



Happy Place by Andrea Edwards

TAKING SECURITY IN JAPAN

WHAT TYPES OF SECURITY INTERESTS CAN BE TAKEN IN JAPAN?

Security interests provided for in the Civil Code and special laws is called typical security. There is non-typical security as the opposite concept of typical security, and they are security interests not stipulated in the Civil Code or special laws. Non-typical security was originally designed to serve as security interests substantially by attaching conditions such as credit reasons to legal principles related to transfer of rights. Some of non-typical security have since come to have basis laws.

The security interests mostly commonly seen on lending transactions are:

- **Mortgages:** are usually taken over real estate. Tangible properties other than real estate are considered movables and mortgages cannot be created over these. The special laws contain exceptions for ships, movables for agricultural use, automobiles, aircrafts and construction machinery, which can all be subject to mortgages. Mortgages can be taken without transferring possession of the asset secured to the lender.
- **Pledges:** are often taken over immovables, movables, shares, receivables and rights. Pledges require a transfer of possession of the asset secured to the lender.
- **Security assignments:** are often taken over immovables, movables, shares, receivables

and rights. Security assignments are created by contract and perfected by delivery or registration. In comparison to pledges, actual delivery of the movable asset is not required for security assignments.

Security interests are “typical” when they are established under the Civil Code and special laws and “non-typical” when they are established based on forms of security recognised by courts in case law. Lenders have a preference for non-typical security interests since lenders may enforce non-typical security interests by disposing of, or acquiring, the assets without court order in default of payment. Provisions allowing lenders to do so are often incorporated into the documents for creation of typical security interests as well.

ARE THERE ANY ASSETS THAT CANNOT BE SECURED?

Most assets can be secured. If security is taken on rights arising under contracts or permits, the beneficiary of the security will want to review the underlying instrument to confirm that such rights can be assigned.

DO SECURITY DOCUMENTS NEED TO BE REGISTERED?

Statutory liens, pledges, security assignments for immovables and mortgages must be registered at the Legal Affairs Bureau. The security can be provisionally registered to reserve priority by paying JPY1,000 per secured asset. Thereafter (and usually before disbursement) a formal registration shall be done by submitting title or other legal documents.

Pledges over movables can only be perfected by continuous possession of the asset and do not need to be registered. In practice, this transfer of possession may be made as a “constructive” transfer with retention of possession, where the debtor in possession manifests the intention to possess the asset on behalf of the lender who is a beneficiary of the pledge. Security assignments over movables need to be registered unless the possession of the relevant movable asset has been transferred to the beneficiary lender in such a manner.

Pledges and security assignments for company shares evidenced by share certificates do not need to be registered, whereas pledges and security assignments created over uncertificated company shares need to be registered in the companies’ shareholder registry. Continuous possession of the share certificates is required for unregistered pledges and security assignments.

Pledges and security assignments over receivables either require registration or obtaining written consent from the obligor with a notarised certificate. Pledges and security assignments over intellectual property needs to be recorded in the Japan Patent Office.

DO SECURITY DOCUMENTS NEED TO BE NOTARISED?

Except for pledges and security assignments over receivables which are not registered, security documents do not need to be notarised by a notary public. However, entities incorporated outside Japan may still need to have security documents notarised if required by the law of their place of their incorporation.

DOES IT TAKE LONG TO REGISTER OR PERFECT SECURITY?

It usually takes a few weeks to register statutory liens for immovables, pledges on immovables and mortgages as well as mortgages by transfers on movables and claims. It usually takes a day to obtain a certificate by a notary public.

IS STAMP DUTY PAYABLE?

Except for mortgages by transfer on immovables, intellectual property rights or claims, no stamp duty is payable.

ARE “PARALLEL DEBT” PROVISIONS REQUIRED IN SYNDICATED FINANCINGS?

Security trusts are recognised in Japan and parallel debt provisions are not required in syndicated financings. In principle, a security trust governed by a foreign law should be recognized in Japan subject to compliance with Japanese public policy.

CAN A FOREIGN LENDER TAKE AND ENFORCE SECURITY IN JAPAN?

A foreign lender can take and enforce security interests in Japan, however note that under the Foreign Exchange and Foreign Trade Act, a non-resident’s acquisition from a resident of immovables or rights (including security interests) to immovables that are located in Japan as capital transactions needs to be reported by such non-resident to the Minister of Finance via the Bank of Japan within 20 days of the relevant transaction.



The Japanese Act on General Rules for Application of Laws requires the governing law of security documents to be (a) Japanese law in case of assets in Japan (art. 13) and (b) the same law as contract in the case of security on contractual rights (case law).

Generally, no prior approval is required for foreign lenders to lend to Japan.

CAN A FOREIGN SECURITY GRANTOR WAIVE ITS SOVEREIGN IMMUNITY?

A foreign security grantor can waive its sovereign immunity. Note that under the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc., if a foreign state grants security over assets, it will not be entitled to immunity in relation to such security.



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