Reform of the secured transactions law in Japan: the form and function tested against the global standard

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Abstract

Since 2021, the reform of the secured transactions law is officially tabled before the Legislative Council of Japan. Prior to this official deliberation, three preparatory study groups, each sponsored by the Ministry of Justice, Small and Medium Enterprise Agency and Financial Services Agency, discussed the agenda. With differences in the details, these three groups have proposed introducing the new approach to secured transactions, namely enabling the creation of security interests in all the debtor's assets without specifying each piece of asset included. These arguments indicate that the modern principles of secured transactions that have emerged from the global efforts towards unification and harmonisation affect domestic law reform.

I. Introduction

The law on secured transactions has been an area of focus in the unification and harmonization of commercial law.[1] The International Institute for the Unification of Private Law (UNIDROIT) has worked on the Convention on International Interests in Mobile Equipment (Cape Town Convention) with four protocols up to now. The United Nations Commission on International Trade Law (UNCITRAL) has also produced many instruments on secured transactions, including the Convention on Assignment of Receivables in

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[1] Souichirou Kozuka, 'Do We Need Harmonisation for Everything? The Possibilities and Limits of Harmonising Financial Law' in Orkun Akseli and John Linarelli (eds), *The Future of Commercial Law* (Hart 2020) 55.

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International Trade, the Legislative Guide on Secured Transactions, and the Model Law on Secured Transactions. Regional organizations such as the Organization of American States (OAS) and the European Bank for Reconstruction and Development have also been active on this subject.

These instruments have formed the standard of modern secured transactions law, although the instruments are not entirely identical.[2] The Cape Town Convention is a globally accepted instrument that reflects such a modern standard. First, the international interests are created with the minimum formality.[3] In other words, the freedom of agreements among the parties is respected to the maximum extent. Second, somewhat relatedly, the protocols to the Cape Town Convention enable identification of the equipment as 'all present and future relevant equipment' or 'all present and future relevant equipment except for specified items or types'.[4] Third, publicity of international interests is made through registration with the International Registry so that a third party does not suffer unexpected loss from a hidden security interest.[5] Fourth, the priority of an international interest against another international interests, as well as against other interests in the asset, is basically determined by the timing of registration.[6] Fifth, an international interest may be validly exercised without the court procedure (that is, by private enforcement) as long as the exercise is made in a commercially reasonable manner.[7] Finally, whether the international interest takes the form of a security interest or title finance (reservation of title or lease), basically the same rules apply.[8]

The emergence of such globally recognized standards of modern secured transactions law has made it possible to evaluate the existing domestic laws on the subject against them. While it is not at all justified that all the jurisdictions are urged to adopt exactly the same laws,[9] the advantages and disadvantages of the national laws are compared with the principles behind the international instruments and assessed in their usefulness—in particular, with regard to improving the access to credit by the business operators. In some cases, such an assessment motivates the reform of the secured transactions law of the jurisdiction, while, in others, an assessment is made in the course of the reform.

[2] Marek Dubovec and Louise Gullifer, *Secured Transactions Law in Africa* (Hart 2019) 35 ff; Charles W Mooney, Jr, 'Lost in Transplantation? Modern Principles of Secured Transactions Law as Legal Transplants' in Louise Gullifer and Dora Neo (eds), *Secured Transactions Law in Asia* (Hart 2021) 25.

[3] Article 7, the Cape Town Convention.

[4] See Art. V (1), Luxembourg Rail Protocol; Art. VII (1), Space Protocol; Art. V (1), MAC Protocol.

[5] Article 16, the Cape Town Convention.

[6] Article 29, the Cape Town Convention.

[7] Articles 8 & 9, the Cape Town Convention.

[8] See Article 2, the Cape Town Convention.

[9] See the case for 'fitness to the context' by Frederique Dahan and John Simpson, 'Legal efficiency for secured transactions reform: bridging the gap between economic analysis and legal reasoning' in Frederique Dahan and John Simpson (eds), *Secured Transactions Law Reform* (Edward Elgar 2008) 122.

Japan is no exception. Having implemented the reformed contract law,[10] the reform of the secured transactions law is now tabled on the agenda in Japan. Although ratification of the Cape Town Convention itself is not among the agenda, due to the lack of coordination among relevant industry sectors, one of the goals of the reform is to make the Japanese law closer to the global standards of modern secured transactions law. Naturally, international instruments—the UNCITRAL Model Law on Secured Transactions, among others—are referred to in the discourse.

This article aims to examine the issues under consideration in the Japanese reform and compare them against the solutions adopted by the international instruments. In the next section, the existing law of secured transactions in Japan is briefly described. The following section describes the works towards the reform. Then, the theories about the function of secured transactions, which may be helpful to uncover the origin of divergence in the domestic discussions of global standards, are briefly reviewed. This is followed by an examination of the proposals made in the course of reform, first focusing on the proposals made by the governmental agencies in charge of economic and financial policies, with reviews over the thoughts about the function of secured transactions, and then examining in detail the proposal made under the auspices of the Ministry of Justice. The final section concludes by analysing the gap between the Japanese and global laws on secured transactions.

II. The existing secured transactions law

1. Types of secured transactions under the Civil Code and statutes

Pursuant to the tradition of the civil law system, the Japanese Civil Code does not admit non-possessory security interest over movables. Retaining the structure since codification in 1896, the Civil Code allows only four types of security interests: right of retention, lien, pledge, and mortgage. The *numerus clausus* principle forbids creation of a new type of security interest not provided in the Civil Code.[11] A mortgage may be created only over real property.[12] The exception is the ship mortgage codified in the Commercial Code.[13]

Only a few years after its codification, Japan started to introduce special statutes to authorize secured transactions not allowed under the Civil Code. Some of them made it possible to treat a set of assets used for a certain business and to create a mortgage over it, such as the assets of a factory or assets used for a railway business.[14] Others authorized the creation of a mortgage over certain

[10] Souichirou Kozuka, 'Between globalisation and localisation: Japan's struggle to decently update its Civil Code' in Michele Graziadei (ed), *The Making of the Civil Codes* (Springer, forthcoming).

[11] Art.175, Japanese Civil Code.

[12] Art.369, Japanese Civil Code.

[13] Art.847, Japanese Commercial Code.

[14] The Law on Railway Mortgages (Law no.53 of 1905); the Law on Factory Mortgages (Law no.54 of 1905). As of 2021, there are seven other statutes authorizing this type of mortgages.

types of movables, including movables used for agriculture or construction, automobiles, and aircraft.[15] In 1958, a law enabling a security interest over the whole enterprise was introduced, inspired by the floating charge under English law.[16] However, with the exceptions of mortgages over automobiles, not many transactions have been made under these special statutes.

