

Some Legal Aspects of Non-judicial Foreclosure in Case of Default on Credit Contract in Vietnam

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Received: April 2, 2015 Accepted: November 11, 2015 Online Published: May 20, 2016

doi:10.5539/ass.v12n6p34

URL: <http://dx.doi.org/10.5539/ass.v12n6p34>

Abstract

This paper aims to present the authors' examination of some aspects of Vietnam's positive law regarding non-judicial foreclosure. Upon default, a bank as a secured creditor may enforce his security right over the collateral that is understood as foreclosure. Foreclosure includes judicial foreclosure and non-judicial foreclosure. In the way of non-judicial foreclosure, a secured creditor can take possession and dispose the secured property without a court's involvement. So, it may save the secured creditor time and cost. The law governing the non-judicial foreclosure should not only provide the efficient mechanics of self-help repossession but also protections to a grantor. It should be examined whether Vietnamese law meets this requirement. By this study, some drawbacks and shortages of Vietnamese law in relation to non-judicial foreclosure are exposed and then some recommendations for improvement of positive law of Vietnam governing the exercise of the non-judicial foreclosure are presented.

Keywords: collateral, commercially reasonable manner, dispossession, foreclosure, repossession, secured creditor

1. Introduction

In Vietnam and other developing countries, a bank extends credits to business entities to constitute the significant part of capital for their operation. In exchange, credits bring about the profits to the bank by means of charging credit fees. However, the bank may confront the credit risk that may drive the bank to the peril of insolvency. Nowadays, the banks have principally lent the business entities in forms of loans, letter of credits, guarantees in Vietnam. Thus, the credit risk incurred to a bank is mainly involved in the events in which a borrower fails to perform their obligations of repayment properly in banking in Vietnam. In order for avoidance or reduction of losses caused by credit risk, Vietnamese banks have been mainly relying on traditional security including pledges, mortgages, and guarantees. Security provides the bank security interest in collateral or a secondary promise to pay so that in case where the borrower fails to perform his obligation of payment, the bank may seek the alternative source of fund to recover its loss. In this paper, a person who provides security interest will be called a grantor.

The positive law of Vietnam has provided a set of rules concerning the process of non-judicial foreclosure. However, such rules are not compatible with other relevant rules. Thus, the non-judicial foreclosure is rarely operative in Vietnam. In addition, there is a short of some rules governing manner of performance of foreclosure. As a result, it is not surprised that the judicial foreclosure is the preferred solution applied by the banks in Vietnam even it takes time and cost. The study therefore aims to point out the main drawbacks and shortages that result in the unfeasibility of the rules governing the non-judicial foreclosure. Moreover, some recommendations for improvement of the current provisions of law of Vietnam governing the non-judicial foreclosure are delivered by this study.

There have been a limited number of studies on non-judicial foreclosure, however, the manner of non-judicial foreclosure has not been resolved by the recent studies in Vietnam. The brief view of recent studies also indicated that there have been no recommendations for recognition of ownership in equity and enactment of

provisions of law governing the manner of disposition of collateral in Vietnam.

This study is qualitative. The positive law of Vietnam was examined in comparison with the law of the jurisdictions of both the United States of America and Australia. Because the rules of law built in those jurisdictions not only diversify the methods of non-judicial foreclosure but also provide reasonable and efficient protections to debtors. Additionally, the results of the study were derived from the analysis of the decisions of courts in Vietnam and the jurisdictions of US and Australia.

2. Default

2.1 Events of Default

Bryan A. Garner (2001) defines that default means the omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due. In the context of secured transactions, default is the ground for the foreclosure on the secured property. There has been no official definition of default in the Civil Code and other relevant legal normative documents in Vietnam. Article 301.1 of the Civil Code concerns about “fail to perform an obligation” (hereinafter referred to as “fail to perform”) and “incorrectly perform an obligation” (hereinafter referred to as “incorrectly perform”) as a default. Pursuant to Article 336, “fail to perform” or “incorrect performance” is recognized as the ground for the foreclosure. However, neither the term “fail to perform” nor “incorrectly perform” is interpreted. There is a phrase “fail to pay the due debt” used in Article 95.2 of the Law on credit institutions of Vietnam of 2010 to be referred as an event of default. Article 56 of Decree No. 163/2006/ND-CP dated December 29, 2006 issued by the Government on secured transactions (hereinafter referred to as “Decree No. 163/2006/ND-CP) lists situations in which the security interest is enforced: “(1). The obligor fails to perform or incorrectly performs the secured obligation when it becomes due; (2). The obligor must perform the secured obligation before it becomes due as a result of breach of contractual or statutory obligation; (3). By the operation of law, security interest must be enforced in order for the obligor to perform other obligation; (4). Other situations as agreed by the parties or provided by the provisions of law.” Decree No. 163/2006/ND-CP gives the leeway for the parties to agree on the event other than “fail to perform” or “incorrect performance” in which the foreclosure is commenced.

Non-payment regards an event that the debtor fails to pay his due debt. By contrast, improper payment is an event that the due debt has not been paid fully by the debtor. In *National Australia Bank v Walter* [2004] VSC 36 (16 February 2004), the loan agreement defined “Events of Default” including the event in which the Borrower fails to pay any sum due. Although they had paid the monthly repayments on time they were in default under the interest-only loan, which had been scheduled for re-payment on 31 December 1999 and extended on several occasions. Default on the interest-only loan constituted a default under the home loan. Both non-payment and improper payment are considered as default under the law of Vietnam and other countries. Therefore, it is not difficult for the parties to particularize them as events of default in their security agreement. However, in many cases, the debtors are in such financial troubles that there is nothing left to pay the outstanding debts. In these cases, the collateral may not be enough to satisfy the secured debts owed to the banks. To avoid such risks, the bank should foresee the situations in which the debtor may get in troubles which badly affect his duty of payment. Then, the bank and its customer typically conceptualize the following situations as events of default which are the grounds for foreclosure:

(1). In practice, the bank always relies on the financial information provided by the borrower to provide the credit facility or remain the credit agreement in full force. But, it is possible that borrower misrepresents his financial situation to obtain the loan from the bank or to inspire the bank to keep the loan agreement in operation. If the borrower’s troublesome financial situation is disguised by the untrue information, the bank may be in the peril of credit risk if the loan agreement is performed. To prevent the credit risk as a consequence of misrepresentation, the bank should be entitled to demand the payment of all debts before they fall due and perform the foreclosure if necessary and reasonable. The parties should therefore conceptualize misrepresentation as an event of default.

