

## POSSESSORY LIENS UNDER VIETNAMESE LAW: LEGAL STRUCTURE, EFFECTIVENESS, AND COMPARATIVE PERSPECTIVES

### RETENÇÃO POSSESSÓRIA SOB A LEI VIETNAMITA: ESTRUTURA JURÍDICA, EFICÁCIA E PERSPECTIVAS COMPARATIVAS

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#### Abstract

This article examines possessory liens under Vietnamese law from a property-based perspective, with a particular focus on the legal structure and effectiveness of this institution within the secured transactions framework. In Vietnam, possessory liens operate as an implicit form of property-based security arising from possession, yet they lack clear normative recognition with respect to their publicity effects and certain proprietary attributes of secured interests. Employing doctrinal legal analysis combined with comparative legal methodology, the article evaluates Vietnamese regulations in light of selected foreign legal systems, notably China and the United States. The study clarifies the structural characteristics of possessory liens and identifies key normative gaps in the current Vietnamese legal framework. On that basis, it proposes targeted legislative recommendations aimed at strengthening the regulation of possessory liens and enhancing their practical effectiveness in commercial practice.

**Keywords:** Possessory Liens. Right of Retention. Secured Transactions Law. Property-Based Security Interests. Publicity and Priority. Vietnamese Civil Code.

#### Resumo

*Este artigo examina os privilégios possessórios no direito vietnamita sob uma perspectiva baseada na propriedade, com foco particular na estrutura jurídica e na eficácia dessa instituição no âmbito das transações garantidas. No Vietnã, os privilégios possessórios operam como uma forma implícita de garantia real baseada na posse, porém carecem de reconhecimento normativo claro em relação aos seus efeitos de publicidade e a certos atributos de propriedade dos direitos garantidos. Empregando análise jurídica doutrinária combinada com metodologia jurídica comparativa, o artigo avalia a legislação vietnamita à luz de sistemas jurídicos estrangeiros selecionados, notadamente a China e os Estados Unidos. O estudo esclarece as características estruturais dos privilégios possessórios e identifica lacunas normativas importantes no atual arcabouço jurídico vietnamita. Com base nisso, propõe recomendações legislativas específicas visando fortalecer a regulamentação dos privilégios possessórios e aprimorar sua eficácia prática no comércio.*

**Palavras-chave:** Privilégios Possessórios. Direito de Retenção. Direito das Transações Garantidas. Direitos de Garantia Real Baseados na Propriedade. Publicidade e Prioridade. Código Civil Vietnamita.



## 1 INTRODUCTION

Secured transactions constitute a foundational component of modern private law systems, facilitating the allocation of credit risk and promoting the efficient performance of civil and commercial obligations. Alongside consensual security devices such as pledges and mortgages, many legal systems also recognize possessory liens as a distinctive form of security, established on the basis of a creditor's lawful possession of the debtor's property<sup>1</sup>. Unlike registration-based security interests, possessory liens typically arise by operation of law and rely on factual control over the asset as a functional substitute for formal publicity.

Possessory liens occupy an established position in both civil law and common law traditions. In civil law systems, they are commonly conceptualized as rights of retention connected to reciprocal obligations<sup>2</sup>, whereas in common law jurisdictions they have developed through judicial doctrines and statutory frameworks governing liens<sup>3</sup>.

Vietnamese law recognizes possessory liens under the Civil Code 2015 as a mechanism for securing the performance of contractual obligations. The Civil Code 2015 establishes the basic legal framework for this institution, allowing a creditor who lawfully possesses the debtor's property to retain such property where the obligation is not performed. Nevertheless, despite this formal statutory recognition, possessory liens under Vietnamese law remain structurally underdeveloped and only weakly integrated into the broader secured transactions framework.

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<sup>1</sup> Van Erp, S., & Akkermans, B. (Eds.). (2016). *Cases, materials and text on property law*. Hart Publishing, 519.

<sup>2</sup> For example, Article 346 of the Vietnamese Civil Code 2015 limits the application of possessory liens to reciprocal contractual relationships, whereas Article 447 of the Chinese Civil Code 2020 allows the exercise of a possessory lien where the obligor fails to perform a due obligation.

<sup>3</sup> Harris, S. L., & Mooney, C. W., Jr. (2016). *Security interests in personal property: Cases, problems, and materials* (6th ed.). Foundation Press, 532.

## 2 METHODOLOGY

### 2.1 Research theoretical framework

This research is grounded in a property-based approach to secured transactions and draws upon three closely interconnected theoretical frameworks to analyze possessory liens under Vietnamese law.

First, the research is informed by property rights theory, particularly the distinction between rights in rem and rights in personam. From this perspective, possessory liens are examined as a form of property-based security, in which the legal effectiveness of the security interest is established primarily through control over the asset, rather than through contractual agreement or registration mechanisms. This approach is central to assessing the legal structure of possessory liens and situating this institution within the broader system of proprietary rights.