2. Current practice recognized by the case laws

The practice has developed two types of security devices to create non-possessory security interests in the secured transactions of movables or receivables. One that is commonly used by Japanese practitioners[17] is known as the 'transfer [of an asset] for security purposes' (*jôto tampo*).[18] This is a transfer of ownership in its form, with the parties' intent being to secure a claim held by the transferee (creditor) against the transferor (debtor). The parties agree that the transferor keeps possession of the asset until it defaults in payment of the secured claim. Thus, it creates a *de facto* non-possessory security interest in the asset, which may be a movable. The case law in Japan affirms such a transaction as valid but treats it as a secured transaction rather than a transaction in ownership. When the secured claim becomes due and the debtor is in default, the transferee (creditor) of the asset may exercise its right to either sell the asset to a third party or to make the ownership conclusively vested in itself,[19] but subject to the duty to give the excess value (difference of the asset's value and the amount of the secured claim) to the debtor (transferor).[20] Furthermore, the courts admit the transferor (debtor) to claim taking back of the ownership by repaying the secured claim, thus creating a right of redemption without explicit agreement by the parties.[21]

The problem with the transfer for security purposes has been the absence of publicity. As it is a transaction not codified in the Civil Code, there was no system to publicly register it. In order to solve this problem, a special statute was

[15] The Law on Credit for Agricultural Properties (Law no.30 of 1933); the Law on Automobile Mortgages (Law no.187 of 1951); the Law on Aircraft Mortgages (Law no.66 of 1953); the Law on Mortgages on Construction Equipment (Law no.97 of 1954).

[16] The Law on Enterprise Charges (Law no.106 of 1958).

[17] Another type of non-statutory security device is ownership retention (*shoyuken-ryuho*). It is used when the secured creditor is credit seller of the collateral. The origin of this security device is a covenant in a sale contract of a movable in which the parties agree that the title of the movable remain with the seller until the buyer make full payment of the installment. The case law in Japan recognizes that the buyer under such an arrangement has a *quasi* qualified property even before the full payment, by which the seller's ownership is limited. The qualified property works as a non-possessory type security device. In this article we will focus on the ownership transfer type to explore the future secured transactions law—that which reflects the policy to promote the 'comprehensive secured transaction'.

[18] See generally, Frank G Bennett, Jr., 'Getting property right: "Informal" mortgages in the Japanese courts' (2009) *Pacific Rim Law & Policy Journal* 463.

[19] Supreme Court, 22 February 1994, *Minshû* vol.48, no.2, p.414

[20] Supreme Court, 25 March 1971, *Minshû* vol.25, no.2, p.208; Supreme Court, 12 February 1987, *Minshû* vol.41, no.1, p.67.

[21] Supreme Court, 7 March 1968, *Minshû* vol.22, no.3, p.509; Supreme Court, 22 January 1982, *Minshû* vol.36, no.1, p.92; Supreme Court, 12 February 1987, *Minshû* vol.41, no.1, p.67.

enacted in 1998, first to enable registration of the transfer of receivables and later amended to expand the registry to accept registration of the transfer of movables in 2004. This statute—the Act on Special Rules to the Civil Code Concerning the Perfection of the Transfer of Movables and Assignment of Receivables (PTMAR)[22]—however, does not provide for the sole criteria of determining priority. The registration under the PTMAR only adds another means to claim priority equivalent to, but not excluding, other priority criteria under the Civil Code, such as possession of a movable or notification to the obligor of a receivable.[23]

III. Reform proposals and background thoughts

1. Undergoing discourses for reform

Currently, the Japanese government is working on the reform of the secured transaction law part (Book III) of the Civil Code, with the focus on the rules for secured transactions over movable property and receivables. The Legislative Council of the Ministry of Justice in Japan formed the Committee of Secured Transactions Law Reform in March 2021.[24] Although the road map to complete the reformation is not yet fixed, the committee will publish the tentative draft in 2022 and will finish the final draft in a couple of years.

Before the launch of this official committee, three study groups that have affiliation with the governmental offices were called. Each of them submitted a proposal of reform to the committee.[25] The sponsors of these study groups were the Ministry of Justice (MoJ), the Financial Service Agency (FSA), and the Small and Medium Enterprise Agency (SMEA), respectively. In this section, we explore the background policies that we can observe in these proposals and examine how such policies are reflected in the individual items of the proposals.

2. Changing policy concerning secured transactions in Japan

A. Old and new theories for secured transactions

(i) Traditional thoughts: allocative security

The policy behind the existing secured transactions law in Japan is not clear. The academics have emphasized that the mortgagee has taken control of the 'exchange value' of the mortgaged asset, while the 'use value' of the asset

[22] Law no.104 of 1998.

[23] Souichirou Kozuka and Naoe Fujisawa, 'Old ideas die hard? An analysis of the 2004 reformation of secured transactions law in Japan and its impact on banking practices' (2009) 31 *Thomas Jefferson Law Review* 293, 306–7.

[24] The establishment of the Committee of Secured Transactions Law was made in response to Request No.144 of the Minister of Justice to examine the law on secured transactions in view of the secured transactions over property other than the real property. Request No.144 is available (only in Japanese) at <https://www.moj.go.jp/content/001341544.pdf> accessed 1 August 2022.

[25] They are available (only in Japanese) from <https://www.moj.go.jp/shingi1/shingi04900001_00061.html> accessed 1 August 2022.

remains with the mortgagor.[26] The distinction of the exchange value and use value apparently derived from the economic theory of Karl Marx,[27] which was popular in the early 20th century in Japan. Courts started to refer to this idea in the late 1920s. In its decision of 1 August 1928, the Great Court of Judicature held that the mortgagee's right is a 'right to value' and argued that the mere fact of deteriorating the value of the mortgaged asset (land) does not give rise to tort liability, unless the mortgagee failed to collect the secured claim as a result.[28] Six years later, the Great Court of Judicature again held that the mortgagee's right is a 'right to value' and denied the mortgagee any remedy against alleged occupation of the mortgaged asset as long as the asset is not destructed by the occupant.[29] In recent decisions, the Supreme Court still held the view that the mortgagee is entitled to collect the secured claim from 'the exchange value of the mortgaged asset' through enforcement and that the mortgagee is prevented from interfering the use of the mortgaged asset.[30]

The traditional theory, besides being referred to in controversies over a few specific issues,[31] led to the view that the mortgagee shall be allocated the value of the asset up to the amount of the secured claim—not more. If the value of the asset exceeds the amount of the claim, the balance remains available for further mortgagees. Recent literature in Japan calls this approach the 'allocative secured transactions'. Such allocative secured transactions affect the priority among creditors, secured versus unsecured creditors, or first-ranked versus lower-ranked mortgagees. On the other hand, the impact of the secured transactions on the behaviour of the debtor is not clear.