(2). In some cases, all or substantially all assets of the borrower have been sold or disposed or planned to be sold or disposed so that the total net assets of the borrower has decreased or may decrease in value. Consequently, the borrower’s capability of performing his payment obligation may be badly affected. It means that the bank is unlikely to get his money back in this case. For this reason, the bank should require the borrower to make a negative covenant on disposition of its all or substantial assets. A breach of the negative covenant should be stipulated as an event of default in the security agreement that leads the exercise of acceleration and foreclosure.

(3). Similar to negative covenant on disposition of assets, the bank should require the borrower to promise that he will not increase his debt to equity ratio in the future. Because the more the debt to equity ratio is, the more

credit risks the bank may confront. And, a breach of this promise should be classified as an event of default.

(4). In addition to the aforesaid events, the parties may agree on other events which put or is likely to put the bank to the credit risks.

Under the freedom of contract, the bank may tend to make a long list of events of default as possible. The loan agreement signed by VPBank gave the bank's power of foreclosure in one of the following cases: (i). The Borrower failed to perform or performed improperly his duty of payment of debt as specified in the credit agreement; (ii). The Borrower ought to have paid the debt before falling due accordingly other terms of the credit agreement or provisions of law but he failed to do or did it improperly; (iii). In case the Borrower which was an enterprise had been partly or fully delegated, sold, leased, divided, split, consolidated, merged, converted, privatized, dissolved, or bankrupt; (iv). In case the Borrower who was a natural person died or was missing (including declaration of missing or declaration of death as provided by the provisions of law); (v). When the Mortgagor and/or the Borrower breached any promise in the contract of security (Trang, 2013). In *National Australia Bank v Mccourt* [2010] WASC 237 (1 September 2010), Clause 9, pt 3 of the Customer Agreement would apply if an agreement to repay the facility on expiry was made. The clause defined an event of default widely to include the Borrowers failing to do something they had agreed to do and consequently, the Notice would not specify a non-existent default on that finding and it would not be 'defective'. Nevertheless, it is doubtful whether the courts shall enforce a contractual clause which contains a list of default other than non-payment and improper payment. The court should not enforce all the events of default specified in the list. As with all contract provisions, terms of default are subject to general Code principles concerning good faith, unconscionability, and reasonableness (Donald, Calvin, Bradford & Knight, Jr., 1997). Even though there has been no cases concerning the events of default in Vietnam, we suggest that the Vietnamese court should enforce the parties' agreements on the events of default providing that they are in good faith, fairness and reasonableness. It means that the list of events of default should be for the purpose of preventing the bank from the potential credit risks resulting from such events. The court should use an objective test to determine the causation between the event and the credit risk. If an event of which concurrence or non-concurrence results in credit risk sustained by the bank, such event may be listed as an event of default. However, if an event which is conceptualized as an event of default for any other purpose, it should not be enforced as an event of default. Furthermore, an immaterial breach of the security agreement or credit contract should not be deemed as an event of default. For example, providing false immaterial information should not be defined as an event of default. Subject to each circumstance, a clause of default may be valid or invalid. A clause which is unconscionable is invalid. It should be noted that the great power of bargain of the bank does not itself constitute an unconscionable clause.

2.2 Acceleration Clause

There is typically an acceleration clause in a security agreement by which the parties agree that upon default, the secured party is entitled to accelerate the debt and demand that all payments are due immediately providing that the acceleration clause must be created and exercised in good faith. In *Commonwealth Bank of Australia v Zatorski* [2012] VCC 1407 (5 October 2012), the contract between the parties specified the acceleration in the events of default: If you are in default and: (a). you do not fix the default in the time allowed by the notice we give you under clause 9.2; (b). the default cannot be fixed, and the time stated in the notice we give you under clause 9.2 elapses; or (c). we do not have to give you a notice under clause 9.2 THEN (d) we may decide, without further notice, that all money owing by you under the Contract is due and payable immediately; (e) we may sue you for payment of the money you owe us; (f) we may exercise rights under the Security, including our right to sell the Security Property. Good faith is a state of mind consisting in: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage (Bryan, 2001). The acceleration clause is enforced by the courts in U.S and Australia if it is in good faith. Accordingly the acceleration clause, if the debtor is in default, all debts become due and the secured party may foreclose the collateral in case the debtor fails to pay the debts which are secured by such collateral. The Vietnamese court should also enforce an acceleration clause if it is in good faith and reasonableness.

3. Foreclosure

3.1 The Overview on Foreclosure

Foreclosure means a process of enforcing the security interest in the collateral by application of one or several remedies to recover the debt owed to a secured creditor in case of default on credit contract or guarantee agreement by the debtor or the guarantor (Thuy, 2006). In US, § 9-601 of UCC sets out the remedies to the secured creditor as follows: (a) After default, a secured party has the rights provided in this part and, except as

otherwise provided in Section 9-602, those provided by agreement of the parties. A secured party: (1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure. In *Okefenokee Aircraft, Inc. v. Primesouth Bank*, 296 Ga. App. 782, 676 S.E.2d 394 (2009), the court gave the opinion, “To the contrary, the Code expressly states that the rights and remedies afforded a secured creditor are cumulative and may be exercised simultaneously (Donald et al., 1997). Accordingly § 9-609 of UCC: (a) After default, a secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose collateral on a debtor’s premises under Section 9-610. (b) A secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace. In short, judicial foreclosure and non-judicial foreclosure are available in the positive law of the jurisdictions of US.”

