration; in other words, if a security measure is not registered, it shall not take effect against a third party and shall not confer priority.<sup>94</sup>

Generally, security over most types of assets is registrable with the National Registration Agency for Security Transactions ("NRST").<sup>95</sup> Security over land use rights and assets attached to land must be registered with the relevant Department of Natural Resources and Environment ("DONRE") at Land Use Rights Registration Centre.<sup>96</sup> Security over ships must be registered with the Vietnam National Maritime Bureau, whereas the Civil Aviation Authority registers aircraft.<sup>97</sup>

*Perfection Rules for security devices other than mortgage:* it appears that the law recognizes registration as the only method of perfection (i.e., to make a secured transaction effective against third parties).

*Perfection in case a third party holds the mortgaged collateral:* Though the law provides that the secured party may authorize a third party to possess the collateral, it does not articulate the requirements for possession by this third party to be effective.<sup>98</sup> Neither did the law pay attention to addressing

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92. *Id.* § 298.

93. VIETNAMESE GOVERNMENT, Decree 102/2017/ND-CP on Registration of Security Interests, § 9.

94. Bộ luật Dân sự 2015 [2015 Civil Code] § 298 (promulgated Nov. 24, 2015, effective Jan. 1, 2017) (Vietnam).

95. VIETNAMESE GOVERNMENT, Decree 102/2017/ND-CP on Registration of Security Interests, § 9.

96. *Id.*

97. *Id.*

98. Xuan-Thao Nguyen & Bich Thao Nguyen, *Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries*, 40 NORTH CAROLINA J. INT. L. COMMER. REGUL. 1, 40 (2014).

the competing interests and issues surrounding this third party and another secured party.

***Enforcement of security***

*General principles:* Civil Codes provide lists of conditions for the enforcement of security as well as permitted courses of action to which creditors can resort.

*Conditions for the enforcement of security:* The security may be enforced when (i) an obligator fails to perform or perform not as agreed on an obligation when it falls due; (ii) an obligator must perform the secured obligation before the time limit due to his/her violation against the obligation as agreed or prescribed by law; (iii) other cases as agreed by the parties or prescribed by law.<sup>99</sup>

With respect to security transactions that are required to be registered in order to become valid, notice must be given to the relevant registration authority.<sup>100</sup> In case third parties also have security interests in the property to be enforced, the secured party that intends to enforce the security must give notice to such third parties.<sup>101</sup>

*Methods for enforcing security:* Permitted methods in different Civil Codes are varied; the 2015 Civil Code broadens the list of methods for enforcing security. The security may be enforced by way of (i) direct sale of the property by the mortgagee/pledgee, (ii) auction of the property, (iii) the mortgagee/pledgee acquiring the ownership of the secured property (subject to certain restrictions, in particular where foreign lenders are concerned), and (iv) other agreed methods for enforcing the security.<sup>102</sup> What should be the method or methods applicable in a particular transaction is determined by the agreement between the parties at hand. In the absence of an agreement on the method of enforcing security, the security shall be enforced via auction unless otherwise prescribed by law.<sup>103</sup>

In practice, enforcing security (specifically, mortgage) by any abovementioned methods can be very difficult in cases where a creditor does not hold possession. It would follow from this that seizing and obtaining possession of security is the core problem in enforcing security under Vietnamese law. This issue shall be discussed in greater detail in the

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99. *E.g.*, Article 90 (1) of the 2008 Law on Enforcement of Civil Judgments amended in 2014 provided that “in case judgment debtors have no more assets or have assets insufficient for judgment enforcement, enforcers may distrain and handle assets of judgment debtors currently in pledges or mortgages if the value of these assets is larger than the secured obligation and expenses for judgment enforcement.”

100. Bộ luật Dân sự 2015 [2015 Civil Code] § 300 (promulgated Nov. 24, 2015, effective Jan. 1, 2017) (Vietnam).

101. *Id.*

102. Bộ luật Dân sự 2015 [2015 Civil Code] § 303 (promulgated Nov. 24, 2015, effective Jan. 1, 2017) (Vietnam).

103. *Id.*



following sections.

*Payment priority:* (i) Where all securities are registered, the payment priority will be determined according to the order in which the securities are registered; (ii) Where there are both registered and not registered securities, the obligation for which the security is registered will be paid first; (iii) Where all securities are not registered, the payment priority will be determined according to the order in which the securities were created.<sup>104</sup>

The provision is the general principles ‘first to file, first in right’ and ‘first in time, first in place’. This provision is very skeletal and superficial and does not help solve issues caused by the conflict between civil law rules and banking regulations--I will give an example in the following section. Additionally, the provision fails to mention some concepts widely discussed in other states and the UNCITRAL Legislative Guide and Model Law, e.g., acquisition security rights, non-acquisition security rights, super priority and/or address the payment priority between different security devices, e.g., the order between a mortgagee and a lien creditor or seller’s or lessor’s ownership rights under a retention-of-title sale or a financial lease agreement.

