

Vietnam

# Legal Updates

November 2021

## Legal Update on Decree 21/2021/ND-CP on Security for Performance of Obligations

The Government has issued Decree No. 21/2021/ND-CP dated March 19, 2021 to guide the Civil Code's provisions on security for the performance of obligations ("**Decree 21**"). Decree 21 took effect on May 15, 2021 and replaced Decree 163/2016/ND-CP as amended by Decree 11/2012/ND-CP ("**Decree 163**").

Decree 163 will continue to apply to secured transactions executed and implemented before Decree 21 came into effect.<sup>1</sup> For a secured transaction which has not been implemented yet, or is being implemented but has provisions which differ from the provisions of Decree 21, the parties can negotiate to modify the provisions of such secured transaction in compliance with Decree 21.<sup>2</sup>

Decree 21 provides a new important guidance on the establishment and enforcement of secured transactions. Notably, premised on the freedom of contract principle under the Civil Code, Decree 21 recognizes the principle of parties' autonomy in concluding their secured transaction. Decree 21 introduces a mechanism which is in general more favorable for the secured party to enforce [the security over](#) the secured assets.

We set out below some key highlights of Decree 21 in comparison with Decree 163.

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<sup>1</sup> Decree 21, Article 61.1.

<sup>2</sup> Decree 21, Article 61.2.

No.	Subject Matters	Decree 21 (New)	Decree 163 (Old)
1	<b>Parties' autonomy in contractual agreements</b>	Premised on the freedom of contract principle under the Civil Code, Decree 21 gives the parties greater autonomy in concluding their agreements. The parties in their agreement may deviate from the provisions of Decree 21, provided that such agreement (i) complies with the general principles of the Civil Code, (ii) fulfills the conditions for a valid civil agreement, and (iii) does not restrict the exercise of civil rights provided under the Civil Code or other related regulations. <sup>3</sup>	N/A
2	<b>Security enforcement</b>	<p>Decree 21 attempts to further reinforce the secured party's rights and autonomy in the process of foreclosure.</p> <p>As an important development against the old regulation, Decree 21 provides that in case the security has been enforced and the ownership over such security is transferred to a purchaser, as an alternative to either (i) an approval in writing of the asset's owner, (ii) a transfer agreement or other agreement entered into between the owner of asset (or another person having the legitimate disposal right over such asset or the judgement debtor) and the purchaser; or (iii) a sales agreement by auction<sup>4</sup>, the competent authority can use (a) <u>the</u></p>	According to Decree 163, in the context of an asset transfer due to foreclosure, where it is provided by law that the transfer of asset ownership or use rights requires (i) an approval in writing of the asset's owner or (ii) a sales contract between the asset's owner (or the judgment debtor) and the purchaser, the <b><u>pledge or mortgage agreement</u></b> can be used as a substitute for those documents. <sup>7</sup>

<sup>3</sup> Decree 21, Article 4.2.

<sup>4</sup> Decree 21, Article 58.2

<sup>7</sup> Decree 163, Article 70

		<u>security agreement</u> <sup>5</sup> or (b) <u>other documents evidencing the transfer of ownership over the security</u> to register the transfer of ownership to the purchaser. <sup>6</sup>	
<b>3</b>	<b>Delivery of security for enforcement</b>	Decree 21 requires the securing party or other third party in possession of the security to deliver the security to the secured party for enforcement, and if such securing party or other third party fail to do so, such parties are required to compensate the secured party. <sup>8</sup> If these parties refuse to hand over the security, Decree 21 provides the secured party with the right to inspect the status of the security to prevent dispersal of the security, or request the court for settlement. <sup>9</sup>	Decree 163 requires the securing party or other third party in possession of the security to deliver the security to the secured party for enforcement. If the securing party or other third party in possession of the security fails to deliver the security, the secured party has the right to seize the security and seek support from the communal People's Committee and local Public Security in doing so. <sup>10</sup>
<b>4</b>	<b>Validity of secured transaction</b>	Pursuant to Decree 21, a secured transaction (except for lien <sup>11</sup> ) will take effect as from either (i) its notarization/certification date if notarization/certification is required by law, or (ii) its signing date or another date as agreed by the parties if notarization/certification is not required. <sup>12</sup>  As opposed to Decree 163, registration is no longer a	Pursuant to Decree 163, a secured transaction will take effect as from the time it is entered into, except for the following cases: <sup>13</sup> (i) the parties agree otherwise; (ii) a pledge will take effect as from the time when the pledged assets are possessed by the pledgee;

<sup>5</sup> According to Article 3.5 of Decree 21, security agreement includes agreement for pledge, mortgage, security deposit, performance bond (for an asset lease contract), escrow deposit, guarantee, prestige guarantee, or sale of asset with retention of ownership

<sup>6</sup> Decree 21, Article 58.2

<sup>8</sup> Decree 21, Articles 52.5 and 52.8.

<sup>9</sup> Decree 21, Article 52.6.

<sup>10</sup> Decree 163, Article 63

<sup>11</sup> Pursuant to Article 347.1 of the Civil Code, lien right shall arise as from the obligor fails to perform its obligation under the bilateral contract when due.