Second, the research applies theories concerning the relationship between ownership and possession, emphasizing the legal separation between these two concepts. Within this framework, possessory liens are analyzed as a legal mechanism that allows a creditor, by virtue of lawful possession of the asset, to temporarily restrict the exercise of the owner's powers. This perspective provides a basis for examining conflicts between possessory liens and other security interests that are grounded in ownership or perfected through registration.

Third, the research draws on transaction cost theory to evaluate possessory liens as a mechanism capable of enhancing the efficiency of civil and commercial transactions. From this viewpoint, possessory liens enable creditors to rely on possession of the asset rather than resorting to registration procedures or judicial enforcement, thereby reducing monitoring costs, enforcement costs, and information costs in transactional practice.

### 2.2 Research methods

The research employs doctrinal legal analysis combined with comparative legal methodology. In the first stage of the analysis, the provisions of Vietnamese law governing possessory liens - particularly those set out in the Civil Code 2015 and Decree

No. 21/2021/ND-CP - are examined systematically in their relationship with the broader framework of secured transactions law.

In addition, the research undertakes a comparative analysis with selected foreign legal systems, namely Chinese law and United States law. The selection of these jurisdictions is based on differences in legal tradition as well as the level of development of possession-based security mechanisms.

### 3 RESULTS & DISCUSSION

#### 3.1 Legal structure of possessory liens under Vietnamese law

Under Vietnamese law, a possessory lien is defined as a statutory mechanism designed to secure the performance of obligations through the creditor's lawful possession of the debtor's property. Article 346 of the Civil Code 2015 provides that: "*A possessory lien is the right of a party entitled to a claim (hereinafter referred to as the lien holder), who lawfully possesses property that is the subject matter of a reciprocal contract, to retain such property where the obligor fails to perform or improperly performs its obligation.*"

This definition demonstrates that Vietnamese law places actual possession of the property as the legal basis for the establishment of a possessory lien. This is a characteristic feature of property-based rights, insofar as the right is directly attached to a specific asset. The legal effectiveness of a possessory lien arises from factual control over the property and does not depend on the agreement of the parties or on any registration mechanism. Accordingly, possession plays a central legal role by transforming a purely obligation-based claim into a security right attached to property. According to the view of a Vietnamese legal scholar, possessory liens function as an ad hoc protective measure designed to safeguard the interests of the entitled party, rather than as the result of a pre-established secured transaction agreement<sup>4</sup>.

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<sup>4</sup> Truong, T. Đ. (2021). *Nine security measures for contractual obligations* (3rd rev. ed.). National Political Publishing House – Truth, 273.

## 3.2 Legal grounds and conditions for the establishment of possessory liens under Vietnamese law

It can be observed that, although the Civil Code 2015 does not expressly classify possessory liens as property-based security interests, Vietnamese law has, in substance, implicitly recognized this institution as a form of asset-based security. Under this legal structure, a possessory lien may be established only where all of the following grounds and conditions are fully satisfied.

### 3.2.1 *First, the lien holder must be in lawful possession of the property*

A possessory lien constitutes a mechanism of self-help in civil law, reflecting the ability of the entitled party to protect its legitimate interests without recourse to judicial authorities<sup>5</sup>. It is an opportunistic and situational form of security, not pre-arranged and lying outside the subjective intent of the parties at the time of entering into a reciprocal contract. Accordingly, the establishment of this security measure is premised on the existence of lawful possession of the property by the lien holder at the time the creditor's right to contractual performance is infringed.

This prerequisite comprises two essential elements. First, at the time the security measure is established, the entitled party must be in possession of the property that constitutes the subject matter of the reciprocal contract. Second, such possession must be lawful; that is, the possessor must not have acquired the property through coercion, threats, fraud, or other forms of bad faith conduct. In other words, at the time the possessory lien is established, possession must be evident and arise naturally from the process of performing the reciprocal contract.

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<sup>5</sup> Nguyen, N. D. (2024). *Textbook on law of secured transactions*. Vietnam National University Ho Chi Minh City Press, 221.

### *3.2.2 Second, the possessory lien must originate from the transfer of property to the entitled party for the performance of a reciprocal contract*

A possessory lien is established on the basis of the reciprocal relationship of rights and obligations between the entitled party and the obligor under a valid and effective reciprocal contract. Accordingly, the retained property must be property over which the entitled party has lawfully acquired possession as a result of the obligor's voluntary transfer for the purpose of performing that contract. Viewed in light of the context and the function of securing the performance of civil obligations, the possessory lien and the secured obligation are intrinsically linked, in that both arise from the same contractual relationship<sup>6</sup>. Typical examples include the transfer of property under contracts of deposit or safekeeping, or the transfer of property under pledge agreements established to secure the performance of obligations<sup>7</sup>. This requirement serves both to preserve the reciprocal nature of possessory liens and to prevent abuse by creditors in asserting retention rights. Accordingly, no possessory lien may be established over property lawfully possessed by the entitled party if it does not originate from the reciprocal contract giving rise to the breached obligation.

