**CASE LAW NO. 11/2017/AL**

**on recognition of the mortgage agreement on land use rights with property on the land not owned by the mortgagor**

*This case law was adopted by the Judicial Council of the Supreme People’s Court on 14 December 2017 and promulgated under Decision No. 299/QD-CA dated 28 December 2017 of the Chief Justice of the Supreme People’s Court.*

## Source of the case law:

The Cassation Decision No. 01/2017/KDTM-GDT dated 01 March 2017 of the Judicial Council of the Supreme People’s Court on the commercial case *“Disputes over a credit agreement”* in Hanoi between the plaintiff being Joint Stock Commercial Bank A (represented by Mr. Pham Huu P as the legal representative and Ms. Mai Thu H as the duly authorized representative) and the defendant being Company B Ltd (represented by Mr. Tran Luu H1 as the legal representative); the persons with related rights and obligations, namely Mr. Tran Duyen H, Ms. Luu Thi Minh N, Mr. Tran Luu H1, Ms. Pham Thi V, Mr. Tran Luu H2, Ms. Ta Thu H, Mr. Nguyen Tuan T, Ms. Tran Thanh H, Mr. Tran Minh H, and Ms. Do Thi H.

## Location of contents of the case law:

Paragraph 4 of the section *“Findings of the Court”.*

## Overview of the case law:

### Background 1 of the case law:

A party mortgages its land use rights and the assets attached to such land lot owned by it in order to secure the performance of its civil obligations, however, there is other property owned by a person other than the mortgagor on such land; the form and content of the agreement in accordance with the law.

### Legal resolution 1:

In this case, the court must determine that the mortgage agreement is valid.

### Background 2 of the case law:

The mortgagor and the mortgagee agree that the mortgagee is allowed to sell the secured assets, i.e. land use rights over a land lot having a house not owned by the land user (mortgagor).

### Legal resolution 2:

When the court settles the case, it must reserve for the owner of the house priority to receive the transfer of such land use rights if it has a demand.

## Applicable provisions of laws relating to the case law:

* Article 342 of the Civil Code 2005 (corresponding to Article 318 of the Civil Code 2015);
* Article 715 and Article 721 of the Civil Code 2005;
* Article 1.19.4 of the Decree No. 11/2012/ND-CP dated 22 February 2012 by the Government amending and supplementing a number of articles of the Decree No. 163/2006/ND-CP dated 29 December 2006 on secured transactions (codified under Article 325.2 of the Civil Code 2015).

## Key words of the case law:

*“Mortgage of land use rights”, ”Other person's property on the land lot”, ”Recognition of a mortgage agreement on land use rights”, ”Agreement on enforcement of secured assets”, ”Priority to receive transfer”.*

**CONTENTS OF THE CASE**

In the Statement of Claims dated 6 October 2011 and the testimony in the court, the plaintiff being Joint Stock Commercial Bank A presented as follow:

On 16 June 2008, Joint Stock Commercial Bank A (hereinafter referred to as the *“****Bank****”*) and Company B Ltd (hereinafter referred to as *“****Company B****”)* signed the credit agreement No. 1702-LAV -200800142. Accordingly, the Bank granted Company B a loan of VND10,000,000,000 and/or equivalent amount in foreign currency for the purpose of supplementing working capital for conducting Company B’s registered business.

During performance of the agreement, the Bank disbursed a total amount of VND3,066,191,933 to Company B under the credit agreements and the promissory notes. Until 5 October 2011, Company B had the outstanding principal and interest of VND4,368,570,503 (the principal amount is VND2,943,600,000 and the interest amount is VND1,424,970,503) under 03 promissory notes.

The secured assets of the aforementioned loan were the residential house and land [land lot No. 43, map No. 51-1-33 (1996)] at No. 432, Group 28, Ward E, District G, Hanoi owned and used by Mr. Tran Duyen H and Ms. Luu Thi Minh N (under the Certificate of Land Use Rights and Ownership of Residential House No. 10107490390 issued by the People's Committee of Hanoi on 7 December 2000), mortgaged by Mr. Tran Duyen H and Ms. Luu Thi Minh N under the mortgage agreement on land use rights and the assets attached to land dated 11 June 2008. This agreement was notarized by Notary Public Office No. 6 in Hanoi and registration of the secured transaction was certified by the Department of Natural Resources and Environment of Hanoi dated 11 June 2008.