In the course of the period of the bubble economy in the late 1980s, followed by the post-bubble economic downturn in the 1990s, allocative secured transactions resulted in serious problems.[32] First, as the land prices soared during the bubble economy, the value of the mortgaged real property seemed to have been boosted, which resulted in over-borrowing by the debtors. The discipline over the debtor did not work, and the debtor committed excessive risks after the

[26] Sakae Wagatsuma, '資本主義と抵当制度の発達' (Capitalism and the development of the law on mortgages) (1930) 2 *Hôritsu Jihô* 233 (in Japanese).

[27] See Karl Marx, *Capital: A Critical Analysis of Capitalist Production* (Samuel Moore and Edward Aveling tr, first published 1887, Dietz Verlag 1990) Ch 1.

[28] Great Court of Judicature, 1 August 1928, *Minshû* vol.7, p.671.

[29] Great Court of Judicature, 15 June 1934, *Minshû* vol.13, p.1164.

[30] Supreme Court, 24 November 1999, *Minshû* vol.53, no.8, p.1899.

[31] Two major issues associated with the traditional view were the mortgagee's possible actions against abusive occupant of the mortgaged asset (land) and the mortgagee's right to be subrogated to the rent from the mortgaged land. It is considered that the traditional view, if strictly applied, leads to negative answers to both issues. However, the Supreme Court in the 1990s concluded in the opposite without discarding the view that the mortgagee's right is a right to the exchange value. According to the Supreme Court, the mortgagee's subrogation to the rent does not interfere with the mortgagor's right to use the mortgaged asset (Supreme Court, 27 October 1991, *Minshû* vol.43, no.9, p.1070), while an abusive occupant of the mortgaged land could interfere with realization of the exchange value of the mortgaged land, in which case the mortgagee may demand evacuation of the occupant by way of the *action Paulienne*.

[32] On the economic situation of Japan in the 1980s and 1990s, see generally WR Garside, *Japan's Great Stagnation* (Edward Elgar 2012).

original creditor extended loans. By using the term of information economics, it was the debtor's moral hazard. Once the bubble burst, land prices dropped significantly, and many creditors found their claims to be only partially covered by the mortgaged asset. Banks suffering from the insufficient security for the existing loans became reluctant to extend new loans to new borrowers, which caused a credit crunch towards the end of the 1990s. The borrowers now faced the problem of information asymmetry, being unable to convince the creditors of their credibility.

Having experienced these problems, the FSA started to discourage banks from relying (only) on security. The banks, on their side, turned their eyes to mechanisms to provide disciplines over the borrower, including the ever-wider use of covenants when giving loans. In the beginning, though, these shifts in thought went only halfway. It was emphasized that secured transactions should sustain the debtor's business rather than ensure collection of the debt. The introduction of the filing system under the PTMAR, mentioned above, was made in this context, with the aim of making credit available to those businesses with only movables—in particular, inventory—to be used as encumbered assets.[33]

Theoretically, however, making movables available as encumbered assets does not enhance the efficiency of credit if the allocative approach is extended to security interests in movables. On the macro-economic level, it might have had the impact of channelling the credit from debtors having real property to debtors with no real property. Such a policy may make sense if the economic actors having land ownership are categorically inefficient and more efficient entrepreneurs generally do not have real property. However, unlike the economy having newly transitioned to market economy, the Japanese economy in the early 2000s was not in such a situation. It was no wonder that the PTMAR had limited, if any, impact on the economic growth in Japan.

(ii) The arrival of new approaches: comprehensive security

Japan's allocative approach, however, is not consistent with the global standard of modern secured transactions law, which allows the identification of encumbered assets not only individually but also by reference to 'all the grantor's movable assets' or 'all the grantor's movable assets within a generic category'.[34] As already discussed, the latter approach is advocated by the Cape Town Convention as well. Under these rules, a creditor can monopolize the debtor's assets and exclude later creditors from approaching the debtor and providing additional finance. Such an approach is known as 'comprehensive secured transaction' in Japan because all the debtor's assets (as may be specified by certain criteria) are comprehensively encumbered by a security interest.

[33] Souichirou Kozuka, 'Law in a changing economy: law of trade credit and security interests in context' in Dimitri Vanoverbeke, Jeroen Maesschalck, David Nelken and Stephan Parmentier (eds), *The Changing Role of Law in Japan* (Edward Elgar 2014) 81.

[34] Art. 9 (2), UNCITRAL Model Law on Secured Transactions.

The comprehensive approach provides disciplines over the debtor's possible opportunism. The debtor's opportunism means the possibility that a debtor changes its business and alters the risk after the creditor extends credit. As long as this possibility is not excluded, the creditor will take account of such a risk and require stricter conditions when extending credit to the debtor. By excluding another creditor from taking security interests in the debtor's assets, the creditor can be satisfied that the debtor cannot increase its business risks by making use of the additionally made finance.[35] Thus, at least theoretically, the comprehensive approach ultimately benefits the debtor, because the latter will enjoy looser conditions of credit.

(a) The SMEA proposal: reform of the law on transfer for security purposes

In 2019, the SMEA consigned research on the contracting practices of small- and medium-sized enterprises (SMEs) to a non-profit organization, the Shoji Homu Kenkyukai. The latter organized the Study Group on Transactional Law, consisting of several law professors and practitioners. Based on the their research,[36] the SMEA published a proposal on the 'transfer for security purposes that is easy for small and medium enterprises to use'.[37] The SMEA's proposal aims to broaden the variety of financing methods for SMEs so that a SME can have access to finance on the basis of expected cash flow in the future.[38] As mentioned above, the Japanese case law has recognized the transfer of an asset for security purposes as a valid transaction and basically treated it as creating a security interest in the asset. Still, the SMEA proposal points out that there remain uncertainties and unpredictability in the rules concerning the transfer for security purposes—in particular, in the rules on foreclosure—as far as the rules are not prescribed by statutory provisions and are developed by *ad hoc* court decisions. On this basis, the SMEA proposal suggests that transfers for security purposes be regulated by statute.[39]

The SMEA proposal, however, does not simply require turning the existing case law into statutory provisions. It further argues that the asset of the transferor (debtor) should be evaluated higher if all the assets of the business are treated as a whole rather than individually as inventory, equipment, or receivables, as under the current practice.[40] The value of the whole business as 'going concern' is not recognized if each piece of the assets is treated individually. However, under the current case law, the assets must be specified either individually (such

[35] Arnould WA Boot, Anjan V Thakor and Gregory F Udell, 'Secured Lending and default risk: equilibrium analysis, policy implications and empirical results' (1991) 101 *Economic Journal* 458; René M Stulz and Herb Johnson, 'An analysis of secured debt' (1985) 14 *Journal of Financial Economics* 501.