### *3.2.3 Third, the obligor must hold rights in respect of the retained property*

Under Vietnamese law, rights in property recognized by law include the right of possession, the right of use, the right of disposition<sup>8</sup>, as well as other proprietary rights such as usufructuary rights, rights over adjacent immovable property, and superficies<sup>9</sup>. Unlike other security measures for the performance of civil obligations, possessory liens do not require the secured property to be owned by the obligor<sup>10</sup>. Accordingly, to satisfy this condition for the establishment of a possessory lien, the obligor need not be the owner

<sup>6</sup> Le, V. N., Vu, T. H. Y., Doan, T. P. D., Trinh, T. H., Luu, M. S., Lien, Đ. P. H., & Huynh, N. K. C. (2020). *Textbook on law of secured transactions*. Vietnam National University Ho Chi Minh City Press, 228.

<sup>7</sup> Nguyen, N. D. (2024). *Textbook on law of secured transactions*. Vietnam National University Ho Chi Minh City Press, 221, 222.

<sup>8</sup> Article 158, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>9</sup> Article 159, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>10</sup> Article 295.1, Civil Code of the Socialist Republic of Vietnam. (2015).

of the retained property, but must hold at least one legally recognized civil right in respect of that property.

Given that the retained property constitutes the subject matter of a reciprocal contract, requiring the obligor to possess a certain proprietary entitlement is both appropriate and necessary. A party that holds no rights in respect of the property lacks the legal basis to introduce that property into civil transactions. The obligor's rights in the retained property may arise from various legal grounds, including ownership; other transactions relating to the property such as donation, lease, or loan; authorization granted by the owner to use the property in civil transactions; performance of another reciprocal contract relating to the property; or lawful possession established on statutory grounds<sup>11</sup>.

#### *3.2.4 Fourth, the lien holder must have the right to demand performance of a due obligation*

In a reciprocal contract, the right of one party corresponds to the obligation of the other. The performance of obligations is typically determined by the terms of the reciprocal contract<sup>12</sup>, or, in certain cases, by statutory provisions governing the relevant contractual relationship<sup>13</sup>. Once a reciprocal contract becomes legally binding, the corresponding rights and obligations of the contracting parties arise.

Where the obligor fails to perform or improperly performs its obligation, the entitled party may elect to apply a possessory lien in order to secure its right to contractual performance. In other words, at the time the possessory lien is established, there must already exist a breach of a due contractual obligation. The party establishing the possessory lien must therefore be the party entitled to demand proper and complete performance of the obligation that has fallen due.

From the foregoing analysis, it is evident that Vietnamese law provides a relatively strict framework governing the grounds for the establishment of possessory liens. These grounds do not arise from the agreement of the contracting parties, but rather from the factual circumstances of voluntary transfer and lawful possession of the contractual

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<sup>11</sup> Article 165.1, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>12</sup> Article 275.1, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>13</sup> Article 275.6, Civil Code of the Socialist Republic of Vietnam. (2015).

property, the creditor's right to demand performance of a due obligation, and the obligor's proprietary relationship with the retained property. In the absence of any one of these four conditions, a possessory lien cannot be validly established.

Nevertheless, the legal structure of possessory liens under Vietnamese law remains incomplete. Unlike pledges and mortgages, which are clearly conceptualized and closely integrated into registration-based publicity mechanisms, possessory liens are primarily regulated as a legal response to non-performance of obligations, rather than as a fully systematized form of security interest.

### 3.3 The relationship between the retained property and the contractual obligation

As indicated directly in the statutory definition of possessory liens under Article 346 of the Civil Code 2015, the secured property subject to this measure must be the "*subject matter of a reciprocal contract*". The Civil Code 2015 does not provide a general definition of what constitutes the subject matter of a contract, but instead specifies the subject matter in relation to particular types of contracts. For example, the subject matter of a contract of sale includes all types of property recognized under the Civil Code 2015<sup>14</sup>, provided that such property is not prohibited from transfer or subject to statutory restrictions<sup>15</sup>; the subject matter of a service contract consists of work that can be performed and that does not violate prohibitions of law or social morality<sup>16</sup>; the subject matter of a contract for work (processing contract) is an item determined in advance according to agreed specifications or statutory standards<sup>17</sup>; and the subject matter of a lease of productive assets includes land, forests, unused water surfaces, livestock, business establishments, and means of production<sup>18</sup>.