#### IV. A MANY-FOLD APPROACH OF SEIZING AND OBTAINING POSSESSION OF SECURED ASSETS IN VIETNAMESE LAW

Similar to our observation on the global context of seizing and obtaining possession of secured assets, in Vietnamese law, ‘asset seizure’ or ‘obtain possession’ are legal terms that have not yet been formally defined but are self-explanatory via the reading of relevant legal provisions. In this part, this paper shows that Vietnamese laws and regulations lack coherency concerning the right to seize and obtain possession of secured assets.

Seizing and obtaining possession of secured assets have existed as early as with the promulgation of Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCĐC-BTC. Under part B on Some Specific Provisions on Procedures for Handling Security Property, Clause I on Handling, it has been provided that “1. 1. The security property shall be handled according to agreement reached between the credit institution and the securer in the credit contract or the security contract

...

3. The credit institution shall make record on the handling of security property, which must clearly state the hand-over and reception of security property, the mode of handling the security property, the rights and

104. Bộ luật Dân sự 2015 [2015 Civil Code] § 308 (promulgated Nov. 24, 2015, effective Jan. 1, 2017) (Vietnam).



obligations of the parties and other agreements (if any).

Where the credit institution applies measures to compel the security property-keeping party to hand over the security property to it for handling, the former shall make the record on the seizure of the property according to the provisions at Point 3.3 of Clause 3, Section XI of Part B.”

The phrase *‘to compel the security property-keeping party to hand over the security property to it for handling’* can be understood as equivalent to ‘seizure’ or ‘obtain possession’.

Prior to the Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCĐC-BTC, the 1995 Civil Code and the regulation implementing the 1995 Civil Code--Decree 165/1999/ND-CP on secured transactions neither mentioned ‘seizure’ or ‘obtain possession’ nor explicitly and formally recognized this right. The 1995 Civil Code only recognized the right of a creditor to *‘request’* but not ‘compel’ or ‘self-enforce’ the security property-keeping party to hand over the security property to it for handling.<sup>105</sup> While Article 359 of the 1995 Civil Code allowed possible otherwise courses of action if agreed upon by parties, it did not provide the border of or conditions to be valid for any possible agreements.

Notwithstanding, what is provided under the Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCĐC-BTC is not a kind of ‘seizure’ and ‘obtain possession’ as what is practiced by other states or imagined by foreign/international instruments and scholars. Neither it is as coercive as the term that is used--‘compel’. It is ‘of symbolic nature’ rather than of practical meaning because it does not purport to allow a flexible, prompt, and expeditious seizure and obtaining possession but only to prolong the process by adding more administrative steps. Under *Part IX on procedures for requiring the security holder to hand over the security assets to credit institutions*, it provided that if the security holder ‘still does not hand over the security property’, the credit institution *shall first send a written request to the People’s Committee and the Public Security of the place where the secured party resides or where the security is located to request for cooperating and availing in recovering the secured assets*. After receiving the credit institution’s request, the People’s Committee shall *apply the measure of educating and persuading the property holder to hand over the security property to the credit institution*. The People’s Committee shall prescribe the time limit for the handling, but not exceed 10 days from the date the People’s Committee applies the measure of education. The rationale for the ‘propaganda’ approach of this provision is that quite the same to

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105. Article 335 and 354 of the 1995 Civil Code. The same can be observed with respect to Article 18 and Article 29 of Decree 165/1999/ND-CP “In cases where the securer or the third party holding the security assets fails to hand them over, the securee may request the competent State agency to apply necessary support measures to compel the hand-over of such assets”.

China, Vietnam adopts a vision of mass line ('dân vận')<sup>106</sup> and incline toward the 'forced mediation', influenced by Eastern Asian culture (A Chinese counterpart--the Maoism 'jízōng qúnzhòng zhìhuì'<sup>107</sup> can be observed).

After the expiration of the time limit, if the security holder still fails to hand over the assets to the credit institution, the credit institution can seize the security with the support of the People's Committee and the Public Security agency. Notwithstanding, Section 3.2 of the Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCĐC-BTC suggests that credit institutions cannot self-seize the security because the People's Committee, the Public Security agency and credit institutions were empowered to carry out only restrictive prescribed courses of action as follows:

'a. For collateral being a means of transport . . .

--The Traffic Police Agency, through vehicle registration, if detecting the cases requested by the credit institution, shall not allow the title transfer or transfer of ownership and shall request the vehicle owner or a person authorized by the vehicle owner to consult a credit institution before carrying out the procedures for title transfer or ownership transfer.

--In case, through patrol, the traffic police agency discovers that the vehicle driver is using a copy of the vehicle registration certificate as prescribed in Clause 2, Article 12 of Decree No. 178 that has expired, the traffic police agency shall make a record of vehicle seizure and send a written notice (directly, fax or via other means of communication) to the credit institution to receive the impounded vehicle. Within 15 days after receiving the notice, the credit institution must assign someone to receive the property . . . If after prescribed the time, the credit institution has not come to receive the property, the traffic police agency will return the vehicle to the driver of the impounded vehicle.

b. For security assets that are warehouses, houses and other construction works, credit institutions may transfer furniture and non-security assets to the agency that manages the assets and receives the secured assets to treat . . .'