On 30 October 2009, the Bank and Company B continued to sign the credit agreement No. 1702-LAV-200900583. Pursuant to the agreement, the Bank extended to Company B a loan of USD180,000. The purpose of the loan was to pay for the transportation of goods for

export; the term of the loan was 09 months; the interest rate was 5.1% per annum; the overdue interest rate was 150% [thereof].

In performing the agreement, the Bank fully disbursed the loan of USD180,000 to Company

B. Company B only repaid the principal amount of USD100,750 and the interest amount of USD1,334.50. As of 05 October 2011, Company B still owed the principal amount of USD79,205 and the interest amount of USD16,879.69. The total of the principal amount and the interest amount was USD96,120.69.

The secured assets for the loan under the credit agreement No. 1702-LAV-2009058 consisted of:

* Shipment of 19 JMP-branded trucks with capacity of 1.75 tons of finished products, which are 100% brand new and valued at VND2,778,750,000 (assembled by Company B under the stock keeping unit mode), the Bank held manufacturer’s quality certificates), mortgaged by Company B under the mortgage agreement No. 219/2009/EIBHBT-CC dated 29 October 2009. This agreement was registered as a secured transaction at the Registration Agency for Secured Transactions in Hanoi on 2 November 2009;
* The balance of 3-month term deposit account of VND1,620,000,000 issued by the Bank. Since Company B made the partial payment, the Bank released the amount of VND1,620,000,000 into the Company B's savings account, corresponding to the amount repaid.

At the first-instance hearing, the representative of the Bank confirmed that as to the loan of USD180,000, Company B repaid the principal in full with the interest of USD5,392.81 outstanding; as to the secured assets being 19 trucks, 18 out of them were sold and there was 01 remaining truck. The Bank requested the court to allow it to take the remaining vehicle to recover the outstanding loan amount.

The bank requested the court to compel:

* Company B to pay the outstanding principal and interest of VND4,368,570,503 in VNDunder the credit agreement No. 1702-LAV-200800142;
* Company B to pay the outstanding interest of USD5,392.81 in USDunder the credit agreement No. 1702-LAV-200900583.

In the case where Company B failed to make payment or did not make full payment, it requested the court to liquidate the secured assets as follow:

* Rights of ownership of residential house and use of land at No. 432, Group 28, Ward E, District G, Hanoi under the ownership and use of Mr. Tran Duyen H and Ms. Luu Thi Minh N;
* 01 JMP truck with capacity of 1.75 tons of finished products, which is 100% brand new assembled by Company B, under the mortgage agreement No. 219/2009/EIBHBT-CC dated 29 October 2009.

*The representative of the defendant, i.e. Mr. Tran Luu H1 - the General Director of Company B, presented that:* Company B confirmed the outstanding amount of principal, interest and the secured assets as presented by the Bank but it requested the Bank to allow gradual repayment.

*Persons with related rights and obligations, namely Mr. Tran Duyen H and Ms. Luu Thi Minh N, presented that*: they acknowledged that they entered into the mortgage agreement on the residential house and land at No. 432 mentioned above to secure repayment of the loan with the maximum amount of VND3,000,000,000 owed by Company B. The mortgage agreement was notarized and registered as a secured transaction. The family Mr. Tran Duyen H and Ms. Luu Thi Minh N supported Company B in repaying nearly VND600,000,000 for the loan that had the mortgage on their residential house and land lot. Thus, they proposed that the Bank should grant Company B an extension of repayment period so that Company B had reasonable time to recover its production and arrange repayment to the Bank. They also requested that the court does not summons their sons, daughters-in-law, daughters, and sons-in-law to appear in the court.

Mr. Tran Luu H2 on behalf of the children and grandchildren of Mr. Tran Duyen H and Ms. Luu Thi Minh N living at the residential house and land at No. 432 presented as follows:

At the end of 2010, he became aware that his parents had mortgaged their family's residential house to secure repayment of a loan of Company B. After Mr. Tran Duyen H and Ms. Luu Thi Minh N had been granted the Certificate of Land Use Rights and Ownership of Residential House in 2000, Mr. Tran Luu H2 and Mr. Tran Minh H had spent money to build another 3.5-story house on the land lot and 16 family members currently live at the house and land at No. 432. When signing the mortgage agreement, the Bank did not consult with him and the other people living at the house and land lot. Therefore, he requested that the court should not recognize the mortgage agreement and should consider that the amount of VND550,000,000 contributed by them and their siblings to repay for Company B under the credit agreement having its secured assets as the aforementioned residential house and land at No. 432. It was incorrect for the Bank to arbitrarily deduct the loan in foreign currency having its secured assets as 19 trucks.