[36] <https://www.meti.go.jp/meti_lib/report/2019FY/000303.pdf> accessed 1 August 2022.

[37] <https://www.chusho.meti.go.jp/keiei/torihiki/jyouto_tanpo/proposal.pdf> accessed 1 August 2022.

[38] SMEA Proposal, p.2.

[39] SMEA Proposal, p.1.

[40] SMEA Proposal, p.1.

as 'machine with serial number 1234') or by specifying the location of the asset (such as 'commodities stored in the warehouse X').[41] This case law prevents the transfer of 'all the assets of the debtor's business' for security purposes. As a result, the finance is available only for the amount smaller than the 'going concern' value of the debtor's business.

In order to improve this situation, the SMEA proposal suggests allowing the identification of the encumbered asset as 'all the inventory of the debtor'. Furthermore, it suggests that the entire business of the debtor, comprising various types of assets, such as the inventory, equipment, and receivables, be transferred for security purposes. The proposal even argues (as an option for the legislator) that the security interest in such a case may be filed as 'security over the business'.[42]

The SMEA proposal pays due attention to the modern principles of secured transaction law. It requires that the registry for security interest be newly established and replace the current registry for movables and receivables under the PTMAR.[43] In this registry, the priority of the secured creditor against a third party is determined pursuant to the timing of filing. Contrary to the existing registry under the PTMAR, registration shall be the only way to claim priority. Other mechanisms, such as the transfer of possession in case of movables, shall be excluded, so that a hidden security interest with priority by such a mechanism does not appear.[44] The registration shall be simple, again enabling the general identification such as 'all the inventory'.[45]

Foreclosure is one of the key elements of the SMEA proposal, as it is considered better to be regulated by prescribed rules, not through case-by-case decisions of the court. The assumption is that the secured creditor (transferee of the asset for security purposes) can foreclose without having the court sponsor the procedure.[46] In case a security interest is created in the entire business of the debtor, the SMEA proposal suggests that the foreclosure be made by appointing an 'administrator', who shall operate the debtor's business and repay the secured debt from earnings until the whole business is sold to a purchaser. Before appointing an administrator, the secured creditor shall ask for permission by the court, though the court's role is limited, and the basic nature of the procedure is still private enforcement.[47]

(b) The FSA proposal: introducing a new type of security interests over the business

The FSA's 'Study Group on Credit and Reorganisation Practices Supportive of Businesses' (FSA Study Group) was launched in November 2020. After three

[41] Supreme Court, 15 Feb 1979, *Minshû* vol.33, no.1, p.51. See also Art.8 (1), Regulation on Registration of Transfer of Movables and Receivables.

[42] SMEA Proposal, p.5.

[43] SMEA Proposal, p.6.

[44] SMEA Proposal, pp.8–9.

[45] SMEA Proposal, p.8

[46] See II.2. above.

[47] SMEA Proposal, pp.13–19.

meetings held in one and a half months, the FSA Study Group published the *Outline of Issues* (*Ronten Seiri*).[48] The *Outline of Issues* argues that the current financing practice still focuses on tangible assets, such as real property and equipment, and fails to give due credit to intangible assets, including data and goodwill. Given that there are various new business models emerging in the industry, such as a manufacturer outsourcing the actual production process to a third party, the financial institutions are required to adapt to those developments.[49] The *Outline of Issues* points out that, as a result, credit of middle risk has remained insufficient under the current practice, faced by the difficulty of correctly identifying the 'value of the business', comprising both tangible and intangible assets.[50]

The *Outline of Issues* then argues that a new type of security interest to comprehensively cover the whole business of the debtor, including movables, receivables, contractual status, intellectual property and goodwill, may improve the identified problem and requires it to be considered by the Legislative Council.[51] There is an appendix giving a concise picture of the proposed new type of security interest, known as business growth security interest (BGSI). According to the *Outline of Issues*, the Study Group made references to the UNCITRAL Model Law on Secured Transactions as well as the US Uniform Commercial Code (UCC) in elaborating the BGSI.[52] It is also noted the function of secured transactions as discipline over the debtor.[53]

The Study Group did not meet for 10 months after the publication of *Outline of Issues*. In the meantime, the FSA, as the Secretariat, may have received various responses to the proposal. At the fourth meeting of the Study Group finally held in October 2021, the Secretariat submitted a paper describing details of BGSI (FSA paper).[54] Given that the UNCITRAL Model Law was studied as a reference, there is no surprise that the FSA paper adopts the principles of the modern secured transactions law for the proposed rules on BGSI in many respects. The main feature of BGSI is that the agreement does not have to identify the encumbered asset individually. Whether the general description for each asset (probably in such a manner as 'all the inventory of the debtor' or 'all the intellectual property held by the debtor') shall be required or identifying the 'business' of a certain debtor shall be sufficient is yet to be further discussed.[55] It also left open whether to exclude real property, bank accounts, and securities held through accounts from BGSI.

[48] <https://www.fsa.go.jp/singi/arikataken/rontenseiri.pdf> accessed 1 August 2022.
[49] Outline of Issues, pp.5–6.
[50] Outline of Issues, p.3.
[51] Outline of Issues, p.11.
[52] See Outline of the Issues, p.21.
[53] Outline of Issues, p.12.
[54] <https://www.fsa.go.jp/singi/arikataken/siryo/20211025/seidoimage.pdf> accessed 1 August 2022.
[55] FSA Paper, p.11.

It is intended that the priority of BGSI is determined by filing.[56] A purchaser of an asset from the debtor in the ordinary course of business shall acquire a right without encumbrance.[57] It is suggested that certain types of trade creditors enjoy priority over a BGSI, similar to the priority of acquisition finance under the UNCITRAL Model Law or purchase money security interest under Article 9 of the UCC, though apparently registration of notice by such trade creditor is not required.[58]

The FSA paper, just like the SMEA proposal, spends many words on the foreclosure of BGSI. It is proposed that both the procedure sponsored by the court and the foreclosure through private enforcement are admitted.[59] Under the court-sponsored procedure, the court appoints a trustee to operate the business encumbered by BGSI and ultimately to sell the business subject to the approval of the court.[60] It is suggested that an auction is not required.[61] When the business is successfully sold, the court will distribute the proceeds to the creditor secured by BGSI and then to other creditors.[62] If the creditor secured by BGSI chooses to not use the court-sponsored procedure, it must sell the encumbered business by a 'fair' means (private enforcement).[63]

3. *Conflict with the domestic context*

A. Proposals in the report of the Pre-Official MoJ Study Group

(i) Role of the Study Group

In this section, we examine the approach of the Study Group Concerning Personal Property Secured Transactions Law (Pre-Official MoJ Study Group), which was consigned by the MoJ to consider issues for reform.[64] The research was apparently made as preparation for the official reform process at the Legislative Council.[65] The Pre-Official MoJ Study Group

[56] FSA Paper, p.28.