What credit institutions can seize are only 'the collateral being

106. HỒ CHÍ MINH, DÂN VẬN [MASS LINE] 120 (1949); Bùi Thị Minh Hoài, *Công tác Dân vận tự hào và trách nhiệm trên chặng đường mới* [Mass Mobilization Affairs, Proud and Responsibility on a New Path], (Đảng Cộng sản Việt Nam [Communist Party of Vietnam], Oct. 14, 2021), <https://dangcongsan.vn/tieu-diem/cong-tac-dan-van-tu-hao-va-trach-nhiem-tren-chang-duong-moi-593905.html>.

107. Wen-Hui Tsai, *Mass Mobilization Campaigns in Mao's China*, 6 AM. J. CHIN. STUD. 21, 21-48 (1999).

machinery, equipment, raw materials, fuel, consumer goods, precious metals, gems and other security assets' (Section 3.2.c) which credit institutions are often not willing to take as collateral due to several legal risks.<sup>108</sup> Notwithstanding, credit institutions could hardly avail themselves even with respect to this kind of collateral. The low-successful chance boils down to the fact that while pursuant to Section 3.3, the seizure process must be made in the presence of the debtor's<sup>109</sup> and witnessed by the representative of the People's Committee of the locality where the property holder resides or where the security property is located and other relevant agencies, as Xuan-Thao Nguyen and Bich Thao Nguyen rightly noted, the advance notification gave debtors a chance to disperse and hide the security assets<sup>110</sup> or even hide themselves.

The 2005 Civil Code retains the spirit of the 1995 Civil Code. Various translations of the 2005 Civil Code have shown that while seizure and obtain possession of collaterals are not recognized, 'realization' is understood as identical to the disposition of assets only.<sup>111</sup> Decree 163/2006/ND-CP, implementing the 2005 Civil Code on secured transactions, which is then revised by Decree 11/2012/NĐ-CP, however, diverges from the 2005 Civil Code. Decree 163/2006/ND-CP revised by Decree 11/2012/ND-CP inherits the 'seizure and obtain possession' regime from the Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCDC-BTC as a default legal regime, which is applicable even in the absence of a contractual agreement:

"1. The holder of the security asset shall hand over that asset to the asset disposer according to the latter's notice. Upon the expiration of the time limit stated in the notice, if the asset holder fails to hand over the asset, **the asset disposer may take into custody the security asset** according to the provisions of Clause 2 of this Article for disposal or request the court to handle." (Article 63.(1)).

Decree 163/2006/ND-CP made seizure and obtaining possession be widely available to all mortgages and pledges and all creditors, instead of the limited number of credit institutions. Article 63 of Decree 163/2006/ND-CP establishes two requirements for the seizure and obtain possession of security that are (i) the requirement of notification,<sup>112</sup> and (ii) the

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108. Nguyen & Nguyen, *supra* note 98, at 38.

109. *See more id.* at 45.

110. *See more id.* at 44.

111. 2005 *Civil Code* (No. 33/2005/QH11), unofficial Translation, <https://wipo.lex-res.wipo.int/edocs/lexdocs/laws/en/vn/vn001en.pdf>.

112. "... To notify in advance the asset holder of the application of the measure of taking into custody the security asset within a reasonable time limit. The written notice must clearly state the reason and time of the taking into custody of the security asset, rights and obligations of the parties."

requirement of legality and public order (đạo đức xã hội--‘the social morality’ in the Vietnamese terminology).<sup>113</sup> Nevertheless, though, the regulation stipulates that “the securer or the third party holding the security asset shall bear reasonable and necessary expenses for the taking into custody of the security asset. If it fails to hand over the security asset for disposal or commits acts of obstructing the lawful custody of the security asset, thus causing damage to the securee, it shall pay damages”, such a rule did not work and could be found nowhere in reality. There are many reasons. First, there is no implementation mechanism, even a symbolic one.<sup>114</sup> Second, there are concerns for public order or undue or coercion from the side of creditors if seizing and obtaining possession is carried out widely without being strictly supervised. Third, again, debtors can disperse and hide the security asset or themselves.<sup>115</sup>

In 2015, the National Assembly passed the new 2015 Civil Code; implementing regulations, e.g., the Decree 21/2021/ND-CP on guiding the 2015 Civil Code were enacted subsequently. With respect to the regime on seizure and obtaining possession of security assets, compared to previous Civil Codes, the 2015 Civil Code and implementing documents do not make any drastic changes. Different from Decree 163/2006/ND-CP revised by Decree 11/2012/ND-CP, the 2015 Civil Code and Decree 21/2021/ND-CP do not recognize the right of creditors to seize and obtain possession. Article 52.(6) of the Decree 21/2021/ND-CP provides that creditors have the right “*to consider and conduct physical inspection of collateral to prevent dispersion of collateral, realize*”--rather than a right to seize and obtain possession.

In June 2017, the National Assembly issued Resolution No. 42/2017/NQ-QH14 to pilot the handling of bad debts of credit institutions, effective 15 August 2017. This resolution was issued with the expectation of speeding up the process of debt settlement and capital recovery at credit institutions, in other words, to improve financial capacity, which has been threatened by bad debts caused by corruption and fraud scandals and poor business outcome.