In Vietnam, Article 336 of the Civil Code of Vietnam of 2005 says, “If a pledgor fails to perform or performs not as agreed a civil obligation when it falls due, the pledged property may be realized in accordance with the agreed methods, or auctioned in accordance with law, in order to satisfy the obligation. The pledgee shall have priority to payment from the proceeds of sale of the pledged property.” The remedies provided by Article 336 are applicable to the mortgage as well. In case of guarantee, Article 369 of the Civil Code of Vietnam of 2005 sets forth that if a guarantor fails to perform or performs incorrectly the obligation on behalf of the principal when it falls due, the guarantor must provide property under its ownership in order to pay the beneficiary. Section 13 of the Decree No. 11/2012/ND-CP provides the detailed guidance for Article 369. According to this Section, if the guarantor secures his obligation by his property, the secured property shall be foreclosed accordingly the provisions of law. If there is no security for the guarantor’s secondary obligation, the guarantor must deliver his property as required by the beneficiary. If at the time of realization, the guarantor’s asset does not exist or are exhausted, the beneficiary may require the guarantor to deliver his own after-acquired asset to the beneficiary to complete the unsatisfied obligation.

It can be asserted that judicial foreclosure and non-judicial foreclosure are also available in the positive law of Vietnam. The non-judicial foreclosure includes (1) repossession; and (2) retention or disposition. The law should provide the rules which enforce the non-judicial foreclosure so well that it eases the procedures of recovery in case of default. On the other hand, the rules should impose some duties on the secured creditors in order for protecting the interests of the debtors against the secured parties’ abuse.

3.2 Selection of Judicial Foreclosure or Non-judicial Foreclosure

In U.S, the secured creditor may follow the judicial foreclosure or exercise the self-help repossession of the collateral. In theory, the judicial foreclosure will consummate time and costs. Therefore, the secured party will select the non-judicial foreclosure. However, the provisions of law concerning the non-judicial foreclosure are not practically operative in Vietnam.

In *Vietcombank v. Kim Chi private enterprise, Kim Chi and the guarantor* used the following assets as collateral: (1). The property (land and the house) located at 15A Tran Phu, Pleiku town, and the title was held by Mrs. Phan Thi Dai (Nguyen Thi Thu Lan) and Mr. Nguyen Anh. The value of the property was VND 520,000,000 and was used to mortgage the duty of the guarantee at maximum amount of VND 364,000,000; (2). The property (land and the house) located at 15 Tran Phu, Pleiku town, the title was held by Mr. Ha Van Hien and Mrs. Nguyen Thi Kim Chi; (3). The property (the land and the house) located 15C Tran Phu, Pleiku town valued at VND 365,000,000 and the property (the land and the house) located at 46 Dinh Tien Hoang, Pleiku town valued at VND 275,000,000, the titles to both properties were held by Mrs. Nguyen Thi Lam. And the properties were used to secure the guarantee’s duty at the maximum amount of VND 427,000,000; (4). The property (the land and the house) located at 10A Vo Thi Sau, Pleiku town (Decision No. 05/2006/KDTM-GDT). When the debtor was in default on payment of the loan, Mrs. Phan Thi Dai and Mr. Nguyen Anh who held the title to the property at 15A Tran Phu and Mrs. Nguyen Thi Lam who held the title to the property at 15C Tran Phu agreed on selling those properties at a public auction at Gia Lai auctioning center. On August 19, 2003, the auction sale was completed and the properties were sold for VND 1,806,000,000 (Decision No. 05/2006/KDTM-GDT). In this case, one of the reasons contributed to the success of the auction sale was the consent of the grantors. If the grantors fail to cooperate, it is hardly to exercise the power of sale at the public auction. Therefore, the banks prefer to sue the debtors and grantors before the court even if it often takes time and cost to pursue the lawsuit.

Article 721 of the Civil Code of Vietnam of 2005 states, “If the mortgagor fails to perform or performs incorrectly the obligations secured by the mortgage of the land use rights by the time that performance falls due, the land use rights shall be realized as agreed; if there is no agreement or if realization is not able to be implemented as agreed, the mortgagor shall have the right to institute court proceedings.” Under such rule, the

banks have no option but triggering the lawsuit if the parties fail to reach the agreement on the method of foreclosure. The options available to the creditors are not diversified. In addition, for the properties of which the titles are required to be registered with the relevant competent governmental agencies, the conveyance of titles must be registered with the same agencies as well. So, it would be very difficult for the banks to operate their power of sale if the debtors refuse to cooperate. Because the banks are not the registered owner of secured property, the registrar will not consider the banks as the bona fide seller. As a result, the contract for sale of the secured property is not valid in the view of the registrar, and the conveyance of title is not eligible to be registered. Although, the parties reach the agreement on methods of foreclosure at the time of contracting, the debtors may still object what they have agreed. Trang (2007) argued, "It is undeniable that at the time of formation of the agreement of mortgage, the banks always offer the terms and conditions on foreclosure on the collateral including the particular points of time and methods to set out the timely procedures for recover and maintenance of their capital. The mortgagees are not reluctant to accept such offer as they are clearly aware that those they accept shall be nothing if being objected by them in the future."

4. Repossession

4.1 The Legality of Repossession

Repossession is a process that a secured party takes possession of the collateral on default. It will not be a big problem if the collateral is under the secured creditor's possession or control. However, it will be more complicated when the collateral is under possession or control of the debtor or third party. In fact, the debtor or third party will be often involuntary to deliver the collateral to the secured party. In this case, the secured party cannot utilize threat or force to take possession of the collateral or otherwise he will be convicted of robbery. Thus, the law should answer the question how to take possession of the collateral without any violation of law or public policy.