In First-instance Commercial Judgment No. 59/2013/KDTM-ST dated 24 September 2013, the People’s Court of Hanoi ruled to:

* *Accept the claims by Joint Stock Commercial Bank A against Company B Ltd;*
* *Compel Company B Ltd to repay to Joint Stock Commercial Bank A the outstanding amount under the credit agreement No. 1702-LAV-200800142, consisting of: the principal amount of VND2,813,600,000; the interest amount of VND2,080,977,381; the overdue interest amount until 23 September 2013 of VND1,036,575,586; the penalty interest amount due to late payment until 23 September 2013 of VND123,254,156; the total amount of VND6,054,407,123.*
* *Compel Company B Ltd to repay to Joint Stock Commercial Bank A the outstanding amount under the credit agreement No. 1702-LAV- 200800583 as the overdue interest amount of USD5,392.81.*

*In the case where Company B Ltd fails to repay or fully repay the outstanding amount of the credit agreement No. 1702-LAV-200800142, Joint Stock Commercial Bank A may request the Civil Judgment Enforcement Agency of Hanoi to handle related secured assets in accordance with the law, being the rights to ownership of residential house and use of land at land at No. 432, map No. 51-1-33 (1996) under the Certificate of Land Use Rights and Ownership of Residential House No. 10107490390 issued by the People's Committee of Hanoi on 7 December 2000 to Mr. Tran Duyen H and Ms. Luu Thi Minh N, having their residential address at No. 432, Group 28, Ward E, District G, Hanoi in order to recover the outstanding loan amount...*

*Where Company B Ltd fails to repay or fails to fully repay the outstanding amount of the credit agreement No. 1702-LAV-200800583, Joint Stock Commercial Bank A may request the Civil Judgment Enforcement Agency of Hanoi to handle related secured assets in accordance with the law, namely 01 remaining JMP truck with capacity of*

*1.75 tons of finished products, which is 100% brand new assembled by Company B, under the mortgage agreement No. 219/2009/EIBHBT-CC dated 29 October 2009 in order to recover the outstanding loan amount”.*

In addition, the first-instance court ruled on the court fees and the right to appeal of involved parties pursuant to the law.

After that the first-instance hearing, the defendant and the persons with their related rights and obligations submitted appeals against the aforesaid commercial first-instance judgment.

According to Appellate Commercial Judgment No. 111/2014/KDTM-PT dated 7 July 2014, the Appellate Court of the Supreme People’s Court in Hanoi ruled to:

*“Uphold First-instance Judgment No. 59/2012/KDTM-ST dated 24 September 2013 of the People’s Court of Hanoi on the credit agreements, the loans and other outstanding amount incurred by Company B Ltd to Joint Stock Commercial Bank A; set aside part of First-instance Judgment No. 59/2013/KDTM-ST dated 24 September 2013 of the People’s Court Hanoi on the parts of the mortgage agreement relating to the third party, specifically:*

*... Set aside the parts of the ruling on the mortgage agreement on land use rights and the assets attached to such land of the third party (i.e. the residential house and land at No. 432, Group 28, Ward E, District G, Hanoi) signed on 11 June 2008 at the Notary Public Office No. 6 in Hanoi and registered as a secured transaction at the Department of Natural Resources and Environment of Hanoi on June 11, 2008...*

*Transfer the case file to the People’s Court Hanoi for verification, evidence collection and re- hearing to determine which property legally owned by Mr. Tran Duyen H and Ms. Luu Thi Minh N is used as the secured assets securing repayment of the loan of Company B Ltd towards Joint Stock Commercial Bank A under the credit agreement No. 1702-LAV- 200800142 dated 16 June 2008”.*

In addition, the appellate court also determined the court fees.

After the appellate hearing, the Bank and the People’s Court of Hanoi submitted written requests for review of the appellate judgment according to cassation procedures.