Article 7.(1) of Resolution 42/2017/NQ-QH14 explicitly allows credit institutions to seize and obtain possession of security assets if conditions

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113. When taking into custody the security asset, the asset disposer has the following responsibilities: “. . . b. Not to apply measures in violation of prohibitions prescribed by law and in contravention of social ethics in the course of taking into custody of the security asset”.

114. Nguyen & Nguyen, *supra* note 98, at 43; Nguyễn Ngọc Điện, *Quy Định Về Xử Lý Tài Sản Bảo Đảm Trong Nghị Định Số 163/2006/NĐ-Cp Và Những Vấn Đề Cần Giải Quyết Tại Thông Tư Liên Tịch Hướng Dẫn Xử Lý Tài Sản Bảo Đảm* [Regulations on Realizing Collateral in Decree No. 163/2006/ND-CP and Issues in the Joint Circular Guiding Collateral Disposal to be Solved], 4 TẠP CHÍ KHOA HỌC PHÁP LÝ [VIETNAMESE JOURNAL OF LEGAL SCIENCE] 24 (2012).

115. Nguyen & Nguyen, *supra* note 98, at 44.

prescribed by Article 7.(2), 7.(3), and 7.(4) of the Resolution 42/2017/NQ-QH14 are cumulatively met:

- (i) Occurrence of any case in terms of treatment of collateral prescribed in Article 299 of the Civil Code that is either an obligator fails to perform or perform not as agreed an obligation when it falls due, or an obligator must perform the secured obligation before time limit due to his/her violation against the obligation as agreed or prescribed by law, or other cases as agreed by the parties or prescribed by law;
- (ii) The security agreement clearly indicates the grantor's consent to the credit institution's right to seize the collateral upon occurrence of the case of treating collateral as per the law;
- (iii) The secured transaction or security interests has been registered as prescribed by law;
- (iv) The collateral is not in dispute in a case that has been accepted but remained unsolved or has been resolving at an authorized court; the collateral is not put under temporary emergency measures; and the collateral is not distrained or under judgment enforcement as prescribed by law;
- (v) The credit institution . . . has fulfilled obligation to publish information . . .,<sup>116</sup> including, information about time and place of seizure, collateral to be seized, reasons thereof;<sup>117</sup>
- (vi) The legality and public order requirement: credit institutions, bad debt purchaser/manager, and entity authorized to seize collateral may not adopt measures that commit violations of law during the seizure process.

It can be observed that the content of the right to seize and obtain possession of secured assets in Resolution 42/2017/NQ-QH14 is different from, if not to say, incoherent with, the spirit of the 2015 Civil Code. The

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116. "a) Post information on its website;  
b) Send a notice to the People's Committee and police authority of commune where collateral is located;  
c) Put up a notice on the bulletin board at the head office of People's Committee of commune which the grantor has referred to in the security agreement and at the head office of the People's Committee of commune where the collateral is located;  
d) Send a notice to the grantor directly or by secure delivery service at grantor's address specified in the security agreement."

117. "a) Post information on its website and send a prior notice stating its exercise of right to seize collateral to the People's Committee of commune which the grantor has referred to in the security agreement before seizing the collateral;  
b) Send a notice to the grantor directly or by secure delivery service at grantor's address specified in the security agreement before the exercise of right to seize collateral."

measure offered by Resolution 42/2017/NQ-QH14 is even more proactive and intrusive than the one offered by Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCĐC-BTC, making it look similar to the ‘seizure’ and ‘obtaining possession’ in some foreign laws, e.g., the UCC. Credit institutions enjoy a broad leeway and are in the driving seat to seize and obtain possession of the security since the role of public agencies in the seizing process has been simplified; it looks that Resolution 42/2017/NQ-QH14 has also tried to design the role of public agencies to be more balanced as their task is designed primarily about keeping social order.<sup>118</sup>

#### V. SHORT-COMINGS OF THE PREFERENTIAL POLICY

The initiative to endow credit institutions with the right to seize and obtain possession of secured assets is believed to be successful as it has been helping credit institutions to implement debt recovery and decrease bad debts.<sup>119</sup> Nevertheless, Resolution 42/2017/NQ-QH14 and its predecessors can be observed as a ‘preferential policy’. Seizure and obtaining possession are the privilege that is exclusively enjoyed by credit institutions. The over-concentration on credit institutions’ interests<sup>120</sup> may make the state lose a complete social landscape and other worth-considering considerations and interests, e.g., justice and marginalized groups. Indeed, there are many shortcomings with the current status quo:

First, it is unclear what might happen or what the process may be in cases where an asset is mortgaged to one (or more) credit institutions while it has been pledged to an entity or individual in advance (and the collateral is still physically held by the latter creditor) and the credit institution needs to seize or obtain possession. In 2002, Muto Shiro noted that ‘in cases where a debtor creates a security interest on the asset on behalf of a credit institution and then creates a subsequent security interest on behalf of a non-credit institution creditor (such as individuals or trading companies), it is not clear which law shall apply and whether or not the subsequent secured transaction is valid.’<sup>121</sup> Xuan-Thao Nguyen and Bich Thao Nguyen rightly pointed out that the Vietnamese law only emphasizes ‘one method of perfection (registration) as the

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118. Vietnamese National Assembly, Resolution 42/2017/NQ-QH14 on Piloting Bad Debt Settlement of Credit Institutions, § 7 (5).