Providing guidance on the implementation of the Civil Code 2015, Government Decree No. 21/2021/ND-CP dated 19 March 2021 on the implementation of the Civil Code concerning security for the performance of obligations ("Decree No. 21/2021/ND-

<sup>14</sup> Article 105.1, Civil Code of the Socialist Republic of Vietnam. (2015).: "*Property includes objects, money, valuable papers and property rights*".

<sup>15</sup> Article 431.1, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>16</sup> Article 514, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>17</sup> Article 543, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>18</sup> Article 484, Civil Code of the Socialist Republic of Vietnam. (2015).

CP”) further specifies that property subject to a possessory lien is property that constitutes the “*subject matter of the obligation in the breached reciprocal contract*”<sup>19</sup>. Accordingly, the entitled party may retain the property, or the portion of the property, that is directly related to the breached obligation<sup>20</sup>.

At this point, a notable divergence can be observed between the Civil Code 2015 and Decree No. 21/2021/ND-CP with respect to the scope of property that may be retained. While the Civil Code 2015 limits the retained property to the subject matter of the breached reciprocal contract, Decree No. 21/2021/ND-CP adopts a more flexible approach. Property, or a portion thereof, that is *directly related to the breached obligation* may be understood more broadly to include not only property constituting the subject matter of the reciprocal contract, but also other property that, although not itself the subject matter of the contract, is directly connected to its performance. For example, where the breached obligation concerns work resulting in the creation of a product, the entitled party may retain the product created or the raw materials used to produce that product<sup>21</sup>.

It is not difficult to discern the substantive differences between the Civil Code 2015 and Decree No. 21/2021/ND-CP in this respect. Requiring the retained property to be strictly limited to the *subject matter of the reciprocal contract* significantly restricts the ability to establish a possessory lien. Such a limitation is neither necessary nor conducive to the effective application of possessory lien rules in Vietnamese practice. By contrast, defining the retained property as property *directly related to the breached obligation*, as provided in Decree No. 21/2021/ND-CP, is more readily applicable in practice while still ensuring that the right of retention is not abused to unjustifiably appropriate another person’s property. This is because the retention of *property directly related to the breached obligation* must still satisfy all the grounds and conditions for the establishment of a possessory lien, as analyzed in the preceding sections.

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<sup>19</sup> Article 8.3, Decree No. 21/2021/ND-CP on secured transactions. (2021).

<sup>20</sup> Article 48.1, Decree No. 21/2021/ND-CP on secured transactions. (2021).

<sup>21</sup> Article 48.2, Decree No. 21/2021/ND-CP on secured transactions. (2021).

### 3.4 Property-based rights of the lien holder in the retained property under Vietnamese Law

The legal structure of possessory liens reflects the principle of separation between ownership and possession. Where the creditor lawfully possesses the property, the owner's powers are temporarily restricted without any transfer of ownership; the law recognizes possession as an independent factual status with legal significance, particularly when employed as a mechanism to secure the performance of obligations. However, Vietnamese civil law currently refers only to a limited set of basic rights of the lien holder during the period of possession. Consistent with the function of exerting pressure on the breaching party to perform its obligation, Vietnamese law permits the lien holder merely to retain possession (together with the duty to preserve the property) and to exploit the property to collect fruits and profits only with the consent of the obligor<sup>22</sup>.

A core privilege of security transactions, the right to enforce or dispose of the secured asset, has not been recognized by Vietnamese law in relation to possessory liens. This omission constitutes a significant deficiency in the proprietary dimension of this security device. Under general principles of proprietary security, a secured creditor is entitled to enforce its security interest against the collateral regardless of who holds the asset<sup>23</sup>. By contrast, unlike other in rem security interests such as pledges and mortgages, the lien holder is not entitled to dispose of the retained property as a secured creditor, nor does it enjoy priority in payment from the proceeds of sale. The lien holder's right is confined to retaining possession of the property in order to exert pressure on the obligor to perform the obligation<sup>24</sup>.

Another aspect relevant to the proprietary character of possessory liens concerns right of recourse over the retained property. The secured party does not enjoy a right of recourse, as a possessory lien remains effective only so long as the lien holder continues to lawfully possess the secured property. Once factual possession is no longer maintained,

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<sup>22</sup> Article 348.3, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>23</sup> Nguyen, N. D. (2024). *Textbook on law of secured transactions*. Vietnam National University Ho Chi Minh City Press, 78.