Pursuant to Article 63 of the Decree No. 163/2006/ND-CP, the secured party must give the holder of the collateral (a person who possesses the collateral) a notice prior to taking possession of the collateral. However, this section ignores the debtor and grantor who should have been notified of repossession. "Before a mortgagee can exercise a power of sale, the mortgagor must be issued with a default notice. The default notice must also generally meet certain requirements. For instance, the default notice must be clear, accurate and unambiguous so that the defaulting mortgagor fully understands the problem and what action needs to be taken. The notice must explain the nature of the default and the steps that should be taken by the mortgagor to rectify the matter." (Joan, 2009). The reason for being notified is that the debtor has the opportunity and time to repay the debt and then redeem the collateral. Foreclosure should be treated as the last resort. We therefore suggest that Decree No. 163/2006/ND-CP should be amended so that the secured party is under an obligation to give the debtor, the grantor and the holder of the collateral a notice of default. The notice of default should include the information on the default, the time for curing the default, the remedies applicable where the default is not cured timely, and the measures of taking possession of the collateral and retention or dispossession.

Section 63.2(b) of Decree No. 163/2006/ND-CP requires the repossession must not be violation of statutory prohibitions or social ethics. However, the term "statutory prohibitions or social ethics" has not been officially interpreted. There have been no decisions of courts on repossession found in Vietnam. If the provisions of law keep silent in the definition of "statutory prohibitions or social ethics", the secured creditor will not dare to exercise of repossession, because, he may be scared of being charged with taking possession of secured asset. Therefore, the term "statutory prohibitions or social ethics" should be clarified by a detailed guidance made by the Ministry of Justice or judicial interpretation made by courts in litigation. The judicial interpretation should be preferred. In US, § 9-609 of UCC require the repossession must be exercised without breach of the peace. The term "breach of the peace" has been judicially interpreted in the jurisdictions of US. In *Davenport v. Chrysler Credit Corp*, Court of Appeals of Tennessee, Middle Section, 818 S.W.2d 23, 15 U.C.C. Rep. Serv. 2d 324 (1991), the court interpreted, "The term "breach of the peace" is a generic term that includes all violations or potential violations of the public peace and order...It includes all unlawful acts and acts of public indecorum that disturb or tend to disturb the public peace or good order...While breaches of the peace frequently involve offenses against individuals, they also include offenses against the public at large or the State....Offenses against individuals, generally, criminal offenses, must be accompanied by violence or a threat of violence in order to be considered a breach of the peace...Public policy favors peaceful, non-trespassory repossession when the secured party has a free right of entry....American Lender Service's repossession of the Davenports' automobile was not accompanied by violence or the threat of violence because Davenports were not at home at the time. However, Chrysler Credit and American Lender Service do not dispute that they obtained the automobile by entering a closed garage and by cutting a lock on a chain that would have prevented them from removing the automobile.

Despite the absence of violence or physical confrontation, entering the closed garage and cutting the lock amounted to a breach of the peace.” (Donald et al., 1997).

4.2 Some Suggestions for Interpretation of “Statutory Prohibitions or Social Ethics”

Borrowing from American conception of “breach of peace”, the term “statutory prohibitions or social ethics” should be officially interpreted as: (1). Using violence; (2). Using threat of violence; (3). Intentional infliction of emotional distress which is an intentional act that amounts to extreme and outrageous conduct resulting in severe emotional distress to another (Kenneth, Roger & Frank, 2011), e.g. using dirty words in communication, repeatedly telephoning at the mid night, defamation and etc.; (4) Violation of public order, such as making noise at night or at the community.

4.3 The Feasibility of Repossession

In Vietnam, “equitable ownership” or “ownership in equity” is not recognized. Thus, repossession is not feasible where the property is required to be registered with the competent governmental agency. Because, the secured creditor is not a statutory holder of the title to the property, he is not entitled to dispose the collateral even if it is under his possession. Therefore, the relevant provisions of law of Vietnam should be amended so that “ownership in equity” is recognized. It means that the registrar of asset is under a duty to recognize a secured party’s repossession of collateral if the secured creditor can present the enforceable security agreement whereby his right to take possession of collateral is stated and the evidence that he has already served the notice of default on the debtor, debtor and the holder of collateral. Where the repossession is recognized by the registrar of asset, the asset may be directly disposed by the secured creditor without the debtor’s authorization, and the registrar of asset has no reason to deny the registration. In case the secured creditor selects to retain the collateral, the registrar must register the secured creditor as a new holder of the title to the property.

5. Disposition of the Collateral

After obtaining possession of the collateral, the secured party has two alternatives: 1) sell the collateral and use the proceeds to satisfy the obligation; or 2) within certain limits, keep the collateral in satisfaction of the obligation (Donald et al., 1997). Retention of the collateral will be selected by the bank if expected proceeds are low and the costs accompanied with the foreclosure are high. A creditor who retains collateral has no right to seek a deficiency judgment (Donald et al., 1997). § 9-610 (a) of UCC gives the means of disposition of collateral: “(a) After default, a secured party may sell, lease, license, or otherwise dispose any or all the collateral in its present condition or following any commercially reasonable preparing and processing.” According to § 9-610 (b) of UCC, a public disposition or private disposition is allowable. And a secured party may purchase collateral at a public disposition. He may also buy the collateral at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations. (§ 9-610 (d) of UCC.) In short, under UCC, a secured creditor is provided the following options in disposition of collateral: (1) private disposition; or (2) public disposition by means of one or more contracts, as a unit or parcels, and at any time and place on any terms. In Australia, secured creditors have a large number of methods of disposition as well. For example, section 128 (2) of Personal Property Securities Act 2009 says, “A secured party may dispose collateral under this section: (a) by private or public sale (including auction or closed tender); or (b) by lease, if the security agreement so provides; or (c) if the collateral is intellectual property—by licence.” In Vietnam, Sections 58 and 59 of the Decree No. 163/2006/ND-CP provide two methods of foreclosure. The first method is the stipulated method which is agreed by the parties. The stipulated method may be one of the following actions taken by the secured party: (1). Performance of power of sale of the collateral; (2). Acceptance of the collateral to discharge the secured duty; (3). Acceptance of proceeds or other property from the third party in case the mortgaged property is a claim for payment of debt; (4). Other actions as agreed by the parties (Section 59 of the Decree No. 163/2006/ND-CP). The second method is selling the collateral at a public auction. Despite Section 64 of Decree No. 163/2006/ND-CP mentions about the private sale of secured personal property, in practice, it is hardly for the secured creditor to implement the private disposition rather than public sale in Vietnam. As mentioned above, a public auction is successful only if the grantor cooperates well in Vietnam. Hence, debtors and grantors find no protection provided available in the current provisions of law, they often not cooperate with secured creditors. The secured creditors therefore have no choice but bringing the case before the court to seek judicial foreclosure in spite of the consummation of time and cost.