119. VIETNAMESE GOVERNMENT, *supra* note 83.

120. *Id.*

121. Muto, *supra* note 69, at 1038.



basis to determine priority . . . Priority is determined only based on the order of registration, regardless of whether the secured party takes possession or control of the collateral or not.’<sup>122</sup> The Vietnamese law required that if the asset holder is a third party, the securer shall coordinate with the asset disposer in taking into custody the security asset’.<sup>123</sup> In cases, where an asset is mortgaged to one (or more) credit institutions while it has been pledged to an entity or individual in advance (and the collateral is still physically held by the latter creditor) and the credit institution needs to seize or obtain possession, it seems to be unfair if the law requires the pledge-creditor to handle the collateral to the credit institution.

I encountered a case as follows. Mr A pledges a car (with all associated legal documents, primarily, the certificate of vehicle registration) to a pawnshop. He then asks for his certificate of vehicle registration to be reissued for being lost. After the certificate of vehicle registration has been reissued, Mr A mortgage it to a bank. Resolution 42/2017/NQ-QH14 (and its predecessors) may permit the bank to seize the car from the pawnshop.

***Second, legal regulations, especially Resolution 42/2017/NQ-QH14, do not seem to pay due attention to the interests of related parties.*** It can be injustice in permitting the seizure and obtaining possession of secured assets that are a single house where the whole family is residing or the only means of production of a debtor that is essential for the survival of not only the debtor but the whole family. The rules also pay no attention to the interests of other disadvantaged parties, such as employees of enterprises. A real case is that when an enterprise is probable or highly possible in default [if its assets are seized] or are in default, proceeds have been prioritized to handle bad debts of credit institutions<sup>124</sup>. This results in the loss of hundreds and thousands of employments<sup>125</sup>. Consequently, since the enterprise still owes salary and social insurance premium payment, hundreds and thousands of workers lose their labor, expressed in their salary, and cannot receive benefits from social insurance, causing frustration to the public goods.<sup>126</sup>

***Third, it is quite unfair that law enforcers who are present at the scene are required to support only one side of the civil relationship--credit***

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122. Nguyen & Nguyen, *supra* note 98, at 41.

123. Vietnamese Government, Decree 163/2006/ND-CP on Security Transactions, § 63 (3).

124. Lê Đình Tuấn, *Trao đổi về bất cập trong việc thực hiện Nghị quyết số 42/2017/QH14 của Quốc Hội về thí điểm xử* [Discussing inadequacies in the implementation of Resolution No. 42/2017/QH14 of the National Assembly on piloting bad debt settlement of credit institutions] (Công tin tin điện tử Viện kiểm sát nhân dân tỉnh Bắc Giang [Portal of the People's Procuracy of Bac Giang Province], 2021), <https://vksbacgiang.gov.vn/chuyendephapluat/59/8691>.

125. *Id.*

126. *Id.*



***institutions.*** Though Resolution 42/2017/NQ-QH14 designs public authorities to be impartial and neutral, to implement Resolution 42/2017/NQ-QH14, the Ministry of Public Security also issued Decision 9018/QD-BCA-A04 dated November 19, 2019 on the working process to ensure security and order in the process of seizing collateral under Resolution 42/2017/NQ-QH14 which is reported to direct police at all levels nationwide ‘to proactively coordinate with credit institutions’.<sup>127</sup> The presence of the police who are required to support credit institutions in private space cause fears to debtors, secured asset holders, and related people, including even debtors’ neighbours.

This provision can also be wasteful of public resources. At the end of the day, some of the basic governing principles of transactions are the freedom of contract, good-faith, and privity of contract. Except for some rare public safety and public order reasons, which must also be necessary and appropriate, proportionate, a contract cannot confer rights or impose obligations upon any person who is not a party to the contract, even public forces and authorities. Nguyễn Ngọc Điện asserts that police forces ‘should not be entitled to intervene’.<sup>128</sup> Indeed, authorities should only get involved when the parties cannot solve the problem by themselves, and in getting involved, authorities must maintain their impartial and neutral position and must be fair, objective, and unbiased, as much as they can. This prerequisite is missed in the current regulations.

***Finally, the legal rules, associated legal process and their underlined ideas, as a whole, are flawed and unfair to debtors.*** Though credit institutions often complain about the non-cooperation of debtors or the collateral holders and argue that it is due to an inadequacy in the enforcement of the right to seize the collateral,<sup>129</sup> the non-cooperation and non-compliance in the delivery of the security property should not be treated as equivalent to an act of public disorder and social insecurity in default. Objections to seizure and obtain possession of secured assets do not always stem from infidelity and bad-faith: it is possible that debtors have reasons to believe that if the secured property is handed over, their legitimate rights and interests will not be secured or their lives will be threatened, e.g., they are in hardship or the secured assets are their only residential place or means of production.<sup>130</sup> Though ‘pacta sunt servanda’ is the cornerstone of contract law, this principle is not a peremptory norm that can override all justice considerations. There are many hidden interwoven fundamental rights related to a secured agreement that restrict the implementation of contractual

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127. This Decision is not quite widely accessible by the public.