<sup>24</sup> Nguyen, N. D. (2024). *Textbook on law of secured transactions*. Vietnam National University Ho Chi Minh City Press, 222.

the possessory lien terminates automatically by operation of law<sup>25</sup>. In other words, the lien holder loses its legal powers over the property upon losing actual possession and has no right to recover the property<sup>26</sup>. Decree No. 21/2021/ND-CP provides a limited exception in this respect, stipulating that where a competent authority or authorized person requires the lien holder to surrender the retained property for the resolution of a matter in accordance with law, such surrender does not constitute a ground for termination of the possessory lien<sup>27</sup>. Nevertheless, this exception is articulated only at the level of principle. At present, no legal instrument provides specific guidance on how the creditor's interests are to be protected after the retained property has been handed over to a competent state authority. In substance, the lien holder already lacks both a right of recourse and a right of priority over the secured asset. Once possession of the collateral is lost, even if the law continues to recognize the formal legal effect of the possessory lien, the practical capacity to exert pressure on the obligor is substantially diminished.

Originating as a contractual right arising within reciprocal contracts, possessory liens have been formally codified in Vietnamese law as one of the nine measures for securing the performance of obligations under Article 292 of the Civil Code 2015. However, despite nearly a decade of application in practice, possessory liens have not achieved the expected level of effectiveness as a security device. In Vietnamese secured transactions practice, traditional measures such as pledges, mortgages, and guarantees continue to be favored, while possessory liens are rarely employed and remain largely absent from transactional practice. According to the authors' assessment, the primary reason for this situation lies in the legal structure of possessory liens as a security measure, which remains fragmented and underdeveloped, thereby discouraging parties in civil transactions from considering or choosing this form of security.

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<sup>25</sup> Article 350.1, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>26</sup> Nguyen, N. D. (2024). *Textbook on law of secured transactions*. Vietnam National University Ho Chi Minh City Press, 222.

<sup>27</sup> Article 47.1, Decree No. 21/2021/ND-CP on secured transactions. (2021).

### 3.5 Effectiveness of possessory liens under Vietnamese law

By its nature as a statutory security measure operating within reciprocal contractual relationships, Vietnamese law clearly determines that a possessory lien becomes effective at the point when the obligation falls due and the obligor fails to perform or improperly performs that obligation<sup>28</sup>. This rule must be read in conjunction with the grounds and conditions for the establishment of possessory liens analyzed in the preceding sections. Under this approach, although the moment at which a possessory lien takes effect is formally recognized in law, the regulation remains largely “one-directional” reflecting the legislator’s normative design without sufficient regard to the will of the entitled party. Specifically, where a reciprocal contractual obligation is breached and the entitled party is lawfully in possession of the property constituting the subject matter of that reciprocal contract, a possessory lien arises automatically and remains effective until one of the statutorily prescribed grounds for termination occurs, including: the lien holder no longer retaining factual possession of the property; the parties agreeing to substitute another security measure for the possessory lien; full performance of the obligation; destruction or loss of the retained property; or termination by agreement of the parties<sup>29</sup>.

Correspondingly, with respect to third parties, a possessory lien produces opposability effects against third parties from the moment the lien holder takes possession of the property<sup>30</sup>. Under the current Vietnamese legal framework, the act of retaining the property following a contractual breach is treated as an implicit form of notice to the obligor and to other relevant third parties regarding the establishment and effectiveness of this security measure. Both the effectiveness and opposability of possessory liens are thus grounded in the factual act of retaining the secured property. Vietnamese law does not impose any express duty to notify either the obligor or other relevant third parties. While this approach may be consistent with the nature of possessory liens as an immediate self-help response to contractual non-performance, it may, in certain circumstances, give rise to conflicts between lien holders and other secured creditors.

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<sup>28</sup> Article 347.1, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>29</sup> Article 350, Civil Code of the Socialist Republic of Vietnam. (2015).

<sup>30</sup> Article Điều 347.2, Civil Code of the Socialist Republic of Vietnam. (2015).

For example, A leases a car from B for a long-distance trip. During the trip, the car breaks down, and A takes it to a repair shop but is unable to pay the repair costs. The repair shop owner retains the car to secure payment of the outstanding repair expenses owed by A. During this period, although the possessory lien established by the repair shop over the car is effective and opposable to third parties B who are unaware that the car is being retained, may still enter into a mortgage transaction with Bank C using the same car as collateral. In this scenario, two security interests simultaneously exist over the same asset, yet the secured parties may be unaware of each other's rights. This situation can generate conflicts of interest between the repair shop owner and the bank that has extended credit to B on the basis of the same collateral.

Although Vietnamese law recognizes the principle that a single asset may secure the performance of multiple obligations, this principle is subject to the condition that the secured parties consent to such an arrangement<sup>31</sup>. The scenario discussed above does not satisfy this requirement, as it involves the concurrent application of a possessory lien and a mortgage over the same asset without mutual awareness or consent. The absence of transparent information, which may initially appear to favor the lien holder, in fact places the lien holder in a position of difficulty and potential conflict when seeking to protect its secured interests against other secured creditors. For these reasons, the authors submit that improving information transparency in the establishment and enforcement of security measures is an issue that Vietnamese law should further examine and refine in relation to possessory liens.