The disposition must be exercised in the commercially reasonable manner or the secured creditor is imposed a duty of acting in good faith to the debtor in disposition of collateral. The term “commercially reasonable” is used in UCC. “The commercially reasonable sale occurs whenever a secured party sells collateral either: 1) in the usual manner in a recognized market for property of that type; 2) at the current price of property in a recognized

market; or 3) in conformity with the regular commercial practices of dealers in that type of property. The fact that a better price could have been obtained does not, in and of that fact alone, imply that the sale was commercially unreasonable.” (Donald et al., 1997). Such term is borrowed in Convention on International interests in mobile equipment signed at Cape Town on November 16, 2001. Article 8(3) of this Convention says, “Any remedy set out in sub-paragraph (a), (b) or(c) of paragraph 1 or by Article 13 shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.”

In Australia, the term “duty to act in good faith” or “a duty of reasonable care” is commonly used. Section 131 of Personal Property Securities Act 2009 requires, “A secured party who disposes of collateral under section 128 (other than by purchasing the collateral) owes a duty, to any other person with a security interest in the collateral, and to the debtor, immediately before the disposal, to exercise all reasonable care: (a) if the collateral has a market value at the time of disposal—to obtain at least that market value; or (b) otherwise—to obtain the best price that is reasonably obtainable at the time of disposal, having regard to the circumstances existing at that time.” There is, however, the term “good faith” or “reasonable care” is not statutorily defined. The courts apply the case – by – case test to determine whether the performance of the secured creditor is in good faith. For example, the courts will consider the manner in which the property was advertised, the method by which the property was sold, who sold the property, the nature of the purchaser, the price obtained for the property, and the timing of the sale (Joan, 2009). “It is generally accepted that it is a measure of ‘good faith’ for the mortgagee to obtain a ‘fair price’ or the market value at the time the property is sold. The term ‘market value’ ‘is the price a willing vendor would sell the asset to a willing buyer, where neither is so anxious as to overlook normal business and commercial consideration and both are in possession of all the necessary information to determine the value of the relevant asset’.” (Joan, 2009).

There have been no provisions in the positive law of Vietnam governing the manner of disposition of the collateral.

5.1 Notices to the Interested Parties

In theory, the disposition is required to be notified to the debtor and grantor. “Because the debtor has the most direct interest in any disposition of collateral, section 9-504(3) requires the creditor to give the debtor notice. Unless the collateral is perishable, the creditor must provide the debtor with notice of a proposed public sale within a reasonable time before the sale is to take place. If the proposed sale will be a private transaction, the creditor must give notice within a reasonable time before the secured party enters the contract to sell.” (Donald et al., 1997). In *Chittenden Trust Co. v. Andre Noel Sports*, Supreme Court of Vermont, 159 V. 387, 621 A. 2d 215, 20 U.C.C. Rep. Serv. 2d 710 (1992), the court delivered the opinion, “a secured party must give “reasonable notification of the time and place of any public sale” of repossessed collateral unless the collateral (1) “is perishable or threatens to decline speedily in value” or (2) “is of a type customarily sold on a recognized market”... The first exception is applicable where a “quick resale of the collateral would better serve the debtor’s interests” and “the time consumed in giving notice might have disastrous consequences” due to the possibility of a sharp price decline... The reasoning behind the “recognized market” exception is that “the debtor does not need the protection against a self-dealing or dishonest creditor because independent market forces set the sale price which is presumptively “commercially reasonable.” This exception generally applies to widely traded stocks, bonds or commodities sold in recognized markets, where the prices are fixed and therefore not subject to manipulation by the secured party.” (Donald et al., 1997). The positive law of Vietnam also requires notices, but the notices are served on the other secured creditors not the debtor and the grantor. Once again, it should be suggested that either a notice of default accompanied by a workout of disposition or a separate notice of default and a separate notice of disposition must be delivered to the debtor and the grantor as the interested persons. Obviously, the other secured creditors are also entitled to such notices.

5.2 Publicity

In *Ford & Vlahos v. ITT Commercial Finance Corp.*, Supreme Court of California, 8 Cal, 4th 1220, 885 P. 2d 877, 36 Cal. Rptr. 2d 464, 25 U.C.C. Rep. Serv. 2d 630 (1994), the court analyzed, “We cannot conclude that the Legislature meant provide that a sale’s advertising is commercially reasonable as long as the bare requirement of formal notice, even if, to sell the type of collateral involved, a responsible dealer would employ more extensive advertising than placing a legal notice a agate type in an obscure newspaper. Publicity is much too important to a proper sale of foreclosed collateral for such a hypothesis to be commercially viable.” (Donald et al., 1997).

We can learn from this case that when exercising a power of sale, sometimes, advertising is not obligatory;