According to Cassation Protest No. 14/2016/KDTM-KN dated 12 April 2016, the Chief Justice of the Supreme People’s Court protested against Appellate Commercial Judgment No. 111/2014/KDTM-PT dated 7 April 2014 of the Appellate Court of the Supreme People’s Court in Hanoi and requested the Judicial Council of the Supreme People’s Court to set aside Appellate Commercial Judgment No. 111/2014 /KDTM-PT dated 7 July 2014 of the Appellate Court of the Supreme People’s Court in Hanoi and First-instance Commercial Judgment No. 59/2013/KDTM-ST dated 24 September 2013 of the People’s Court of Hanoi and to transfer the case file to the People’s Court of Hanoi to re-conduct first-instance procedures in accordance with the law.

At the cassation hearing, the representative of the Supreme People's Procuracy agreed with the cassation protest of the Chief Justice of the Supreme People’s Court and requested the Judicial Council of the Supreme People’s Court to set aside the appellate judgment and transfer the case file to the Superior People’s Court in Hanoi re-conduct appellate procedures.

## FINDINGS OF THE COURT

1. The case file indicated that in order to secure repayment of the loan provided by the Bank under the credit agreement No. 1702-LAV-200800142 dated 16 June 2008 to Company B in which Mr. Tran Luu H1, i.e. the son of Mr. Tran Duyen H and Ms. Luu Thi Minh N acted as the Director, on 11 June 2008, Mr. Tran Duyen H and Ms. Luu Thi Minh N mortgaged their house and land at No. 432, Group 28, Ward E, District G, Hanoi owned and used by Mr. Tran Duyen H, Ms. Luu Thi Minh N under the mortgage agreement on land use rights and the assets attached to such land on 11 June 2008. This agreement was notarized and registered as a secured transaction in accordance with the law.
2. According to the certificate of ownership of residential houses and residential land use rights dated 7 December 2000, the residential house and land at No. 432, Group 28, Ward E, District G, Hanoi (hereinafter referred to as the *“****house and land No. 432****”*), including: the land area of 147.7m2, the residential area of 85m2, the house structure: concrete and brick construction; Number of floors: 02 + 01. When appraising the secured assets, even though the Bank acknowledged there were the registered 2-story house and the 3.5-story house, which had not registered ownership yet on the land area of 147.7m2, the Bank only appraised the value of the land use rights and the registered 2-story house with the total value of VND3,186,700,000 but did not gather information and documents to clarify the origin of the 3.5-story house as well as the owner of such 3.5-story house. which is an omission and does not ensure the lawful rights and interests of the involved parties.
3. During the resolution of the case, on 06 June 2012, the People’s Court of Hanoi carried out on-site examination and evaluation and determined that the house and land No. 432 had 02 blocks of houses (the first block: the land area of 37.5m2, length of 5.9 m, width of

6.35 m; the second block was the three-story concrete house with balcony, the land area of 61.3m2) and currently there were 16 permanent residents being registered and regularly living there. Before the first-instance hearing, on 21 September 2013, Mr. Tran Luu H2 (the

son of Mr. Tran Duyen H and Ms. Luu Thi Minh N) submitted an appeal to the People’s Court of Hanoi, asserting that after having been granted the Certificate of Land Use Rights and Ownership of Residential House in 2000, due to difficult living arrangements, in 2002, the family Mr. Tran Duyen H and Ms. Luu Thi Minh N agreed for Mr. Tran Luu H2 and their other children to spend money to build a new 3.5-story house next to the old 02-story house on the land lot. Thus, the People’s Court of Hanoi was aware that in fact there were 02 houses, i.e. the old 02-story house and the 3.5-story house, on the land lot at the time of signing the mortgage agreement, which was not the same as detailed in the Certificate of Land Use Rights and Ownership of Residential House in 2000 and the mortgage agreement on land use rights and the assets attached to such land on 11 June 2008. When resolving the case, although the People’s Court of Hanoi considered the request of Mr. Tran Luu H2 and the children of Mr. Tran Duyen H and Ms. Luu Thi Minh N relating to the 3.5-story house, the People’s Court of Hanoi did not rule clearly on whether or not the 3.5-story house should be liquidated, which is incorrect and does not ensure the lawful rights and interests of the involved parties.