128. Điện, *supra* note 114, at 25-26.

129. See more Nguyen & Nguyen, *supra* note 98, at 45-46.

130. See more Ryan McRobert, *Defining Breach of the Peace in Self-Help Repossessions*, 87 WASH. L. REV. 569, 584, 585, 590 (2012).

terms that have been freely entered into by parties. As such, demanding debtors to be subjected to legal coercion and punishments for their non-cooperation and non-compliance in default cannot be a good measure.<sup>131</sup> At the same time, the flip side is that rules on seizure and obtaining possession of secured assets lack a mechanism to control the abuse of power by the secured party and protect the debtor.

## VI. THE NEED FOR HARMONIZATION

In 2014, in the article *‘Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries’*,<sup>132</sup> Xuan-Thao Nguyen and Bich Thao Nguyen aimed at finding an explanation for the unsuccess of the Vietnamese secured transaction law. They have provided a range of vivid examples of why Vietnamese secured transaction law would be deemed as having many serious flaws, including, ‘the inconsistency occurs at multiple levels, within the Civil Code itself and between the Civil Code and the regulations implementing the Code, creating a self-contradictory body of secured transactions’.<sup>133</sup> At the heart of their argument is the accusation of the *‘outdated Civil law approach’*. They criticized a wide range of Civil law jurisdictions regarding the secured transaction regime:

‘ . . . Vietnam transplanted an antiquated, opaque, and incomplete body of secured transactions law and trapped secured transactions law deep inside a copiously webbed Civil Code . . . Vietnam, believing that civil law offers the best approach to creating secured transactions law, adopted the approach, structure, and provisions that international communities had already acknowledged as antiquated. In fact, the international community had already replaced this antiquated system with the UNCITRAL Legislative Guide. Rather than following the international trend, Vietnam consulted experts from other civil law countries and transplanted their antiquated system into its own secured transactions law. Thus, Vietnam’s secured transactions laws were outdated before they

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131. See more Ministry of Justice, Ministry of Public Security, The State Bank, Ministry of Finance-The General Department of Land Administration, Joint Circular No. 03/2001/TTLT-BTP-BCA-NHNN-TCDC-BTC Guiding the Handling of Loan Security Property to Recover Debts for Credit Institutions; Vietnamese Government, Decree 163/2006/ND-CP on Security Transactions; Vietnamese National Assembly, Resolution 42/2017/NQ-QH14 on Piloting Bad Debt Settlement of Credit Institutions.

132. Nguyen & Nguyen, *supra* note 98.

133. *Id.* at 29.

were even enacted.’<sup>134</sup>

‘. . . The French brought the “civil law legal system” roots to Vietnam when they colonized the country . . . Moreover, Vietnam closely followed another civil law country, Japan, in drafting its Civil Code’ despite knowing that the Japanese legal system “is deeply flawed.”’<sup>135</sup> [associated footnotes are omitted].

Xuan-Thao Nguyen and Bich Thao Nguyen rightly pointed out pitfalls of the Vietnamese secured transaction law as of 2014 as well as the global trend of soft-law--the UNCITRAL Legislative Guide. Nevertheless, their explanatory accounts are overly simple that may fail to offer a complete explanation for the causes of issues that existed in the Vietnamese legal system, at least concerning the realization of security.<sup>136</sup>

Though, indeed, the Civil Law approach should be partially accountable for the static of the Vietnamese secured transaction law because it is undeniable that the Vietnamese legal system is heavily influenced by the Civil Law tradition<sup>137</sup> which may have a hostile attitude against self-help measures,<sup>138</sup> i.e., seizure and obtain possession of security assets, deeming such measures as ‘inhumane’ and ‘uncivilized’<sup>139</sup> that in turn may reduce courses of actions available to creditors to avail themselves. This, in conjunction with the weak, prolonging, and ineffective judicial and legal enforcement system, irony, has resulted in mistrust of law and violence.

Notwithstanding, the Civil Law tradition should not be blamed as the only cause of various pitfalls of the Vietnamese Law. Contradictions in the Vietnamese legal system happen because of the torn feeling of the

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134. *Id.* at 5.

135. *Id.* at 19.

136. They might also rightly point out shortcomings in many other civil law jurisdictions as well. (See Veronica L. Taylor, *New Markets, New Commodity: Japanese Legal Technical Assistance*, 23 WISCONSIN INT. LAW J. 251, 265 (2004), <https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2005/05/taylor-new-markets-new-commodity.pdf>; Souchirou Kozuka & Naoe Fukisawa, *Old Ideas Die Hard?: An Analysis of the 2004 Reformation of Secured Transactions Law in Japan and Its Impact on Banking Practices*, 31 T. JEFFERSON L. REV. 293, 315 (2008).) Nevertheless, their points in this regard can be contested because first, UNCITRAL Legislative Guide aims at offering a view on diverse practices and nondefinitive broad advice, considering that each jurisdiction may have its own problems “The Guide seeks to rise above differences among legal regimes to offer pragmatic and proven solutions that can be accepted and implemented in States with divergent legal traditions (civil law, common law, as well as Chinese, Islamic and other legal traditions)” (UNCITRAL, *supra* note 7, at 1). Second, whether the Common law tradition is more economically efficient than the Civil Law tradition can be very contested (Michael Graff, *Law and Finance: Common-law and Civil-law Countries Compared-An Empirical Critique*, 75 ECONOMICA 60 (2008); Nuno Garoupa & C. G. Liguierre, *The Syndrome of the Efficiency of the Common Law*, 29 BU INT’L L.J. 287-336 (2011).) Without empirical evidence and thorough analysis, this paper cannot offer a comment in this respect.