however, the creditor owed a duty to make sure that the collateral is sold at the best price that may both cover the debt and benefit the debtor and grantor. That means that the secured creditor is not allowed to be so selfish to concentrate on his own interests but ignore the interests of the debtor and grantor. For the interest of the debtor and grantor, the secured creditor is obliged to take reasonable steps to obtain the best price. Therefore, in nearly all cases, the sale must be publicized so that the best buyer is given the opportunity to access to the sale. Our point of view is supported by *Ford & Vlahos v. ITT Commercial Finance Corp.*, Supreme Court of California, 8 Cal, 4th 1220, 885 P. 2d 877, 36 Cal. Rptr. 2d 464, 25 U.C.C. Rep. Serv. 2d 630 (1994). In this case, the court opined, “the purpose of requiring adequate advertising of a foreclosure sale is to force the secured party to ensure the auction is well attended by legitimate bidders, so that the highest commercially reasonable price for the collateral shall be obtained.” (Donald et al., 1997). In most cases, advertisement or public notice is required in the process of disposition. But what is an adequate advertisement or public notice? In *Ford & Vlahos v. ITT Commercial Finance Corp.*, Supreme Court of California, 8 Cal, 4th 1220, 885 P. 2d 877, 36 Cal. Rptr. 2d 464, 25 U.C.C. Rep. Serv. 2d 630 (1994), substantial evidence supported the trial court’s conclusion that the Phoenix newspapers, with their limited circulation, did not provide a forum likely to bring bidders and a fair price for the foreclosed aircraft, and the sale hence was commercially unreasonable (Donald et al., 1997). This case reminded us that the little advertisement or notice shall not be sufficient to amount to an adequate advertisement or notice. In particular, advertising for an unreasonable short time, in unpopular media or in the manner that the potential buyers have no chance to give their offer to buy shall not be considered as an adequate advertisement. In *Wainwright bank & trust v. Railroadmens Federal Sav. & LN.*, 806 F.2d 146, 4. U.C.C. Rep.Serv.2d 1295 (7th Cir. 1986), Coffey, Circuit Judge of United States Court of Appeals, Seventh Circuit asserted, “We strongly agree with the district court’s conclusions that the manner of public sale was clearly commercially reasonable. The SBA completely complied with what was required by Indiana law, I.C. 32-8-16-i. Notice of the sale was published in the Noblesville Daily Ledger three weeks, well before the sale. Notice was posted as required in three public places in Hamilton County and on the door of Hamilton County Courthouse. The decision to pursue the public sale came only after 10 months of effort by the Receiver to arrange for a private sale. The eventual price paid by SBA for the real property was approximately 75% of the SBA’s appraisal value.” (Donald et al., 1997).

In few cases, the secured property shall be neither to be placed in the market nor advertised for sale. Reasonably, in case there is a potential buyer who is ready to pay much more than its current market value or the professionally appraised price, the property should be sold to him immediately. This point of view was delivered by Applegarth J of Supreme Court of Queensland in *Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC 242 (7 October 2008). Applegarth J held, “The statutory duty imposed by s 85(1) does not in its terms require the property to be put to the market. Circumstances might be imagined in which the statutory duty is performed without placing the property on the market. For instance, an exuberant prospective purchaser may be prepared to pay far in excess of what a reliable current valuation and other evidence indicates is the market value of the property. In such a case, reasonable care may compel a mortgagee exercising a power of sale to promptly accept the offer before it is withdrawn. The fact that in such a situation the statutory duty may be performed without taking the property to the market by advertising it and listing it with real estate agents simply illustrates that each case must be determined on its own facts.”

5.3 The Best Price

The courts in territories of Australia test the “market value” and “reasonable care” taken by the secured creditor to determine the good faith in the exercise of power of sale. Reasonable care means that the creditor must employ all necessary reasonable steps to obtain the best price, at least the price is not under value. In *National Australia Bank v Walter* [2004] VSC 36 (16 February 2004), Dodds - Streeton J of the Supreme Court of Victoria provided the opinion that “A video tape of the auction was played in Court. It revealed a considerable attendance and a conventional bidding process, conducted by an attentive and competent auctioneer. The video tape did not disclose any unusual or untoward occurrence or circumstance. It did nothing to assist the Walters’ claim. In my opinion, there is no evidence that the auction was improperly conducted, that there was negligence or a failure to take reasonable steps to sell the brewery land or associated equipment for the best price then available or that any party breached any duty or obligation in relation to the sale.” It, however, does not mean that the secured party must spend too much money to perform the burdensome activities. The steps taken by the secured creditors are reasonable subject to each circumstance. In *Investec Bank (Australia) Limited v Glodale Pty Ltd & Ors* [2009] VSCA 97 (14 May 2009), Neave and Redlich JJA and Forrest AJA delivered the opinion of the Supreme Court of Victoria – Court of appeal, “However, in our view, his Honour did not mean that the concept of reasonable care in selling at market value varies depending upon the identity of the seller. Rather, his Honour was pointing

out, correctly, that where a mortgagee is involved in a sale a range of matters must be taken into account. The fact that the sale is one made by the mortgagee (or the controller) cannot be ignored. As Dodds-Streton J pointed out in *Florgale*, the multitude of competing considerations vary from case to case. Many and varied factors will influence the method adopted to effect the sale (eg marketing, engagement of an agent or agents, timing, date and place of sale, method of sale, fixing a reserve). That the sale is by a mortgagee or a controller is a relevant consideration in determining whether reasonable care has been taken in all the circumstances. Further the statutory duty does not detract from the common law principle that the mortgagee may sell at the time chosen and does not have to wait until a time when a better price may be obtained.”

The best price may be obtained from the recognized market, such as in the stock exchanges, OTC, commodities exchanges and etc. In this case, the best price is equal to the market value. However, if there is no recognized market, a prudent dealer should refer to the valuation made by a competent valuer. At Australian common law, the secured creditor is under an obligation to obtain the reliable valuation from the competent valuer. We can imply such duty in *Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC 242 (7 October 2008). In this case, Applegarth J of the Supreme Court of Queensland stated, “I find that its failure to obtain an updated valuation in April 2003, an updated valuation opinion from HTW or at least, an estimate of current market value from local real estate agents breached its statutory duty in circumstances in which it had no reliable information concerning the current market value of the land it proposed to sell by private treaty.” In case, there are several expert valuations, the valuation issued by the certified practicing valuers shall be obtainable. The decision of the Supreme Court of Victoria – Court of Appeal illustrated such rule in *Panayiota Vasiliou v. Westpac Banking Corporation* (ABN 33 007 457 141) and Ors, [2007] VSCA 113 (29 May 2007). The court held:

“That does not, however, affect our conclusion that this aspect of the ground of appeal fails. His Honour was right to conclude on the evidence before him that, as at April 2001, the property had a market value of \$400,000 or less. No other conclusion was reasonably open, given that the evidence, including that called on behalf of Ms Vasiliou, was overwhelmingly to that effect. One after another, certified practising valuers fixed the value of the house at \$400,000 or below. We set out below the summary table which his Honour provided in the judgment (We have omitted the municipal valuation):

Table 1.