#### **4 COMPARATIVE PERSPECTIVES ON POSSESSORY LIENS: VIETNAM, CHINA, AND THE UNITED STATES**

The United States ("U.S.") is a common law jurisdiction with a well-developed federal secured transactions framework under Article 9 of the Uniform Commercial Code ("UCC Article 9"), which has been widely applied not only within the U.S. but has also been received and emulated by many other jurisdictions. China, by contrast, belongs to the civil law tradition and shares with Vietnam a number of economic, social, and cultural

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<sup>31</sup> Article 296.1, Civil Code of the Socialist Republic of Vietnam. (2015).

similarities. The Chinese Civil Code 2020 was enacted on the basis of codifying numerous statutes and legislative instruments, while also incorporating elements of UCC Article 9, the Uncitral Model Law on Secured Transactions, and the laws of various other jurisdictions, with the objective of improving the business environment through reform of the traditional secured transactions system governing movable property<sup>32</sup>. The Vietnamese legal framework governing the grounds, conditions, and effectiveness of possessory liens also exhibits significant convergence with international practice<sup>33</sup>. Nevertheless, from a comparative perspective, several progressive features of Chinese and U.S. law merit further discussion, as set out below:

#### **4.1 First, the relationship between the retained property and the breached contractual obligation**

The Chinese Civil Code 2020 adopts an approach that differs in certain respects from Vietnamese law regarding the scope of property subject to a possessory lien. Under Article 448 of the Code, the determination of the retained property depends on the nature of the parties to the reciprocal contract, specifically whether the parties are individuals or non-enterprise entities, or whether the contract is concluded between enterprises. Where one or all of the parties to the reciprocal contract are individuals or non-enterprise entities, the property subject to a possessory lien must belong to the same legal relationship as the breached obligation<sup>34</sup>.

In this respect, the Chinese Civil Code aligns closely with the approach adopted in Decree No. 21/2021/ND-CP of Vietnam. The retained property must be directly related to the performance of the reciprocal contract and to the obligation that has not been performed. This design reflects a reciprocal security mechanism linking the obligation and the retained property, thereby preventing abuse of the right of retention by the lien holder. By contrast, where all parties to the reciprocal contract are enterprises, Article 448

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<sup>32</sup> Zhang, J. (2021). Recent developments in the law of secured transactions of movables under the new Chinese Civil Code. *Uniform Law Review*, 26(1), 192.

<sup>33</sup> Van Erp, S., & Akkermans, B. (Eds.). (2016). *Cases, materials and text on property law*. Hart Publishing, 531,532.

<sup>34</sup> Article 448 Civil Code of the People's Republic of China. (2020).: "*The movable property retained under a lien by the creditor shall be in the same legal relationship as the underlying claim, unless the lienholder and the debtor are both enterprises*".

of the Chinese Civil Code 2020 permits the creditor to retain any movable property of the enterprise, even if the debt is not directly related to the retained property. In this exceptional case, the principle of reciprocity between the retained property and the breached contractual obligation does not apply. This rule represents a deliberate expansion of creditor rights in commercial transactions, aimed at strengthening the creditor's position in situations involving delayed or non-payment by enterprises.

Accordingly, Article 448 of the Chinese Civil Code 2020 reflects a distinctive approach to possessory liens. While it establishes, as a general rule, that the retained property and the secured obligation must arise from the same legal relationship, it simultaneously introduces a significant exception in enterprise-to-enterprise transactions. This approach differs fundamentally from the regulation of statutory liens in the U.S., which are designed around a high degree of specialization for each type of possessory lien.

Specifically, mechanic's liens recognized under the laws of various U.S. states (such as Tennessee or California) allow contractors, laborers, or material suppliers to assert a lien directly against the immovable property they have improved or constructed, in order to secure payment for labor and materials<sup>35</sup>. Agricultural liens are limited to specific crops or livestock that are directly connected to the unpaid obligation<sup>36</sup>. Warehousemen's liens arise where storage charges remain unpaid and are confined to the specific goods deposited in storage<sup>37</sup>. Similarly, hotelkeepers' liens permit hotel operators to retain a guest's property for unpaid accommodation or service charges, but only with respect to property brought onto the premises and typically excluding vehicles and animals<sup>38</sup>. A common feature of these forms of possessory liens is that the right of retention arises only where the lien holder has provided labor, services, or incurred expenses that are directly related to the specific property retained.

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<sup>35</sup> Nelson, B. (2007). Construction liens: A national review and template for a uniform lien act. *William Mitchell Law Review*, 34(1), 245–272.

