
ELABORATING ON THE OLD LAND-USE RIGHTS CHESTNUT
CONCLUDING THOUGHTS ON CIRCULAR 12

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Introduction

On November 22, 2000, the State Bank of Vietnam, Ministry of Justice, Ministry of Finance and General Department of Land Administration issued Inter-ministerial Circular 12/TTLT-NHNN-BTP-BTC-TCDC to implement certain decisions made by the government of Vietnam in its Resolution 11/2000/NQ-CP dated July 31, 2000 to facilitate secured transactions entered into by Vietnamese credit institutions.

Resolution 11 instructed the relevant ministries to provide guidance to Vietnamese banks with respect to the implementation of Decree 178 dated December 29, 1999 of the government governing secured transactions entered into by Vietnamese banks. Resolution 11 does not mention Decree 165 dated November 19, 1999 of the government governing secured transactions involving foreign lenders. Circular 12 makes two significant changes with respect to the secured transactions covered by Decree 178.

Deferral of Registration

Circular 12 defers (i) registration of mortgages of land-use rights and immovables with the local land administration departments until specific guidelines on the procedures and fees for registration of secured transactions are issued by the relevant agencies, and (ii) registration of pledges of movables until the National Center for Registration of Secured Transactions is "established and operational."

Easing Restrictions on Use of Ownership Documents

Circular 12 eases restrictions applicable to secured transactions based on surrender of ownership documents to lenders in several respects.

With respect to land-use rights, in addition to land-use right certificates, Circular 12 permits Vietnamese banks to perfect security interests in land-use rights by taking possession of other documents that also evidence the borrower's right to use land allocated by or leased from the state including decisions from the competent authorities to allocate or lease land to the borrower, documents evidencing payment of rentals or fees for using land.

With respect to immovables other than land-use rights and movables, the borrower can use documents "evidencing its legitimate ownership" over such assets. Under Circular 12, such assets include immovables attached to land (facilities, plants, construction structures, and other assets attached to land) and such movables as machinery, equipment and other movables not attached to land. Circular 12 provides a non-exhaustive list of documents evidencing legitimate ownership of collateral that can be used to replace ownership certificates, including: (i) purchase contracts; (ii) invoices relating to the purchase "in accordance with the regulations of the Ministry of Finance"; (iii) documents evidencing payments for purchase of goods; (iv) certificates of final acceptance of completion of construction of facilities; and (v) other documents "in accordance with Vietnamese law."

Applicability of Circular 12 to Foreign Loans

Circular 12 only applies to secured transactions relating to domestic loans. As stated in the recitals, Circular 12 was issued to implement Resolution 11. Section III of Resolution 11 titled "Resolutions on Financial and Credit Issues" in its paragraph 6.a only instructed the State Bank to "coordinate with the relevant agencies" to resolve certain issues relating to secured transactions covered by Decree 178.

Decree 178 regulates secured transactions relating to domestic loans extended by Vietnamese banks. In addition, Circular 12 at various places refers to Decree 178 and makes no mention to Decree 165. Therefore, Resolution 11 and Circular 12 only deal with the issues arising in connection with secured transactions entered into by Vietnamese banks. From a legal standpoint, the changes made by Circular 12 are not applicable to secured transactions entered into by foreign lenders.

We conferred on this issue with an official of the Ministry of Justice who confirmed that Circular 12 is not applicable to secured transactions entered into by foreign lenders. The official however asserted that Circular 12 may be applied by analogy to resolve issues related to secured transactions entered into by foreign lenders. This interpretation is technically problematic under normal rules of statutory interpretation. Because the government explicitly referred to only Decree 178 in Resolution 11, the correct implication has to be that the government meant to leave Decree 165 alone. In addition, the authority for any attempt of the Ministry of Justice to clarify the implementation of Decree 165 is also doubtful.

Circular 12 implemented Decree 178 on the basis of a resolution by the government. Instructions from the government guiding the implementation of a government decree or amendments of one government document by another are entirely appropriate. The same cannot be said of an Ministry of Justice (MoJ) document purporting to clarify or interpret either a government decree or an inter-ministerial circular by applying the principles of such documents to a new area of law the government clearly chose not to touch.

Although the changes made by Circular 12 cannot be used from a legal point of view to resolve issues relating to foreign loans, Circular 12 is not entirely without impact.

Effectiveness of Secured Transactions Prior to Registration

Resolution 11 and Circular 12 may be helpful in addressing an issue of validity raised by Article 16.1 of Decree 165 governing secured transactions involving foreign lenders. Article 16.1 reads in its entirety as follows:

"1. Secured transactions are valid from the time that the last party signs the document. In the event the secured transaction must be registered with the registration agency, then this transaction will be valid from the time of registration. Since the government has clearly announced that registration is deferred, the question becomes the appropriate interpretation of the second sentence of Article 16."

There are a few possible interpretations of the impact of deferral of registration. First, Article 16 may be read to say that foreign lenders may not validly undertake secured transaction until registration is established. Second, Article 16 may also be read to say that since registration has been deferred indefinitely, foreign lenders may undertake valid secured transactions but the method of perfection and the priority of their security interests are not clear. We believe the second interpretation is the more sensible one and should be confirmed in future documents issued by the relevant authorities governing secured transactions entered into by foreign lenders.

Negative Pledge and Perfection of Security Interests in Collateral without Ownership Certificates

By allowing Vietnamese banks to perfect security interests in land use rights and immovables by taking possession of ownership certificates and similar documents, Circular 12 creates the risk for the foreign lenders that their borrowers may use such documents as collateral in secured transactions with Vietnamese banks. The situation may become very chaotic if Vietnamese banks take a flexible approach in accepting any documents "evidencing legitimate ownership" as permitted by Circular 12.

Foreign lenders may consider strengthening the negative pledge covenant in their loan agreements by taking possession of all the documents evidencing the borrower's ownership of all the collateral. The borrowers should be asked to surrender possession of land use right certificates, land lease agreements, decisions from the competent authorities to allocate or lease land to the borrowers and evidence of payments for land. For immovables other than land use rights and for movables, it may be impossible for the lenders to take all the documents evidencing the borrowers' ownership of such assets. Except for certificates of final acceptance of completion of construction of the facilities, concepts such as "purchase contracts," "invoices relating to the purchase," "documents evidencing payments for purchase of goods," and "other documents in accordance with Vietnamese law" are entirely open-ended. As a result, foreign lenders and their lawyers are charged with the seemingly impossible task of making sure that they get every possible document "evidencing legitimate ownership" to prevent the same collateral being pledged to a Vietnamese bank.

Conclusions

Circular 12 is clearly an attempt by the government to facilitate domestic lending by resolving critical issues relating to secured transactions entered into by Vietnamese banks. It, however, does not touch upon similar issues faced by foreign lenders. In addition, it may create a very chaotic and unpredictable situation by introducing the new concept of "documents evidencing legitimate ownership" which limits the usefulness of a negative pledge covenant. Foreign lenders therefore should keep a close watch on future developments in the regulations governing secured transactions in Vietnam for efforts made by the government to improve the legal environment.