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## **LEGAL DOCUMENTS**

**- DECREE 21 REGULATING IMPLEMENTATION OF  
THE CIVIL CODE ON SECURITY FOR THE  
PERFORMANCE OF OBLIGATIONS –  
APRIL 2021**

The Government has recently issued Decree No. 21/2021/ND-CP guiding the implementation of the Civil Code on the security for performance of obligations, including collateral; establishment and implementation of security measures for obligation performance (the “**Security Measures**”) and enforcement of collateral (the “**New Decree**”) as replacement for current Decree No. 163/2006/ND-CP dated 29 December 2006 on Security Transactions (as amended by Decree No. 11/2012/ND-CP dated 22 February 2012) (the “**Current Regulations**”).

This Newsletter sets out notable changes under the New Decree which shall take effect from 15 May 2021.

## **1. Assets to be Used as Collateral**

In the Current Regulations, a security transaction is allowed to be secured by only two types of collateral being either *assets* or *assets to be formed in the future* not prohibited from trading by laws. As from 15 May 2021, additional types of collateral used to secure the performance of obligations are provided under the New Decree. Those types of collateral include:

- i. current assets or assets to be formed in the future, save for assets prohibited from trading, other transfer or assignment of ownership as at the time of conclusion of the security contract or security measure as provided by Civil Code or other relevant laws;
- ii. assets sold pursuant to a contract for purchase and sale of asset with retention of ownership;
- iii. assets being subject of the obligation in a bilateral contract in which the provision on lien is breached;
- iv. assets under public ownership as stipulated by relevant laws.

Further, both New Decree and Current Regulations allow using land use right as collateral provided that land use right must already exist and not be formed in the future. However, compared to the Current Regulations, the New Decree provides for a clearer provision governing the use of the land use right as collateral in a security transaction. In particular, in the case of land use right to which assets are attached, the securing party is entitled to use separately the land use right for securing the

performance of obligations, and not the attached assets concurrently, and *vice versa*.



## **2. Validity of the Security Measures and Security Contract**

According to the New Decree and the Current Regulations, a security contract required to be notarized or certified shall come into effect as from the time of notarization or certification. In case no notarization or certification is required, a security contract takes effect on the date agreed by the parties. In the event that the parties have not made a specific agreement on the effective date of the security contract, the contract is effective as from the time of signing.

New points from the New Decree are to clarify the effectiveness of Security Measures against third party (the “**Effectiveness Against Third Party**”), specifically as follows.

The Effectiveness Against Third Party arises as from the time the security contract takes effect. However, for special Security Measures as set out below, the Effectiveness Against Third Party shall not arise from the effective date of the security contract:

- i. *for the Security Measures required to be registered with the competent authority*, the date of Effectiveness Against Third Party is that when the registration at the competent agency is completed; or
- ii. *for the Security Measures not required to be registered with the competent authority*, the Effectiveness Against Third Party shall arise as from the time the secured party directly manages, controls or dominates the collateral or another person manages the collateral [pursuant to an agreement or pursuant

to the laws] but the secured party still controls and dominates the collateral; or

- iii. *for the Security Measures of escrow deposit*, the Effectiveness Against Third Party shall arise as from the time the asset is deposited into the escrow account at the credit institution holding the escrow deposit account.

In case the Effectiveness Against Third Party in relation to the above special Security Measures has not arisen, the validity of the security contract shall not be changed or terminated.

The Effectiveness Against Third Party is also applied to all future obligations. Such validity and effectiveness shall not be changed or terminated if the parties fail to reach a specific agreement on the scope of the future obligations, the time-limit for performance of the secured obligations or the period of the security for performance of the obligations.



### **3. Investment in relation to Collateral**

Under the Current Regulations, the mortgagor is entitled to exercise its investment right for the purpose of increasing the value of the collateral. Such right is further specified for implementation according to the New Decree, which likely provides for a mechanism to better protect the legal rights and benefits of the mortgagee. Specifically, the collateral in the New Decree is not allowed to be invested if:

- i. a third party invests in the collateral without the consent of the mortgagee; or
- ii. the investment in the collateral of the mortgagor creates new asset(s) which do not form a part of the collateral as agreed in the mortgage contract

without the consent of the mortgagee; or

- iii. the mortgagee deems that the investment in the collateral may cause the value of the collateral decreased.

### **4. Enforcement of Some Special Collateral under the New Decree**

#### **Collateral being Listed Securities, Goods on Commodity Exchange or Other Moveable Assets**

It has appeared that enforcement of collateral being listed securities, goods on the commodity exchange or other moveable assets to ensure rights and benefits of secured party is a concerned matter that have not been efficiently resolved by the Current Regulations.

Since these are assets with unstable prices and shall potentially cause risks if not being handled promptly, the New Decree provides that the secured party is entitled to sell such collateral at the securities market price or at the commodity exchange price provided that (i) price of such collateral is able to be clearly determined in the market and (ii) the secured party provides prior notice to the securing party and to any other joint secured parties.

#### **Collateral being Assets to be Formed in the Future**



The New Decree recommends the parties in a security transaction to agree on enforcement of the collateral to be formed in the future under the following methods:

<b>Method</b> <b>Collateral</b>	Assignment of contract relating to collateral <sup>1</sup>	Receiving collateral instead of performing secured obligation	Sale of collateral	Enforcement as existing secured assets
Not being formed yet	✓	✓	✓	
Being formed but not yet registered as required by the law	✓	✓	✓	
Being formed and under the ownership of securing party		✓		✓

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<sup>1</sup> For example, contract of purchase and sale; contract for establishment of the right to such asset

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