<sup>36</sup> Pasqualucci, J. M. (2001). Revised Article 9 in South Dakota with emphasis on newly included agricultural liens. *South Dakota Law Review*, 46, 449–515 & Peterson, W. P. (2003). Revised Article 9 and agricultural liens: An Iowa perspective. *Drake Journal of Agricultural Law*, 8, 437–454.

<sup>37</sup> Antcliffe, P. (2014). Warehouseman's liens. *Banking Law Journal*, 131(6), 521–524.

<sup>38</sup> Grant, D. (2006). The hotelkeeper's lien. *International Travel Law Journal*, 162–178.

This comparison demonstrates that, notwithstanding differences in legislative technique, U.S. law adheres to a core principle: **in the absence of a direct connection between the property and the obligation, no possessory lien arises.**

#### **4.2 Second, rules on notice and publicity in the establishment of possessory liens**

From a comparative law perspective, two basic models of publicity may be identified in relation to the establishment of possessory liens. The first model is possession-based publicity, which is currently adopted by both Chinese and Vietnamese law for possessory liens. The act of possessing the retained property serves as a form of publicity of the lien holder's right and constitutes the basis for maintaining the opposability of the security interest against third parties<sup>39</sup>. When factual possession ceases, Chinese law, similar to Vietnamese law, provides that the possessory lien is terminated<sup>40</sup>. In this model, the lien holder is required only to demonstrate its secured interest through actual control over the property, without the need to undertake any formal legal procedures with state authorities or third parties, including the party in breach of the contractual obligation.

Without denying the legal value of this first model of publicity, U.S. law simultaneously recognizes a second model, namely publicity through registration of notice documents (notice filing). This mechanism is widely used in U.S. law to perfect security interests, including security interests arising from possessory liens<sup>41</sup>. The essence of this form of publicity is not the registration of a security transaction as such, typically associated with consensual security agreements, but rather the filing of a simple notice designed to alert the market to the possible existence of a security interest over a particular asset, thereby prompting interested parties to conduct further inquiry. This system is built upon a unified framework intended to coordinate security interests based on priority determined by public filing, while minimizing informational and transactional costs.

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<sup>39</sup> Article 347.2, Civil Code of the Socialist Republic of Vietnam. (2015) & Article 457, Civil Code of the People's Republic of China. (2020).

<sup>40</sup> Article 457, Civil Code of the People's Republic of China. (2020).

<sup>41</sup> UCC Article 9-310(a), [https://www.law.cornell.edu/ucc/9/9-310?utm\\_source=chatgpt.com](https://www.law.cornell.edu/ucc/9/9-310?utm_source=chatgpt.com).

Accordingly, the absence of a requirement for notification or registration upon the establishment of possessory liens in Vietnamese and Chinese law should not be regarded as an inherent deficiency of these legal systems. Rather, it reflects a deliberate choice in favor of a possession-based publicity model. However, in the context of increasingly sophisticated asset-based credit markets and multi-creditor transactions, this model can operate effectively only if the law establishes clear rules coordinating priority between possession-based and registration-based security interests. At present, Vietnamese law recognizes opposability from the moment of possession, yet it lacks a comprehensive “notice procedure” in a broader sense - that is, it does not clearly specify who must be aware of what information, by what means, and with what legal consequences in cases of ignorance. By contrast, the U.S. UCC system demonstrates that notice filing may serve as a technical standard capable of reducing information costs, enhancing transparency and predictability, and limiting disputes relating to competing security interests over the same asset.

#### **4.3 Third, rules on the lien holder’s right to enforce the secured property**

While Vietnamese law does not address the right of the lien holder to enforce or dispose of the secured property, both Chinese and U.S. law have developed more diversified mechanisms for this category of proprietary security. Under Article 453 of the Chinese Civil Code 2020, once a possessory lien has been established, the lien holder and the obligor must agree on a reasonable period for the performance of the obligation, upon completion of which the possessory lien terminates. Where no agreement is reached or where the agreement is unclear, the lien holder is entitled to fix a performance period for the obligor, provided that such period is not shorter than 60 days, except where the retained property consists of perishable goods or foodstuffs. If the obligor still fails to perform upon the expiration of this period, the lien holder may (i) agree with the obligor to convert the retained property into money, or (ii) sell the retained property by auction or private sale and enjoy priority in payment from the proceeds of sale<sup>42</sup>. This framework demonstrates that Chinese law not only recognizes enforcement rights associated with

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<sup>42</sup> Article 453 Civil Code of the People’s Republic of China. (2020).

possessory liens but also provides a relatively flexible procedural pathway for their exercise.

U.S. law similarly recognizes, in certain contexts under state legislation, the lien holder's right to enforce the retained property. For example, in the case of hotelkeepers' liens, hotel operators may sell the retained property by public auction after providing public notice and observing the statutory waiting period<sup>43</sup>.