1. Pursuant to Article 1.19.4 of the Decree No. 11/2012/ND-CP dated 22 February 2012 by the Government amending and supplementing a number of articles of the Decree No. 163/2006/ND-CP dated 29 December 2006 of the Government on secured transactions: *“4. In case of mortgage of land use rights only, and not mortgage of assets attached to land, and the land users are not concurrently the owners of the assets attached to land, when handling land use rights, owners of the assets attached to land may continue to use the land according to agreements between land users and owners of the assets attached to land. unless otherwise agreed. The rights and obligations between the mortgagor and the owner of the assets attached to the land shall be transferred to the buyer and recipient of the land use right”.* In this case, when signing the mortgage agreement on land use rights and the assets attached to such land, both the mortgagor (Mr. Tran Duyen H and Ms. Luu Thi Minh N) and the mortgagee (the Bank) were aware that on the land lot of Mr. Tran Duyen H and Ms. Luu Thi Minh N, in addition to the 02-story house of which ownership was registered, there was the 3.5-story house of which ownership had not been registered, however, the parties only agreed on the mortgage of the assets including land use rights and the 02-story house attached to the land. Where there are many assets attached to the land, including the assets are owned by land users and the assets are owned by other persons, and the land user only mortgaged their land use rights and assets and the mortgage agreement contained contents and form consistent with the law, the mortgage agreement is valid. Therefore, the appellate court ruling that the mortgage agreement on land use rights and the assets attached to the land on 11 June 2008 was partially invalid (i.e. the part relating to the 3.5-story house); setting aside the part of the first-instance judgment on the mortgage agreement and transferring the case to the People’s Court of Hanoi to verify, collect evidence to determine the property legally owned by Tran Duyen H and Luu Thi Minh N and re-hear the case was not correct. As to the documents and evidence in the case file, the appellate court should have considered and ruled to settle the secured assets being the land use rights and the house legally owned by Mr. Tran Duyen H and Ms. Luu Thi Minh N according to the law. When re-settling the case, the appellate court should have requested the involved parties to provide documents and evidence proving the origin of the 3.5-story house mentioned above in order to ensure the lawful rights and interests for those persons who had spent money building the house and currently living there. At the same time, the appellate court must consult and encourage the involved parties to reach an agreement on handling on the

secured assets. Where the mortgagor and the mortgagee agreed that the mortgagee was entitled to sell the secured assets as the rights to use the land having the house owned by other persons who are not the land users, it was necessary to reserve for the owners of the house priority if they had demand to buy (receive transfer)”.

1. In addition, given the fact that the first-instance court based on the parties’ agreement in Article 5.4 of the credit agreement on the penalty interest amount due to late payment of unpaid interest amount *“the penalty interest due to late payment shall be after 10 days from the due date, the penalty interest rate is 2% of the unpaid interest amount; after 30 days from the due date, the penalty interest rate is 5% of the unpaid interest amount”* to accept the request of the Bank to compel Company B to pay the penalty interest amount of VND123,254,156, which is incorrect with law and cannot be accepted because this is interest-on-interest. The appellate court not discovering this error and upholding the first- instance judgment was incorrect.

In light of the aforementioned reasons:

## RULES

Pursuant to Article 337.2, Article 343.3, and Article 345 of the Civil Procedure Code 2015; Resolution No. 103/2015/QH13 dated 25 November 2015 on the implementation of the Civil Procedure Code;

1. To accept Cassation Protest No.14/2016/KDTM-KN dated 12 April 2016 of the Chief Justice of the Supreme People’s Court.
2. To set aside Commercial Judgment No. 111/2014/KDTM-PT dated 7 July 2014 of the Appellate Court of the Supreme People’s Court in Hanoi on the commercial case with regard to disputes over the credit agreement between the plaintiff as Joint Stock Commercial Bank A, the defendant as Company B Ltd and 10 persons with related rights and obligations.
3. To transfer the case file to the Superior People’s Court of Hanoi for re-hearing according to the appellate procedures under the law.

## CONTENTS OF THE CASE LAW

*“[4] Where there are many assets attached to the land, including the assets are owned by land users and the assets are owned by other persons, and the land user only mortgaged their land use rights and assets and the mortgage agreement contained contents and form consistent with the law, the mortgage agreement is valid*

*… Where the mortgagor and the mortgagee agreed that the mortgagee was entitled to sell the secured assets as the rights to use the land having the house owned by other persons who are not the land users, it was necessary to reserve for the owners of the house priority if they had demand to buy (receive transfer)”.*