[57] FSA Paper, p.22.

[58] FSA Paper, p.28.

[59] FSA Paper, p.40.

[60] FSA Paper, p.44.

[61] FSA Paper, p.47.

[62] FSA Paper, p.52.

[63] FSA Paper, p.55.

[64] The Pre-Official MoJ Study Group consisted of seven civil law professors, three bankruptcy law professors and four legal practitioners. It was organized in 2018 and *Shoji Homu Kekyukai* served as the Secretariat, as in the SMEA's study group. In the Pre-Official MoJ Study Group, each prospective provision of reformed act reported by the staff of MoJ was discussed by the members.

[65] A counsellor of Ministry of Justice who will be in charge of the drafting committee at the Legislative Council as in the official stage commissions a law professor to form a pre study group and to discuss the early plan for the coming new law. Generally speaking, this approach is a regular process for recent Japanese government to draft new laws. Concerning the current Committee of Secured Transactions Law Reform of Legislative Council, Counsellor Tomoaki Sasai commissions it to Professor Hiroto Dogauchi (University of Tokyo then, Senshu University currently and the chairperson of the current Committee), who called 6 Civil Law professors, 3 Civil Procedure/Bankruptcy Law professors and 4 practitioners. In the process of discussion at Pre-Official MoJ Study Group, all topics for the discussion was submitted by the MoJ officers headed by Counsellor Sasai.

published the final report (the MoJ Pre-Report) in April 2021.[66] As mentioned above, it is one of the three proposals submitted to the Legislative Council. However, the approach of the Pre-Official MoJ Study Group is fundamentally different from the other two groups (the SMEA Study Group and the FSA Study Group). While the SMEA Study Group and the FSA Study Group were policy oriented and concerned with promoting a specific transactional model, the Pre-Official MoJ Study Group was expected to be policy neutral to observe the variety of practical needs under the current case law. The Pre-Official MoJ Study Group's concern was on finding a realistic approach to reform the Civil Code in a manner that was acceptable to the majority of Japanese legal practitioners.

(ii) Outline of the proposal

A brief outline of this proposal in the MoJ Pre-Report is as follows. The proposed new law is aimed at covering all types of non-possessory[67] secured transactions collateralizing movables, receivables, and other intangibles. However, new rules will be codified separately for movables and receivables. The distinction between the ownership transfer type and retention type will also be retained.[68] Other types of security interests provided under some special laws may also remain as they are now.

The perfections of security interests are different between the ownership transfer type and the retention type. The ownership transfer type will be perfected by the constructive delivery of the collateral, which is achieved by the agreement that the debtor possesses the collateral as the agent of the secured party.[69] The filing under the PTMAR will be an alternative to the constructive delivery.[70] The basic priority will be decided by the chronological order of perfection, including the constructive delivery as under the current law.[71] A conceivable reform will be the introduction of a new filing system following the concept of notice filing, which is not a general perfection but an additional legal requirement—so to speak, a 'priority filing'—to decide the priority of conflicting security interests that are perfected under the general perfection rules.[72] The ownership retention

[66] Available from <https://www.shojihomu.or.jp/kenkyuu/dou-tanpohousei> (at the bottom of the page) accessed 1 August 2022.

[67] The MoJ Pre-Report, p. 7, 43.

[68] The MoJ Pre-Report, p. 28. The Pre-Report also suggests that the possibility to accept the unified concept of security interest applicable to all types of collateral and secured transactions should be further discussed in the Official Committee. However, in this Report, the baseline is as mentioned above.

[69] Art.183, Civil Code.

[70] The MoJ Pre-Report, p. 72.

[71] The MoJ Pre-Report, p. 78.

[72] The MoJ Pre-Report, p. 78. It provides two options. An option under which only the general priority rule will be accepted is called [Option 3.2.1.1], whereas the other option under which both perfection under the general priority rule and the 'priority filing' rule is accepted is called [Option 3.2.1.2].

type will be perfected by creation.[73] In a circumstance where ownership retention type and the ownership transfer type security interests are conflicting in the same collateral, the ownership retention type has priority anytime.[74]

Each security interest, including ownership transfer type and retention type, will be realized by non-judicial foreclosure based on the disposition power the secured party gains on the default or judicial foreclosure.[75] When it is realized by non-judicial foreclosure, the secured party can choose a method between acquisition type and disposition type. Either way, the foreclosing secured party is obliged to return the excess value, if any, to the debtor. The junior secured party has similar power to realize the security interest to the senior secured party, but the junior secured party can make non-judicial foreclosure only when all the senior secured parties agree to it.[76]

Focusing on the specific type of collateral, any movable property that is a part of floating assets, such as inventory, may be collateralized under the same rule that is applicable to the ownership transfer type security interests in fixed movable property, with some exceptional rules. When such an asset is collateralized, the collateral will be defined as an aggregation of movable property, by specifying the type, volume, and location of the collateral, including the after-acquired property.[77] The debtor has the power to remove each piece of asset out of the specified place, unless otherwise agreed. If the secured party is in fear of the debtor's unauthorized disposition following the removal of the disposed goods, it has the claim of prevention. On the other hand, the buyer of the asset, in the ordinary course of business, can be protected from the unauthorized disposition as the bona fide acquirer. Under the Japanese Civil Code, any party of a transaction who commences the possession of a movable property legally and peacefully without knowledge or reason to know that the deliverer had no authority to dispose it can acquire the title of the movable property.[78] In most cases of the buyer of the collateral in the ordinary course of business, the buyer can take freely of the security interests by this rule.[79]

[73] The MoJ Pre-Report, p. 74.

[74] The MoJ Pre-Report, p. 84. However, in a case where the secured obligation is extended to the non-purchase money, besides the purchase money of the collateral, the priority of the security interest is decided on the chronological order of perfection by the creation (Option 3.2.3.1). Concerning this point, there provided another option in which such a ownership retention type security interest with extended secured obligation has priority over conflicting ownership transfer type to the extend the ownership retention type cover the purchase money obligation (Option 3.2.3.2).

[75] The MoJ Pre-Report, p. 93.

[76] The MoJ Pre-Report, p. 82.

[77] The MoJ Pre-Report, p. 59.

[78] Art.192, Civil Code.

[79] Under UCC Article 9, the buyer in ordinary course of business rule is explained as a rule applicable to unauthorized disposition. Under Japanese law, 'ordinary course of business' rule is just a presumption rule which is not applicable to explicitly unauthorized disposition. However, Civil Code Art. 192 covers similar protection. The rule gives ownership of the movable property to a party who commences the actual possession of the property legally, peacefully and without knowledge or reason to know the fact that the transferor had no authority to dispose it, in the course of a transaction.

