



In banking service, demanding mortgage and guarantee is a way to force borrowers to use capital effectively and pay debts when due, secure safety for bank's working capital, force banks to do business carefully in order to survive and develop, and help develop economic activity.

However, in present conditions in Vietnam, although many legal regulations on making mortgage and guarantee have come into being, but in certain aspects, these regulations had not provided for all possible circumstances and there was a lack of guidelines issued by the Government and related bodies, therefore in doing business, many commercial banks met with difficulties because if they obey regulations, they can't find out borrowers and if they supply loans in certain cases, they have to go against regulations.

The most troublesome problem

TROUBLES WITH MORTGAGE AND GUARANTEE OF BANK LOAN

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and guarantee given by state enterprises to banks, in previous years when there was no State Enterprise Law, the Ministry of Finance and the State Bank agreed that: "Financial management bodies (Ministry of Finance and provincial Services of Finance) permit state enterprises to mortgage state-owned fixed assets to banks. When state enterprises go bankrupt, mortgaged assets will be settled according to the current Bankruptcy Law" (Official Letter no 480/TC-TCBN sent by the Ministry of Finance to the State Bank on March 3, 1994)

But in fact, financial management bodies only certify something as state enterprise's assets and didn't certify that said assets could be mortgaged. Moreover, on Oct. 1, 1995 when the General Department of State-

owned Assets and Capital came into being, such a certificate wasn't issued because this Department argued that such a certification meant to guarantee repayment of state enterprise's debts to banks so this task was not the function of the Department.

Since April 1995, when the State Enterprise Law came into effect, it was ruled that state enterprises were allowed to mortgage public property or assets in their possession (except for important buildings and machinery which required approval of authorized governmental bodies). The Decree 34/CP also ruled that the Ministry of Finance was responsible for making the list of state enterprises' assets allowed to be mortgaged.

But up to now, the Government hasn't issued any decree providing guidelines on realization of the State Enterprise Law, the Ministry of Finance hasn't issued guidelines and the said list.

Another difficulty for state enterprises is that they had no certificate of public property (land and buildings) rented or allocated to them, or certificate of assets in their possession (buildings, machinery, equipment except for means of transport) as other enterprises of non-state sectors did, whereas the bank, in receiving a mortgage or guarantee, want to take possession of the property or title-deeds instead of possessing the balance sheet of a company as they used to do.

The ordinance dated Oct., 14, 1994 on rights and duties of organizations whose land is rented or allocated by the Government, and the Decree 18/CP dated Feb. 13, 1995 providing guidelines on realization of this ordinance, also made difficulties for enterprises (and state enterprises to be precise) in making mortgage or guarantee. The following are some of these difficulties:

- The Article 7 of the said Decree ruled that: "Organizations with land allocated for growing crops, sea-farming, planting trees, producing sea salt are allowed to mortgage assets fixed on the land". This is meaningless. Because these assets are worthless when separated from the land and in fact, they can't be separated from the land in order to be mortgaged.

- The article 9 of the said Decree ruled that: "Organizations whose land is rented can only mortgage rent they have paid or what is built on the land". This article also ruled that: "One can pay rent in advance at most for five years" but in fact, nobody wants to pay in advance, that is, they have nothing to mortgage. As for assets built on the land, when separated

from the land, they are of little value and can't be mortgaged.

If the bank lends money on mortgage according to the Decree 18/CP, it can't meet demand for capital of enterprises because banks can lend at most 70% of the value of mortgaged assets, whereas the paid rent and assets built on the land are of small value in comparison with the value of the land.

Because of these difficulties, most state enterprises borrowing money from state commercial banks have nothing valuable to mortgage. Some enterprises when suffering losses have to let banks take possession of mortgaged property. The total value of mortgaged property controlled by banks amounted to VNĐ680 billion (up to 1995). But commercial banks can't sell property in order to retrieve money lent. How can they solve this problem?

The second problem is related to property mortgaged by non-state companies, family businesses and private persons. Most mortgaged assets (around 70%) are properties (land and its buildings), but many mortgagors haven't received certificate of land use right (at present, only 30% of residents received this certificate, this percentage was lower in rural areas). When borrowers fail to repay debts, it's very difficult to auction these properties. Moreover, local authorities don't support such auction because it can lead to social unrest.

The third problem: there is no governmental body authorized to auction property and no guidelines on organization of auction. In the Civil Code, there is only a vague regulation: "Governmental bodies are authorized to sell property at auction".

This situation put commercial banks in an awkward position when they wanted to sell property in order to retrieve money lent. They usually have two alternatives to choose: to organize auction by themselves, or to secure help from local authorities (people's committee, police, district court, inspection agency...) in order to take possession of assets and auction them. The second choice is preferable.

However, this solution sometimes forces commercial banks to take possession of unnecessary assets unwillingly, because they can't sell these assets, and their possession of these assets is against the law.

The fourth problem: the role of notary public. The Civil Code and Decree 45/HDBT ruled that the mortgage contract must be certified by the notary public or authorized people's committee. At present, the 0.2% fee on a mortgage contract charged by the

notary public is too high for borrowers to bear. The notary public at present doesn't bear full responsibility for contents of a contract. When the notary fails to verify real value of mortgaged property, borrowers and bank employees can take advantage of this and raise property values in order to secure big loans from the bank.

The fifth problem: in principle, in receiving a mortgage contract, banks take possession of the original of title-deeds until debts are repaid. But in fact, certain governmental bodies have issued, either intentionally or accidentally, many originals of title-deeds, instead of issuing one original only, and title-deed holder mortgaged them to different banks and caused harm to bank's working capital.

If mortgaged assets are means of transport or ships, mortgagors have no title-deed to produce for inspection when required by the police, because the title-deeds were kept by banks. This situation put ship (or means of transport) owners in a difficult position.

The sixth problem: The inter-ministerial circular 02/TT-LB issued by the Ministry of Trade and the State Bank drew a vague distinction between mortgage given to a bank and articles left with pawnbroker in exchange for money has caused difficulties for management bodies.

The seventh problem: in current condition, all companies of all sectors, including state enterprises, are badly in need of capital. In the structure of capital of these companies, the loan capital usually represents a larger percentage, so they have not enough assets to mortgage and can't find anyone to act as their guarantor. This problem makes the shortage of medium - and long-term capital more serious.

In order to solve these difficulties and help commercial banks supply enough capital to companies and at the same time, preserve their capital and do business according to the law, the Government had better issue new decree providing guidelines on realization of the State Enterprise Law. The Ministry of Finance should issue list of state property allowed to be mortgaged, and regulation on granting title-deeds to state enterprises. Other governmental bodies such as the Ministry of Justice, Ministry of Interior, Ministry of Trade, the State Bank and the Land Registry Department had better serve as advisors to the Government on amending old regulations and issuing decree on auctioning or issuing circulars giving detailed guidelines on the discussed problems ■