<sup>12</sup> Decree 21, Article 22.1

<sup>13</sup> Decree 163, Article 10

		<p>prerequisite condition for a secured transaction to take effect under Decree 21.</p>	<p>(iii) mortgage of land use right (“LUR”), right to use forest, ownership right over planted forest for manufacturing purpose, aircraft, or sea vessels will take effect as from the time the mortgage is registered; or</p> <p>(iv) the secured transaction will take effect as from the time it is notarized/certified as required by law.</p>
<p>5</p>	<p><b>Validity of secured transaction against a third party</b></p>	<p>Pursuant to Decree 21, a secured transaction shall take effect against a third party as from the time of its registration if the registration is required by: (i) law; (ii) the agreement between the parties; or (iii) the secured party.</p> <p>In case a registration is not required as noted above, a pledge, security deposit and performance bond will take effect against a third party as from the secured party or other legitimate security manager takes possession of the security.</p> <p>An escrow deposit will take effect against a third party as from the assets subject to escrow are deposited into the escrow account.<sup>14</sup></p> <p>For the remaining cases, a secured transaction will take effect against a third party as from the time it takes effect.</p>	<p>Decree 163 simply provided that a secured transaction shall take effect against a third party as from the time of its registration.<sup>15</sup></p>

<sup>14</sup> Decree 21, Article 23

<sup>15</sup> Decree 163, Article 11.1

<p><b>6</b></p>	<p><b>Types of security</b></p>	<p>Decree 21 acknowledges and provides a guidance on all nine types of security, including pledge, mortgage, security deposit, performance bond (for an asset lease contract), escrow deposit, guarantee, prestige guarantee,<sup>16</sup> retention of ownership (in a sales of asset contract) and lien (in a bilateral contract) in accordance with the Civil Code.<sup>17</sup></p>	<p>N/A</p>
<p><b>7</b></p>	<p><b>Description of Security</b></p>	<p>In addition to the general description of security in line with the Civil Code, Decree 21 further provides for express description of certain types of common security, including the following:<sup>18</sup></p> <ul style="list-style-type: none"> <li>(i) LUR and assets attached to land, provided that the concept of security to be formed in the future will NOT apply to LUR;<sup>19</sup></li> <li>(ii) Assets created from surface right or from usufruct right;</li> <li>(iii) Objects attached with an auxiliary object, integrated objects and special objects;</li> <li>(iv) Valuable papers, stocks and balance of deposits;</li> <li>(v) Property rights arising from contracts (e.g., right to receivables, right to exploit and manage an investment projects, right to lease / sublease, other interests or rights with monetary value);</li> <li>(vi) Assets formed from capital</li> </ul>	<p>N/A</p>

<sup>16</sup> This is a type of security whereby a social-political association uses its prestige (without security assets) to provide guarantee for disadvantaged individuals and households to take loans from a credit institution.

<sup>17</sup> Civil Code, Article 292.

<sup>18</sup> Decree 21, Articles 10-19.

<sup>19</sup> Decree 21, Article 10.4.

		<p>contribution (e.g., share, capital contribution, rights to acquire shares/contribute capital, dividends, etc.);</p> <p>(vii) Rights to exploit natural resources;</p> <p>(viii) Property rights arising from intellectual property rights, information technology or other science and technology activities;</p> <p>(ix) Investment projects and assets of an investment project (e.g., an entire project, assets of the project, right to exploit and manage the project, etc.); and</p> <p>(x) Goods in circulation during the course of production and trading, and warehousing.</p> <p>The description of the security will be agreed upon by the parties, but has to comply with certain requirements.<sup>20</sup> If the security is a real estate or movable asset required to be registered, the description of the security must be consistent with the information on the registration certificate.<sup>21</sup> If the security is a property right, the description of the security must include the name of the right and the legal basis from which such right arises.<sup>22</sup></p>	
<p><b>8</b></p>	<p><b>Security over common assets of spouses</b></p>	<p>Decree 21 introduces a new guidance in relation to security over common assets of spouses. Either spouse can create security over the couple's common assets if the</p>	<p>N/A</p>

<sup>20</sup> Decree 21, Article 9.1

<sup>21</sup> Decree 21, Article 9.2

<sup>22</sup> Decree 21, Article 9.3

		<p>secured common assets comprise (i) bank deposits or stocks under that spouse's name, or (ii) movable assets that do not require ownership registration which are currently under that spouse's possession, unless:<sup>23</sup></p> <ul style="list-style-type: none"> <li>(i) it is agreed otherwise by the spouses, and the secured party has been informed of such agreement; or</li> <li>(ii) it is agreed otherwise by the spouses and the secured party.</li> </ul> <p>Even if the couple divorces, such secured transaction will continue to be implemented, unless an effective court decision or judgment decides otherwise.<sup>24</sup></p>	
<p><b>9</b></p>	<p><b>Applicable law</b></p>	<p>In case a specialized law (e.g., law on land, housing, enterprise, investment, securities, insurance, banking, aviation, maritime, intellectual property, etc.) have specific provisions on a secured transaction, such specialized provisions will prevail over the provisions of Decree 21.<sup>25</sup></p> <p>In case the securing party, the secured party, or the obligor is declared bankrupt, the secured transaction shall be dealt with in accordance with bankruptcy laws.<sup>26</sup></p>	<p>Decree 163 provides different ways (as outlined below) to handle the security when the securing party is declared bankrupt:<sup>27</sup></p> <ul style="list-style-type: none"> <li>(i) In case the securing party being at the same time the obligor is declared bankrupt, the security shall be dealt with in accordance with bankruptcy laws;</li> <li>(ii) In case the securing party is not the obligor and the secured debt has become due without being paid/cannot be paid by the obligor, the security shall be dealt with in accordance with bankruptcy laws; and</li> </ul>

<sup>23</sup> Decree 21, Article 27.1.

<sup>24</sup> Decree 21, Article 27.3.

<sup>25</sup> Decree 21, Article 4.1

<sup>26</sup> Decree 21, Article 4.1.

<sup>27</sup> Decree 163, Article 57

			<p>In case the securing party is not the obligor and the secured debt has not become due, the security shall be dealt with in accordance with the agreement among the relevant parties. If the parties cannot reach such an agreement, the security may be foreclosed to satisfy other debts of the securing party in accordance with bankruptcy law.</p>
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