(iii) Disparate concept from those of the SMEA and FSA proposals

As you see in the above outline, there are some concepts accepted in the proposal in the MoJ Pre-Report that seem inconsistent with the idea shared by the SMEA proposal and FSA proposal to enhance the 'comprehensive secured transaction'. We can find some rules that are not mentioned in the MoJ Pre-Report, especially concerning foreclosure, such as rules to evaluate the collateral as going-concern value (SMEA proposal), rules of the foreclosure to be made by appointing an 'administrator' (SMEA proposal), or rule of judicial foreclosure by the trustee appointed by the court (FSA Proposal). One of the possible reasons is the timing of the submission of each proposal. Although the groups working on the SMEA proposal and the FSA proposal reported their plan at the meeting of the Pre-Official MoJ Group, their ideas were far from completed at the time. How the MoJ should treat their ideas in the proposal was not discussed at the Pre-Official MoJ Group.

However, concerning the rules relevant to perfection and priority of floating assets of the debtor, we can observe different circumstances. The MoJ Pre-Report proposed some rules that are disparate from the SMEA or FSA proposals, at least at first glance. We will explore such rules to clarify the approaches of the MoJ to the reform. Such rules are as follows:

- After-acquired property: Under the Pre-Official MoJ Group's proposal, although most types of debtor's assets, including the inventory, can be collateralized by ownership transfer type, the conventional concept of the aggregation that requires specification of the collateral as the aggregation by a set of elements, including the location of collateral, is retained as the standard method to collateralize the after acquired property.
- Secret lien: Although filing of the security interests is available under the PTMAR (which shall remain as it is), it is not mandatory to file it to perfect. The concept of 'priority filing' is advocated as an option, but it will be applicable only among conflicting perfected security interests.
- Concept of the filing: The MoJ Pre-Report supposes to retain the PTMAR as one of the perfection methods. Although the MoJ Pre-Report suggests the introduction of new filing system for the 'priority filing' as an option, it does not show the blueprint of the new filing system.

B. Purposes of the proposals in the context of policy towards comprehensive secured transactions

The MoJ Pre-Report shares the idea with those of the FSA proposal and the SMEA proposal, to a certain extent, that one important segment of modern Japanese financial practice needs to seriously introduce a modern security device reflecting the modern principles to promote the 'comprehensive secured transaction'. However, the introduction of such modern security device was not the only concern of this study group. This reform project is the first official

attempt[80] to codify a non-possessory security device applicable to movables or/and receivables generally. As we briefly mentioned above, ownership transfer for security purposes and ownership retention for security purposes have been recognized by Japanese case law for many years—far before the arrival of changing policy discussed above. From the perspective of type of collateral, such conventional security devices cover not only equipment but also the business debtor's inventory or future receivables, overlapping with the core collateral of the proposed modern secured transaction of the whole business assets type, as typically seen in the FSA proposal.

(i) Reservation of the concept of aggregation as the collateral

The business debtors' liquid assets should include after-acquired property, besides the existing property. Under modern principles, such as the UNCITRAL Model Law, the security interest is created in the after-acquired property and perfected by filing.[81] On the contrary, the MoJ proposal retains the concept of 'aggregation' of the movable property as the collateral of security interest, as developed by Japanese case law. At first glance, the concept of aggregation seems to be reserved in the Pre-Report to be applicable to any type of inventory secured transactions, including the 'comprehensive secured transactions', as the concept that is to be specified by the type, volume, and location of the collateral.[82] The justification of this proposal comes from conventional case law, which recognizes the security interests in inventory as effective against the trustee in case of the debtor's bankruptcy, under Japanese perfection and priority rule.

Under the Japanese Civil Code, the perfection rule applicable to the movable property conveyance is provided parallel to those to the real property conveyance. The conveyance is completed only by the manifestation of intention of the transferor or the owner of the property (such as the debtor in secured transactions).[83] The transferor cannot transfer the same property right and the debtor cannot create security interests with the same priority in the property under the *Nemo Dat* theory. However, the transferee or the secured party cannot assert the conveyance against the third party, who has the merit to claim the lack of perfection,[84] without gaining perfection.[85]

[80] The codification of ownership transfer has attracted scholars' attention for many years. The Guideline to Codify the Ownership Transfer For Security Purpose is a famous early attempt to draft a statute of ownership transfer type secured transactions law by private study group in early 1960s. See Kazuo Shinomiya, '「譲渡担保法要綱試案」解説' (Commentary on the Tentative Proposal to Codify the Ownership Transfer For Security Purpose), 2 *Rikkyo Hogaku* (1961)157, 3 *Rikkyo Hogaku* (1962)194, 4 *Rikkyo Hogaku* (1963) 81, 6 *Rikkyo Hogaku* (1964) 171.

[81] Art.6, UNCITRAL Model Law Art. 6. Similarly, UCC§9-204(a).

[82] Supreme Court, 15 February 1979, *Minshû* vol.33, no.1, p.51.

[83] Art.176 of the Civil Code provides that the creation and transfer of a real right becomes effective solely by the manifestations of intention of the parties.

[84] The highest court of Japan held to limit the party who is eligible to assert the lack of perfection of the earlier transferee in this way, in its early case of real property conveyance. Great Court of Judicature, 15 December 1908, *Minroku* vol.14, p.1276.

[85] Concerning the real property, Art.177 of the Civil Code provides that the acquisitions of, losses of and changes in real rights on immovables may not be duly asserted against any third parties,

This theory is a 'pure race' theory, which is the same as that accepted by the modern secured transactions law.[86] However, under current Japanese law, the effect of filing has been discussed in the real property registration context[87] and the registration has not been given special power to gain priority exceeding the perfection.[88] It is perfection (only)-based pure race theory, under which perfection is always required to win at the race, whereas the priority rule under the UNCITRAL Model Law on Secured Transactions and Article 9 of the UCC is the filing-or-perfection-based pure race theory.

Even in the context of inventory financing, applying this perfection-based priority rule,[89] Japanese lawyers have discussed that if the collateral of the inventory secured transaction is each piece of the inventory, each security interest must be perfected at the time of acquisition by the debtor. Then some pieces of the inventory that the debtor acquires just before the petition of bankruptcy may be voidable as a kind of preference.[90] The concept of the aggregation as the collateral is introduced into Japanese inventory financing practice to give priority to the ownership transfer type security interest in inventory in time of the perfection, which is gained practically by the creation contract with the agreement of constructive delivery concerning the aggregation.