The absence of provisions encouraging parties to agree on post-establishment enforcement mechanisms - including, where necessary, the disposition of the secured property, constitutes a significant shortcoming of Vietnamese law and diminishes the effectiveness and competitiveness of possessory liens in comparison with more traditional security devices. Establishing a flexible legal framework capable of fairly balancing the interests of the parties after a possessory lien has been created is an essential condition for enabling possessory liens to function fully as a security device, rather than remaining merely a contractual right arising within reciprocal contracts, as was largely the case under Vietnamese civil law prior to the entry into force of the Civil Code 2015.

## 5 SOME RECOMMENDATIONS

Based on the foregoing analysis, this article advances several targeted recommendations aimed at strengthening the legal structure and effectiveness of possessory liens under Vietnamese law. These recommendations do not seek to introduce a new security device, but rather to clarify and systematize an existing institution so as to ensure its coherent operation within the secured transactions framework.

### 5.1 First, revising the concept of possessory liens in the Civil Code 2015

Drawing on the legislative experience of China and the United States concerning the relationship between the retained property and the breached contractual obligation, the authors propose revising and refining the definition of possessory liens under Article 346 of the Civil Code 2015 by adopting a more flexible understanding of this relationship.

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<sup>43</sup> Grant, D. (2006). The hotelkeeper's lien. *International Travel Law Journal*, 162–178.

Specifically, it is suggested that the retained property and the breached contractual obligation be required merely to arise from the same legal relationship, rather than limiting the retained property to the “subject matter of the reciprocal contract,” as currently prescribed.

Such a revision would preserve the core principle requiring a direct connection between the retained property and the secured obligation, while expanding the scope of application to assets closely linked to the breached obligation. This adjustment would promote consistency between the Civil Code, its implementing instruments, and sector-specific legislation, while enhancing flexibility in the practical application of possessory liens. At the same time, it would help reduce the risk of abuse of retention rights, align Vietnamese law with comparative legal developments, and better respond to practical needs in Vietnam.

## **5.2 Second, developing additional publicity mechanisms for the establishment of possessory liens**

Although Vietnamese law recognizes the opposability of possessory liens against third parties through factual possession of the property, as analyzed earlier in this article, the level of publicity achieved through possession alone remains limited and does not adequately reach all relevant actors—particularly other secured creditors with interests in the same retained asset. In practice, other security interests may still be created over property subject to a possessory lien without the secured parties being fully informed, giving rise to potential conflicts of interest and undermining the effectiveness of possessory liens as a security mechanism.

Accordingly, consideration should be given to introducing a notice filing mechanism alongside possession-based publicity. Such a mechanism would not only enhance the protection of the lien holder’s legitimate interests, but also help mitigate legal disputes involving third parties by improving transparency and information symmetry in secured transactions.

### **5.3 Third, establishing conditions and procedures for the enforcement of retained property after the creation of possessory liens**

At present, Vietnamese law focuses primarily on the establishment and termination of possessory liens, while providing little guidance on the enforcement of retained property once the lien has been created. As a result, where the parties fail to reach agreement on a resolution, the lien holder's position is particularly constrained: the creditor cannot return the secured property, yet must continue to bear the costs and responsibilities of preservation and storage without being permitted to dispose of the asset.

It is therefore necessary to consider introducing guiding rules that encourage parties to reach agreements on post-establishment enforcement arrangements, including, where appropriate, the disposition of the secured property. At the same time, the law should recognize the lien holder's right to enforce the retained property once statutory conditions are satisfied. Such reforms would enhance the practical effectiveness of possessory liens and contribute to a more transparent and predictable legal environment for secured transactions.

## **6 CONCLUSION**

Although possessory liens have been formally recognized as a security measure under the Civil Code 2015, they continue to be regarded as an institution with an underdeveloped legal structure. The absence of proprietary enforcement rights following the establishment of the security interest, uncertainties regarding the criteria for identifying retainable property, and internal inconsistencies among relevant legal provisions constitute normative gaps that require further legislative refinement. In addition, reliance on factual possession as the sole publicity mechanism to establish opposability against third parties has not adequately resolved conflicts of interest between lien holders and other parties with interests in the same asset—particularly secured creditors whose security interests are not based on possession.

If these structural deficiencies are effectively addressed, possessory liens may evolve into a flexible security device that is more readily adopted in civil and commercial

transactions. Their inherent availability and situational responsiveness—once statutory conditions are satisfied—combined with a legal framework that adequately protects the interests of lien holders, would constitute significant advantages of this statutory security mechanism over consensual forms of security.

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**Authors' Contribution**

All authors contributed equally to the development of this article.

**Data availability**

All datasets relevant to this study's findings are fully available within the article.

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