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**DOES THE SECURED TRANSACTIONS DECREE APPLY TO BOT FINANCING?**

*(Vietnam Investment Review, Issue No. 0433, January 31, 2000 )*

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On November 19 last year, the government issued Decree 165 on secured transactions to primarily govern civil transactions. Decree 165 also applies to economic and commercial transactions where applicable "Vietnamese laws do not provide otherwise." In addition, the decree governs civil, economic and commercial transactions involving a "foreign element." Hence, security arrangements for international financing of BOT projects in Vietnam are now regulated by Decree 165.

Regulations governing security arrangements entered into by foreign lenders in relation to BOT projects can also be found in Article 8 of Decree 62 on BOT projects, dated August 15, 1998 and Article 25.3 of Decree 90 on foreign loans, dated November 7, 1998. Though Article 8 of Decree 62 provides for a broad base of collateral that can be offered to foreign lenders, Article 25.3 of Decree 90 issued later creates confusion because it substantially narrows the scope of collateral provided in Article 8.

**Decree 62**

Under Article 8 of Decree 62, a BOT company may mortgage or pledge the following assets: (i) equipment, plants, architectural works and real estate properties that have been purchased or constructed with the invested capital of the BOT company; (ii) other assets owned by the BOT company; (iii) value of land-use rights in accordance with Vietnamese law; and (iv) property rights of the BOT company.

Since phrases "other assets owned by the BOT company" and "property rights of the BOT company" are very broad and left undefined in Decree 62, such assets and property rights may include, in addition to equipment, plants, architectural works and real estate properties, other types of collateral often used in financing BOT projects in Vietnam. As such, pledges of insurance proceeds, pledges of revenue streams under contracts and conditional assignments over equity interests in foreign-invested enterprises (CAVIA) are presumably all permitted.

**Decree 90**

Decree 90 outlines forms of security available to foreign lenders. Such forms now include, among others, guarantees of Vietnamese banks, guarantees of the Government, offshore guarantees and mortgages or pledges of a borrower's assets. With respect to mortgages or pledges of the borrower's assets, Article 23.5 of Decree 90 provides: "An enterprise may use the assets which are financed by the loan proceeds, or any form of security in accordance with Vietnamese law, to secure foreign loans." Therefore, foreign lenders may take security in Vietnam with respect to assets that are financed by the proceeds of the foreign loans. This provision is different from Article 8 of Decree 65 because Article 8 does not limit assets that are financed by loans or by equity.

It is also not clear under Article 8 whether the assets that can be mortgaged or pledged need to be fully or partially financed by the loans. Unfortunately, the State Bank has never expressed a clear view on this point. The status of assets that are not financed by the loan proceeds is not clear and probably such assets cannot be mortgaged or pledged. It therefore follows that the value of the land-use rights and property rights of a BOT company, including among others

insurance proceeds and contractual revenue streams, may not be mortgaged or pledged since they are not assets which are financed by the loans. The status of the facilities and equipment that are usually financed by both equity and loans is also not clear. If Decree 90 requires the assets to be financed by the loan proceeds, the collateral base of the BOT company will be very limited.

### **Decree 165**

Assets that can be mortgaged or pledged are provided in Articles 7 and 8 of Decree 165 and are very broad. Based upon the provisions on mortgages and pledges of the Civil Code, such assets virtually include all assets, both immovable and movable, of a company and fortunately the requirement of being financed by the loan proceeds has been removed.

In addition, Decree 165 also clarifies a number of issues. Decree 165 for the first time refers to the mortgage or pledge of "future assets" (better known as after-acquired assets). Articles 7 and 8 specifically make it clear that such future assets as new structures affixed to land, revenue streams under contracts and other contractual property rights, and income and benefits derived from mortgaged or pledged property permitted to be taken as security.

In addition to "future assets", there are two new types of pledgeable assets that are not specifically mentioned in Decree 62: (i) equity interests in foreign-invested enterprises, including BOT companies and (ii) rights to exploit natural resources. This is perhaps the first time Vietnamese law specifically permits the concept of CAVIA and pledges over the right to exploit natural resources.

Since Decree 165 also governs security arrangements for foreign loans, its provisions regarding the types of mortgageable or pledgeable assets can in theory be applicable to foreign loans in relation to BOT projects. Such provisions provide for a much broader collateral base than Article 23.5 of Decree 90 and somehow similar to Article 8 of Decree 62 though stated in much clearer terms. The relationship between Decree 165 and Decree 90 is not entirely clear because Decree 165 does not specify whether its Article 7 and 8 replace Article 23.5 of Decree 90. On the basis of Article 80 of the Law on the Promulgation of Legal Documents, one argument however can be made that since Decree 165 was issued after Decree 90 and both govern the same issue, Articles 7 and 8 of Decree 165 prevail over Article 23.5 of Decree 90. Consequently, it appears that the limitation provided in Article 23.5 of Decree 90 has been removed by Decree 165.

### **Conclusion**

Project security in most cases is primarily negative and defensive and intended rather to prevent other creditors from obtain adverse interests in the project assets and thereby holding the lenders to ransom. However, it is always in the interest of the lenders that they can take as much security as possible under applicable law so that in the event of default, they can easily step in and run the entire project for their own benefits.

Decree 165 is the positive step forward because it appears to provide for a much broader collateral base for international financing of BOT projects than that permitted in Decree 90. These provisions are in line with Article 8 of Decree 62 and foreign lenders may rely on them to take security in Vietnam.