Focusing on this point, we should reconsider the proposal of the MoJ. Besides the proposal of reservation of the concept of aggregation, it proposes to consider an option to accept a new rule, under which a filing under the new filing system works as an additional legal requirement to decide the priority among

unless the same are registered pursuant to the applicable provisions of the Real Property Registration Act (Law No. 123 of 2004) and other laws regarding registration. Concerning movable property, Art.178 of the Civil Code provides that the transfer of a real right on movables may not be duly asserted against a third party, unless the movables are delivered.

[86] For the 'pure race theory' under the UCC, see, 4 James J. White and Robert S. Summers, *Uniform Commercial Code* (6th edn, West 2010) 325.

[87] The Japanese conveyance rule is generally designed as the pure race rule. There is no filing system of movables conveyance under Civil Code. Although the PTMAR (after 2004) is applicable to movables conveyance, the effect of registration is just perfection.

[88] This is different from the rules in Art.29 of the UNCITRAL Model Law. Under the American law, which is similar to the latter, a security interest is never perfected when it is not attached to the collateral (UCC § 9-308(a)). It is one of requirements that the debtor has rights in the collateral (UCC§9-203(b)(2)). However conflicting perfected security interests may rank according to priority in time of filing (UCC§9-322(a)(1)). A security interest that is perfected before foreclosure can take priority by the filing before the perfection.

[89] Under the Civil Code, which does not presume any filing system applicable to movables conveyances, the perfection-based theory is the only choice. Some of the existing special laws including the Law on Automobile Mortgages or the Law on Mortgages on Construction Equipment (see footnote 15 above), which provide filing system applicable to movables conveyances in a specific type of collateral or specified type of transaction, never provide perfection-or-filing based priority rule, because the applicable collateral is limited to the equipment. The PTMAR is the first statute that provides for a filing system applicable to movables conveyance covering inventory ownership transfer type secured transactions. Still, it also accepted the perfection-based priority rule (Art.3 (1), PTMAR).

[90] Under the current Bankruptcy Act (widely reformed in 2012), any acts to furnish security interests may be avoided in the interest of the bankruptcy estate, if it was conducted within 30 days before the bankrupt became unable to pay debts, unless the creditor did not know, at the time of the act, the fact that it would prejudice other bankruptcy creditors (Art.162 (1)(ii), Bankruptcy Act).

conflicting security interests.[91] The latter rule can adjust the perfection-based priority rule into a perfection-or-filing priority rule, at least in the case of conflicting security interests. Although there are no explicit notes in the proposal, the agreement to transfer the future asset is effective, even for the security purpose. Although it is not perfected until the debtor acquires the property, it can be perfected by the time of foreclosure. Then the inventory-secured finance can be realized with this new filing, even without applying the rule concerning the aggregation as collateral.

The real purpose of the proposal to reserve the concept of aggregation can be understood as that MoJ intends to prepare dual legal system for inventory finance. It means that the conventional inventory finance will be reserved, besides the 'comprehensive secured transactions'. The conventional secured transactions are based on the idea of 'allocative security'. The aggregation is crystallized just before the foreclosure, and the exchange value of the assets, consisting of the inventory at that point, is collected by the secured creditor with priority.[92]

The question here is how this dual system is evaluated from the perspective of efficiency of secured transaction. In the context of policy to promote 'comprehensive secured transactions', it would be fair to say it should be as efficient as the modern principles, if the proposal of introducing the new rules concerning the filing as a requirement to decide priority among conflicting perfected security interests is adopted by the Legislative Council. At least in the transitional period, the dual system may give choices for the practitioners. If the 'comprehensive security' is, in fact, efficient as the theory suggests, the practitioners will choose it.

(ii) Reservation of the concept of perfection

Under the modern secured transactions law, it is a general rule that security interests must gain publicity by filing or actual possession to be perfected.[93] However, the MoJ proposes to reserve the constructive delivery as another method of perfection that can be an alternative to actual delivery or filing under PTMAR. The point of this question is the possible existence of a hidden lien. Concerning this point, the fact that Japan is one of civil law jurisdictions is material. Civil law jurisdictions have no tradition that the secret lien is *per se* deemed as fraud.[94] Although lawyers generally share the concern of possible

[91] The MoJ Pre-Report, p. 78.

[92] Under the aggregation theory, the value of the collateral from which the secured party make collection with priority is explained as the value of the components at this time. Japanese conventional practice fully understands this point and the secured parties generally assess the estimated exchange value as of the future crystallization. Also it is generally accepted under the current law, the collateral will never be back to the aggregation once it is crystallized.

[93] See UCC § 9-308. Under the American law, the only exception to this rule concerning movable property is a purchase-money security interest in consumer goods, which is perfected upon attachment (UCC § 9-309(1)).

[94] A good example is Germany as one of leading civil law countries. They operate the ownership transfer type secured transactions without any filing or other publicity. See, Moritz Brinkmann, 'The Peculiar Approach of German Law in the Field of Secured Transactions and Why it has

harmfulness of the secret lien, whether it is justified or not is examined on a case-by-case basis.[95] We need to examine the feasibility simulating the circumstance realized by the proposal.

Precisely speaking, the MoJ Pre-Report prepares two scenarios as each option concerning the priority rule relevant to the concept of perfection. One scenario is a conservative approach where priority is based on the perfection only. In this scenario, perfection gained by the constructive delivery is eligible to be perfection that is equivalent to filing under the PTMAR. The purpose of this scenario is to preserve the current law. From the perspective of efficiency of secured transactions to enhance the 'comprehensive secured transactions', it is not preferable because there will be no progress from the current law.

The other scenario is that the new 'priority filing' system as the additional requirement to decide the priority among perfected security interests should be considered. Once such a system is introduced, a reasonable secured party may file its security interest to gain priority against other secured parties. If the concept of perfection that can be fulfilled by the constructive delivery is reserved, the actual coverage of perfection without the priority filing is a case of conflict between the secured party and the judicial lien creditors, such as unsecured creditors, having made attachment on the asset or the debtor's bankruptcy trustee. In other words, it allows the secret lien only against the judicial lien creditors.

In the context of efficiency of secured transactions to realize the policy towards 'comprehensive secured transactions', this proposal does not cause any harm. The concern of such secured transactions might be the priority against the conflicting security interests. Even if the secured party perfected the security interests by only constructive delivery without the 'priority filing', the priority is protected against unsecured creditors.

The remaining question is what kind of secured lender is assumed under this scenario as a perfected secured party who is eligible to be protected against judicial lien creditors without priority filing. An assumption is a transferee of the ownership of the collateral who believed the transfer is for sale.[96] Under the Japanese Civil Code, the conveyance under a sale can be perfected by the constructive delivery. However, on some occasions, the bankruptcy trustee may successfully challenge that it was for a security purpose. To avoid this kind of

Worked (So Far)' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform* (Hart Publishing 2016) 339.