137. See section 3.2.1. of this paper.

138. Kozuka, *supra* note 23, at 33.

139. AQUARONE, *supra* note 2.

Vietnamese legal regulations toward various sources of ideas and interests. Some Vietnamese politicians and lawmakers are--or used to be--appealed to ideas of the Soviet Union and Civil law tradition but it can be naïve to think that many of those people are wholehearted toward theoretical matters. For example, In Resolution 42/2017/NQ-QH14 (and even some of its predecessors), the Vietnamese legislators have embraced an approach similar to what is recommended by the UNCITRAL Legislative Guide but without detailed subordinate provisions or full integration of the UNCITRAL Legislative Guide or Model Law. This shows that Vietnamese lawmakers are pragmatical though not good at getting a complete view and understanding dedicated technical rules; in other words, Vietnamese lawmakers are more driven by practical considerations and more inclined to 'bandage' solutions though such solutions may result in 'quick fixes with additional pains'.<sup>140</sup> Contradictions in the Vietnamese legal system happen because neither a detailed and complex body of secured transaction law nor a full integration and adoption of the UNCITRAL Legislative Guide and Model Law are deemed as [urgently] needed in the eye of Vietnamese legislators. By offering justifications upon some practical needs or asserting the independence between banking regulations and civil law, rule-makers can continuously attempt to pass regulations to fix some issues while overlooking or neglecting the need for resolving the complex and sometimes contradictory relationships between various doctrines and rules.

It is, therefore, clear that the fragmented and over-simplified Vietnamese body on secured transactions requires harmonization - that is, the promotion of the coordination of different legal provisions or systems.

## VII. RECOMMENDATIONS

From the above analysis, the overarching issue that the Vietnamese law should address is the incoherence in legal thoughts and contradictions internal to the Civil Code and between the Civil Code and regulations. Full integration of the UNCITRAL Legislative Guide, as advocated by some scholars<sup>141</sup> can be a good starting point. However, such integration can be insufficient for fixing existing issues. More efforts should be paid to seek ways to address the relationship between branches of law and develop relevant rules, bearing in mind the spirit of the UNCITRAL's recommendations. This paper makes some detailed recommendations for issues that have been analyzed in this part.

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140. Nguyen & Nguyen, *supra* note 98, at 49.

141. Xuan-Thao Nguyen, *Beyond TPP: Legal Reform for Financing Intellectual Property and Innovation in Vietnam*, 20 SMU SCI. TECHNOL. L. REV. 241 (2017); Nguyen & Nguyen, *supra* note 98.

*First*, to not make the seizure and obtain possession as a privilege enjoyed exclusively by credit institutions, this regime should be available to all parties in line with the guide and recommendations of UNCITRAL. In other words, recommendations of UNCITRAL should be adopted uniformly by the Civil Code and regulations. This, on the one hand, may resolve the disparities and contradictions internal to the Civil Code and between the Civil Code and other regulations. On the other hand, better law can reduce uncertainties and difficulties in implementation. This produces better institutions which in turn build trust and expand the availability of credit.

*Second*, rules should be in place to ensure the interests of debtors, holders of the secured assets, and related marginalized parties, and other creditors. Many tasks should be carried out for this purpose.

(1) Vietnamese law should recognize other methods of perfection, besides registration which is currently the only method of perfection in Vietnamese law.

(2) As secured transactions law is ‘intrinsically tied to bankruptcy law’,<sup>142</sup> and certainly, law related to the enforcement of judicial judgments, the regime on seizure and obtain possession of secured assets should learn better legal rules from these branches of law. *First*, a ‘sharing approach’ as provided under Article 115 of the 2008 Law on Enforcement of Civil Judgments amended in 2014 and 2018 should be embraced by the regime on seizure and obtain possession:

“In case of coercive handover of a house being the sole residence of a judgment debtor to a person who has purchased it through auction, if finding that the judgment debtor, after fulfilling judgment execution obligations, becomes unable to rent or to build a new home, the enforcer shall, before carrying out procedures for paying to the judgment creditor, retain a sum of money from the house sale proceeds for the judgment debtor to rent a home for one year at the average rent rate in the locality. The remaining judgment execution obligation shall be performed under this Law.” In case the secured asset is the only or the primary working tool, this working tool should be available for guarantors to rent to continue working.

*Second*, the regime on seizure and obtain possession of secured assets should embrace rules concerning the distribution of proceeds in the 2014 Law on Bankruptcy, accordingly:

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142. Nguyen, *id.* at 244.