Valuer	Date	\$
Dickinson	26 March 2001	400,000
McCarthy	29 March 2001	340,000
Wigg	30 March 2001	390,000
Welch	11 April 2001	320,000
Goding	April 2001	400,000

Given the valuation evidence, there is in our view no basis for the appellant’s contention that his Honour should have preferred the evidence of Mr White over that of the certified practising valuers. The appraisal by Mr White (at \$520,000 – \$560,000) was the odd one out. Assuming that the appraisal was based on an accurate description of the property by Mr Vasiliou, the fact that Mr White did not see inside the property inevitably reduced the weight to be attached to his opinion, as did the fact that he was not a professionally qualified valuer.”

5.4 Building the Rules of Law Governing the Manner of Disposition of the Collateral in Vietnam

Based on the aforementioned opinions delivered by several courts in both US and Australia as well as our own understanding of “commercially reasonable” or “good faith” in the context of disposition of collateral, we would like to present our opinion on definitional coverage of the term “commercially reasonable manner” or “a duty to act in good faith” as follows:

- 1) Prior written notice of default and disposition must be given to the debtor and grantor within a reasonable time.
- 2) The sale is adequately advertised or publicly notified unless: (a). the collateral is perishable or in swift decline of value so that the sale must be exercised immediately or otherwise the reasonably expected return shall not be obtained; (b). the collateral is the type of property which is traded in recognized market and it is sold in the recognized market in foreclosure; or (c). There is a perspective buyer who offers to buy the

collateral for the price that is much more than its fair market or appraised value and subject to the particular circumstance, the secured creditor should accept such offer or otherwise it may be revoked.

- 3) In case the collateral is perishable or in speedy decline of value, the secured creditor is under a duty to sell it within a reasonable time. As the secured creditor fails to sell the perishable asset timely, it may be wholly or partly rotten, as a result, the best price cannot be obtained that causes losses to both parties. Under the “reasonable person standard”, an ordinarily prudent person should foresee the result of delayed sale of perishable asset and he should do something reasonable to prevent such result. In this case, the reasonable standard of care requires the secured creditor to sell the perishable asset within a reasonable time. The similar requirement is also applicable to the collateral in swift decline of value.
- 4) The collateral must not be sold under value. The collateral holds the function as the secondary pool of funds for the secured creditor to recover his money. In some cases, the sale price does not satisfy the secured creditor, the debt is not discharged. The secured creditor reserves the right to pursue the debt until it is completed. So, the secured creditor will not be concerned about how much the collateral should be sold due to his right to seek a deficiency judgment may be enforced. In other cases, the debtor’s obligation should have been discharged if the collateral had been sold at fair market value at least. However, the secured creditor sold the secured property under value and then he submitted a claim for deficiency judgment before a court. It seemed unreasonable that a part of the debtor’s obligation might be paid twice. To harmonize the conflicting interests of the parties, the law should require that the collateral must not be sold under value. The property value must be proved by the market value of similar property in the recognized market at the time of selling or reliable updated valuation issued by a certified practicing appraiser. In case there are two different expert valuations, the valuation which is the most appropriate to the circumstances shall take priority.
- 5) In case there is perspective buyer who offers to buy the collateral for the price that is much more than its fair market or appraised value without any material condition that may disfavor the secured creditor and/or other interested parties, the secured creditor owes a duty to accept this offer. The secured creditor is imposed a duty to obtain the best price. The offered price that is better than its fair market or appraised value without any unfair condition should be considered as the best price. Because, it may not only satisfy the debtor’s obligation, but also give a return to the debtor. The likelihood of a better price is rarely happening in the future. In fact, selling the collateral at the fair market price or appraised price is the success of the secured creditor. Obtaining a better price is often a “day dream.” Ignoring such offer should not be therefore regarded as a reasonable business judgment.
- 6) If the secured creditor is not familiar with the foreclosed property, he/she is under a duty to appoint an agent who has legal capacity and expertise in selling this property in the location of foreclosure. Under the reasonable care standard, a person should not perform what he has no sufficient knowledge and experience of. In lieu of making effort to do and destroy it, an ordinarily prudent man should be required to delegate it to a professional person who is capable of performing properly.
- 7) In most cases, the collateral must be put into an auction sale unless (a) the collateral is perishable or in speedy decline of value so that the sale must be exercised immediately or otherwise the reasonably expected return shall not be obtained; (b) the collateral is the type of property which are traded in recognized market and it is sold in the recognized market in foreclosure; (c). There is a perspective buyer who offers to buy the collateral for the price that is much more than its fair market or appraised value and subject to the specific circumstance, the secured creditor should accept such offer or otherwise it may be revoked; (c) the private sale is approved by the debtor;
- 8) It is subject to each circumstance, the secured creditor must take other reasonable steps and measures to obtain the best price.

We propose that the relevant provisions of law of Vietnam should be amended in order for setting forth the requirements for the commercially reasonable manner of disposition of collateral. The term “commercially reasonable manner” should be interpreted as the foregoing analysis made by us.

5.5 The Aftermath of Commercially Unreasonable Manner

Due to lack of the particular provisions of law on the manner of disposition, no remedies are available in Vietnamese positive law in case of breach of a duty to act in good faith or the exercise of foreclosure in commercially unreasonable manner. Joan (2009) said, “The mortgagee’s power of sale is essentially a remedy against a mortgagor who has not paid the mortgage loan and is in default. However, if a mortgagee fails to act in

good faith and does not take reasonable steps to secure a fair price or market price, there are remedies available to the mortgagor for the mortgagee's breach of duty. The relief will depend on the nature of the contract. If the mortgagee has sold the property 'and there is an enquiry into the propriety of the sale or adequacy of the price, the mortgagee in possession will be liable to account not only for the proceeds of sale received by him but also for those proceeds which he might have received "without wilful default." At Australian common law, the breached debtor/grantor is entitled to a damage which is equivalent to the difference between the market value and the sale price. In *Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC 242 (7 October 2008), the court opined, "The difference between the sale price and the market value is \$53,000. I assess Sablebrook's damages by deducting \$9,000 from this figure. Sablebrook is entitled to judgment in the amount of \$44,000." The court also accepted the interest imposed on the awarded damage. In addition to the remedies at law, the debtor may be entitled to remedies in equity including rescission of the contract to sell and injunction to prevent the secured party from performing the foreclosure proceedings.