[95] Under the traditional Civil Code regime, which provides no filing system for movables conveyances, the needs of non-possessory type inventory secured transaction was pointed out as one of the justifications. Also avoiding a reputation damage of the debtor is sometimes pointed out as a justification for allowing a hidden lien. In traditional circumstance, secured transaction with the inventory was thought to be the last resort, by which an almost insolvent debtor tries to get credit. In this circumstance, the publicity may cause to the debtor reputation damages.

It is remarkable that when the PTMAR was reformed to extend coverage to movable property conveyance in 2002, the justification of secret lien was still advocated to avoid accepting a priority rule under which filing has priority over other type of perfection.

[96] The MoJ Pre-Report, p. 56.

uncertainty, the secured party by the ownership transfer type should be protected against a judicial lien.

A type of transaction that was mentioned several times at the Pre-Official MoJ Study Group might also be relevant. It is a kind of friendship lending.[97] Managers of small- or mid-sized businesses sometimes finance a relatively small amount of money for associate business managers who are their customers or fraternity. We often witness such a transaction in a circumstance where the borrower's business is seriously in danger of failure. In this type of credit, the debtor sometimes creates security interests in movable property used for their business. In these circumstances, the cost of filing is important for them. Some of this type of secured lenders may decide to omit priority filing, with the trust that the debtor will never dishonestly create conflicting security interest. If so, it may be justified that such lenders should be protected against judicial lien creditors who appear unintendedly. These concerns also justify the dual (or multiple) system approach of the MoJ Pre-Report.

(iii) Priority filing

As we have already examined, the introduction of the 'priority filing' will be the key factor to promote the policy towards 'comprehensive secured transactions' under the new regime that is proposed by the MoJ Pre-Report. However, the design of the filing is not yet clear in the report. One of the possible reasons why the Pre-Report does not mention the design of the filing may be that the introduction of the new 'priority filing' is just an option. However, at least during the discussion at the meeting of the Pre-Official MoJ Study Group, a blueprint was shown as a premise of the recommendation to introduce such a new filing system from the perspective of efficiency of secured transactions.[98]

To promote efficient secured transactions, the cost of filing should be reduced. Although the cost is not onerous in the 'comprehensive secured transactions' in which the total value of the collateral is very large, the introduction of the 'priority filing' rule makes almost all reasonable secured lenders gain such a filing. Considering the position of the MoJ Pre-Report, where the allocative secured transactions will be reserved, at least in the dual system approach, the concept of 'priority filing' will be accepted only when its costs are low.[99] On this point, the ideal filing system would be a notice filing. The notice filing means a filing system to give notice of the possibility of the existence of secured transaction to the public by publishing the information of the debtor's name and some

[97] This concern was expressed at the fourth meeting of the Pre-Official MoJ Study Group and then often mentioned. <https://www.shojihomu.or.jp/documents/10448/8432454/0604gijiroku-4.pdf/cd034115-53a6-4c7f-a81c-faac4aaff626> accessed 1 August 2022.

[98] This point was focused on at the 17th meeting. The meeting transcript is available at <https://www.shojihomu.or.jp/documents/10448/8432454/0904gijiroku17.pdf/275f135b-ac55-4bb0-8594-f44d77c9caee> accessed 1 August 2022.

[99] The cost of each filing under the current PTMAR is 7,500 yen (around 80 USD). People think it is almost minimum price, if the filing system is reserved to be parallel to the real property registration.

simple information about the security interests. The collateral needs to be described, but the description to indicate the possibility of the security interests in the type of collateral is enough:[100] a description "whole liquid assets" should be effective as the description in the effective filing. When the information that the filing office has to control is small, the cost of the filing will be reduced.

However, there are controversies concerning the acceptability of this type of filing system. Up to now, the model of the filing has been the real property registry. It has the following features. The registration must be a publication of the actual existing conveyance of the specified property. Specification is based on the physical address of cadastral units. The application of the registration must be made jointly by the transferor and transferee. The MoJ Pre-Report suggests that the notice filing system be adopted because it is not the perfection as the real property registration system. It will be just an additional requirement to decide the priority of already perfected security interests. However, it will be one of the controversial points at the Official Committee.

It is difficult to predict what actions will be taken to advance the policy to promote the 'comprehensive secured transactions', if the option of the introduction of 'priority filing', which is based on the notice filing concept, is not adopted by the Legislative Council. One possibility is that a special law is enacted, which codifies the rules to realize 'comprehensive secured transactions' following the concept of BGSI in the FSA proposal or in line with the SMEA proposal. Then, the secured transactions law in the special statute will be distinct from the general secured transactions law. However, this solution will make the legal system less simple. Furthermore, the 'comprehensive secured transactions' realized under the concept of BGSI or a similar one will be highly regulated by the concerned regulatory authority, such as the FSA. The authors hope that the priority filing is approved by the Legislative Council and paves the way for enhancing the efficiency of the secured transactions by making use of 'comprehensive secured transactions'.

IV. Conclusions

It is yet to be seen how the Legislative Council will respond to the three proposals in the course of debates over the reform of the secured transactions law. The problem of the existing law is well recognized. It does not provide for a solid basis for creating security interests in movable assets, as the transfer for security purposes is not codified in the Civil Code and lacks a system for publicity. The reform is led by the policy to improve this law to be in line with modern global standards. Still, the Legislative Council needs to consider the consistency with other parts of the domestic legal system, such as the land registry system and the rules on the conveyance of title—in particular, for real property. The idea of 'comprehensive secured transactions' to give discipline over the debtor is known, but not all the lawyers are convinced.

[100] UCC § § 9-502, 9-504.

Even if the Legislative Council does not accept the idea of comprehensive security, simply introducing priority filing, which is the registration system adopted in global instruments such as the UNCITRAL Model Law on Secured Transactions and the Cape Town Convention, may contribute to bringing Japan's secured transactions law closer to the global standards. Another possibility is that a special statute is enacted by the initiatives of the SMEA and the FSA to introduce a new type of security, whether BGSI or other kind. If the latter approach is adopted, however, the new special statute might be available only to limited creditors or debtors. In particular, if the regulation over the creditor becomes stricter as the condition for introducing the new type of secured transactions, from the motivation to mitigate the perceived risk of abusive use, the reform might end up in the opposite outcome from the global approach, which is to make the secured transactions easier. In this regard, it is noteworthy that both the SMEA proposal and the FSA Study Group's *Outline of Issues* mention the problem of the abusive use of comprehensive security.[101]

Whatever the final outcome of the reform in Japan will be, it is obvious that the international instruments on secured transactions law have had an influence on reform, not only as a general motivation but also as a reference model for specific issues. It is just another piece of evidence that the role of harmonization in law is significant in today's world.

[101] SMEA Proposal, p.23; FSA Paper, p.6.