“ . . . when the judge gives the Decision on the declaration of bankruptcy, the assets of the insolvent entity shall be redistributed in the following sequence: (i) cost of bankruptcy; (ii) the unpaid salaries, severance pay, social insurance and medical insurance to employees, other benefits according to the labor contracts and collective bargaining agreements; (iii) Debts incurred after the initiation of bankruptcy which are used for resuming the business operation; (iv) financial obligations to the Government; unsecured debts payable to the creditors on the list of creditors; secured debts which are not paid because the value of collateral is not enough to cover such debts.”

**Third**, the presence of law enforcers should be ensured to be de facto neutral and impartial. Police should only get involved when there is a fair risk of or real public endangerment or disturbance. To ensure the impartiality of the process,

(1) in articulating the presence of law enforcers, rules should maintain a neutral and impartial voice by restricting legal grounds for the presence of law enforcers so that such grounds satisfy the requirements of necessity, of proportionality. Police can only present when they receive information from any party about a fair risk of or real public endangerment or disturbance; their role should be strictly about keeping public order--rather than supporting any party,

(2) the law may allow the secured party to deploy some lawful self-help measures to ensure public order during the seizure process, e.g., utilizing private security services.

**Forth**, it is necessary to establish conditions to terminate the seizure process, or at least, to scrutinize such a process under a judicial review process to reduce risks of abuse from credit institutions. In 2014, Xuan-Thao Nguyen and Bich Thao Nguyen rightly pointed out that “there are no specific provisions addressing “self-help,” “no breach of the peace” duty, “commercially reasonable” disposition standard . . . conditions for the debtor to redeem the collateral . . . and remedies for the debtor when the secured party violates the rules for enforcement of the security interest.”<sup>143</sup> The UNCITRAL Legislative Guide on Secured Transactions has indeed recommended states to consider these issues.<sup>144</sup> In the US, generally speaking, the seizure and obtaining the secured assets should not be made or should be terminated if (1) there is any use of law enforcement during the repossession; (2) there is any violence or threat of violence; (3) there is any

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143. Nguyen & Nguyen, *supra* note 98, at 16.

144. UNCITRAL, *supra* note 7.



unheeded verbal request to cease the repossession; (4) at the court discretion considering the degree of trespass and negative mental impact.<sup>145</sup> Notwithstanding, the law on secured transaction and rules on seizure and obtaining possession of security should strive beyond nominating terminologies. Rules should specify the content and substance of legal provisions and relevant terminologies. For example, though US jurisdictions vary on the conditions for the termination of the seizure and obtain possession of security, they make clear their standings by means of respective case law: “Some courts have held that a debtor’s verbal objection, however minor, makes any seizure a breach of the peace. Other courts require a somewhat higher level of protest, necessitating an “unequivocal oral protest” or a debtor’s “clearly expressed objection”,<sup>146</sup> or have a probability of a violent escalation,<sup>147</sup> or actually escalate the level of violence and violation of law, e.g., property rights that is a trespass is not a ‘mere trespass’<sup>148</sup>”. This implicitly stresses the role of the judiciary in developing rules and theories concerning seizure and obtain possession of the collateral. Taiwanese law may serve as a good example in this regards--balancing interests between parties.



#### VIII. CONCLUSION

This paper studies the seizure and obtaining possession of secured assets in Vietnam, bearing in mind the global landscape. The body of Vietnamese rules on the seizure and obtaining possession of secured assets is incoherent and internally self-contradictory. Notwithstanding, Vietnamese rules in this regard confer a privilege upon credit institutions to seize and obtain possession of secured assets. This paper demonstrates that the core issue of Vietnamese secured transaction law is the line drawn between civil law rules and banking regulations. This paper argues the need for harmonization and recommends that to fix the issue, the regime on the seizure and obtaining possession of security should fully adopt UNCITRAL’s recommendations as well as better rules of close-tied law branches, such as the 2014 Law on Bankruptcy and the 2008 Law on Enforcement of Civil Judgments amended in 2014 and 2018 and laws of foreign jurisdictions.

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145. McRobert, *supra* note 130.

146. *Id.* at 584.

147. *Marcus v. McCollum*, 394 F.3d 813, 820 (10th Cir. 2004); *Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449, 451-53 (Wis. Ct. App. 1993).

148. McRobert, *supra* note 130, at 583.



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## 越南法下擔保物的查封、 拍賣及取得制度

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### 摘 要

本文聚焦於探討越南法下的擔保交易。擔保交易制度係法院外清償債務重要機制，然而此一制度可能影響到公共秩序、債權人及債務人間的利益，擔保交易法制需在三者間取得平衡。本文指出越南現行法下的擔保交易制度有許多規範矛盾及規範不明之處。本文首先簡介數個國家的擔保交易法制，並從歷史觀點說明越南擔保交易法制的流變，最後具體指出相關法制不足之處，包含信貸機構在擔保交易法中的特權、民法與銀行法間的規範不明等。對此，本文建議越南擔保交易制度應邏輯一貫地參考聯合國國際貿易法委員會的擔保交易模範法及相關法規進行修訂。

關鍵詞：取得占有、查封、擔保、擔保交易、越南法下的擔保交易