Donald et al. (1997) presented three different approaches that the courts have applied in reaction to the commercially unreasonable disposition of collateral in US. Some jurisdictions absolutely bar a secured party's recovery of any deficiency judgment for non-compliance. They do so regardless of whether the noncompliance was the failure to give notice or the failure to conduct the sale in a commercially reasonable manner. To contrary, as analyzed by Donald et al., (1997), under the second approach, the creditor did not automatically suffer any sanction at all for his noncompliance. The full burden was placed on the debtor to establish fair market value of the collateral. Only when he had done so was he then entitled to a set-off for the difference between the sale price actually realized and the fair market value of the collateral, to wit, the price it should have brought if it had been sold in a commercially reasonable way. That difference would be used, as a set-off, to reduce the amount of the deficiency. The third approach is called "rebuttable presumption" rule. According to this rule, the creditor who fails to give notice or conducts a commercially unreasonable sale can still recover a deficiency if the rebuts the presumption that the value of the collateral was equal to the debt (Donald et al., 1997).

5.6 Some Suggestions to Set Out Remedies in Case of Commercially Unreasonable Disposition

We support the second approach due to the following reasons. Firstly, upon selling the collateral, and there is a deficiency, the secured creditor is entitled to seek a deficiency judgment. Courts should compare the total obligation, the incomplete obligation and the proceeds received from the sale to determine the acceptable deficiency. The court has no power to grant the set-off against the deficiency judgment if the debtor/grantor fails to demand the court to do that. Secondly, if the debtor/grantor does not seek the difference, the court cannot make any judgment on determination of difference. Thirdly, the difference between the fair market value and the sale price of the foreclosed property should be understood as damage incurred to the debtor/grantor. He is therefore placed a burden of proof of damage and the causation between the breach and the damage. If the debtor/grantor fails to present the evidence of facts to ascertain the difference, the court may presume that the sale price is not under value. And the counterclaim for set-off may be dismissed. Fourthly, there is no causal link between the breach of a duty to act in good faith and a right to recovery of the full amount of debt. Therefore, it seems unreasonable and unfair for the courts to automatically deprive the secured creditor of a right to seeking deficiency just because of his breach of a duty to act in good faith. The secured creditor should not be burdened with proving that his sale price is not under value or otherwise he may bear some further unnecessary expenses. In *Nancy and Stjepan Sostaric v. Sally Marshall*, 14-0143 (W. Va. 2014), Justice Ketchum of Supreme Court of Appeals of West Virginia stated, "Based on all of the foregoing, we now hold that a trust deed debtor may assert, as a defense in a lawsuit seeking a deficiency judgment, that the fair market value of the secured real property was not obtained at a trust deed foreclosure sale. In view of this holding, Syllabus Point 4 of *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997) is overruled. Additionally, we hold that a fair market value determination in a lawsuit seeking a deficiency judgment following a trust deed foreclosure sale must be asserted by the deficiency defendant. Unless the deficiency defendant requests such a determination, the foreclosure sale price, rather than the property's fair market value, will be used to compute the deficiency. Finally, we hold that if a circuit court in a lawsuit seeking a deficiency judgment following a trust deed foreclosure sale determines that the fair market value of the foreclosed property is greater than the foreclosure sale price, the deficiency defendant is entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price."

From the foregoing arguments, we recommend that the current provisions of law of Vietnam should be supplemented for the purpose of that the remedies should be available to the debtor if the secured creditor breaches the duty to act in good faith. The remedies should be:

- 1) Monetary remedies: The debtor/grantor is entitled to seek the difference between the fair market value and the sale price of the foreclosed property. However he is on the burden of proof. If he manages to ascertain the difference, he may be granted a set-off against a deficiency judgment or recovery of the difference plus interest imposed on the difference for a period of time from the date of breach to the date of judgment.
- 2) Remedies in equity: The debtor/grantor may seek specific performance, injunction or rescission subject to each circumstance. Specific performance is applicable when the debtor/grantor requests the court to order the secured party to perform his duty as agreed by the parties or provided by law. Injunction is used to prevent the secured party from the bad faith actions during the course of foreclosure. Rescission should be applicable when a contract to sell has already entered into by the secured party and the buyer. In this case, the court will make an order to set aside the contract to sell.

6. Conclusion

Upon examination of the positive law of Vietnam in comparison with the law of the jurisdictions of US and Australia, it is exposure that ownership in equity has not been recognized in Vietnam, so the self-help repossession does not seem an efficient way to foreclose on the collateral in Vietnam. Moreover, vacancy of rules regarding the manner of disposition leads to difficulties in non-judicial foreclosure on the collateral. Therefore, the judicial foreclosure is the best choice for the banks, as a secured creditor, to recover his money. That practice is odd in the business environment because judicial foreclosure takes time and cost. By this paper, we recommend Vietnamese law makers should amend and supplement the current provisions of law regarding foreclosure as follows:

First, the events of default should be widened subject to the fair and reasonable agreement of the parties.

Second, the provisions of law should be amended and supplemented to encourage the secured creditors to exercise the legitimate and feasible self-help repossession.

Third, the notice of default and the notice of disposition of collateral shall be required to be given to the debtors and debtors.

Fourth, the secured creditor's remedies for enforcement of the security interest should be diversified to create the practical mechanics for non-judicial foreclosure. The non-judicial foreclosure must be exercised in the commercially reasonable manner.

Fifth, the law should provide the remedies applicable to the commercially unreasonable exercise of foreclosure.

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Appendix A

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