MORTGAGING A RESIDENTIAL CONSTRUCTION INVESTMENT
PROJECT: COMPARISON OF VIETNAMESE AND CHINESE LAW

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ABSTRACT

Objective: The primary objective of the analytical review was to conduct a comparative analysis of the residential construction investment project mortgaging laws in China and Vietnam. The aim was to examine the existing legal frameworks associated with residential mortgages in the two countries and the analysis of areas of similarity, differences, strengths, flaws and drawbacks. The research further evaluates how the mortgage rules protect borrowers and identifies the existing strengths and weaknesses and the systems, and provide the necessary recommendations.

Methodology: The review adopted the form of a summary of the existing state of the current laws and regulations associated with the topic of research by combining reference to primary sources including legislation, existing court cases with reference to secondary sources including handbooks, policy papers and most recent journal articles.

Findings: Both China and Vietnam have definitive laws which outlines the registration processes of mortgages for residential project construction projects. In China, the registration of mortgages is outlined by Article 388, 395, 400 and 402, Civil Code and Article 2, Real estate Registration Regulation 2019. In Vietnam, the registration of residential real estate mortgage is governed by Article 317, 318, 320-324 of Civil Code 2015 and MOJ Circular 07/2019/TT-BTP. Existing similarities and differences in the parties’ rights and obligations in relation to mortgaging residential real estate projects. Significant differences in terms of the legal aspects of taxes and fees on mortgaged residential property in China and Vietnam.

Conclusions: China and Vietnam have witnessed varying levels of changes of property mortgage regulations attributed to the rising housing and mortgage finance needs. The two countries have recorded a wide range of reforms and changes to the law and regulations that govern the mortgaging a residential construction investment project.

Keywords: mortgaging, residential construction investment project, comparative analysis, China, Vietnam.

Received: 10/07/2023
Accepted: 10/10/2023
DOI: https://doi.org/10.55908/sdgs.v11i9.875
HIPOTECANDO UM PROJETO DE INVESTIMENTO EM CONSTRUÇÃO RESIDENCIAL: COMPARAÇÃO ENTRE AS LEIS VIETNAMEITA E CHINESA

RESUMO

Objetivo: O principal objetivo da revisão analítica foi realizar uma análise comparativa das leis de hipoteca do projeto de investimento em construção residencial na China e no Vietnã. O objetivo era examinar os quadros jurídicos existentes associados às hipotecas imobiliárias nos dois países e a análise de áreas de similaridade, diferenças, pontos fortes, falhas e desvantagens. A pesquisa avaliou ainda mais como as regras hipotecárias protegem os mutuários e identificou os pontos fortes e fracos existentes e os sistemas, e fornece as recomendações necessárias.

Metodologia: A revisão adotou a forma de um resumo do estado atual das leis e regulamentos atuais associados ao tópico de pesquisa, combinando referência a fontes primárias, incluindo legislação, processos judiciais existentes com referência a fontes secundárias, incluindo manuais, documentos de política e artigos de revistas mais recentes.

Constatações: Tanto a China quanto o Vietnã têm leis definitivas que delineiam os processos de registro de hipotecas para projetos residenciais de construção. Na China, o registro de hipotecas é descrito nos artigos 388.o, 395.o, 400.o e 402.o do Código Civil e no artigo 2. Real estate Registration Regulation de 2019. No Vietname, o registro de hipotecas imobiliárias para habitação é regido pelos artigos 317.º, 318.º, 320.º a 324.º do Código Civil de 2015 e pela Circular MOJ 07/2019/TT-BTP. Semelhanças e diferenças existentes entre os direitos e obrigações das partes em relação à hipoteca de projetos imobiliários residenciais. Diferenças significativas em termos de aspectos legais de impostos e taxas sobre imóveis residenciais hipotecados na China e no Vietnã.

Conclusões: A China e o Vietnã têm testemunhado níveis variados de mudanças nos regulamentos de hipotecas imobiliárias atribuídas ao aumento das necessidades de financiamento imobiliário e hipotecário. Os dois países registraram uma ampla gama de reformas e alterações nas leis e regulamentos que governam a hipoteca de um projeto de investimento de construção residencial.

Palavras-chave: hipoteca, projeto de investimento de construção residencial, análise comparativa, China, Vietnã.

1 INTRODUCTION

Since the turn of the new millennium, a large number of Asian countries including China and Vietnam have found themselves in a puzzling position of establishing free market economies while still nominally adhering to the Communist ideologies, especially in regulatory law. In China and Vietnam, the tension between the two doctrines is clearly evident in the real estate sector which has led to complications in terms of the regulatory legal frameworks including mortgage law. While developers in both countries are developing award-winning residential construction projects with most contractors seeking high volume mortgages, there are legal doctrines that still prohibit the ownership of private property, like in China where all the land is owned by the state. As a result of
the legal doctrine confusion, both countries have consistently re-enacted and updated their existing legislative regulations on mortgaging residential construction investment projects to accommodate the changing economic landscape while still subscribing to the existing doctrinal laws. However, in both countries, the doctrinal confusion and the different mortgage regulations and laws have not held back the real estate market, especially in China major cities, which has witnessed an exponential boom of residential construction projects for a larger part of the two decades.

Mortgage regulations and laws play a crucial role in facilitation of real estate transactions and enhancing the security of loans, and it is important for real estate project contractors to understand and these rules. In most countries, mortgage laws for residential construction investment project covers issues associated with mortgage origination, registration, rights and obligations of associated parties, foreclosure processes and consumer protection legislation (Chu & Mihn, 2023). Also, the mortgage laws outlines the necessary legal processes to be followed by lenders to protect their interest in case of lack of legal compliance or borrower payment failure. An important aspect of the mortgage law is registration to prove the mortgage legality and priority against the other parties (Chu & Mihn, 2023). On the same note, the involved parties including the potential purchasers and lenders can insert relevant legal provisions during registration to assess the openness, feasibility and efficiency of the mortgage (Duong & Truong, 2019). The legal rights and obligations of the involved parties reveals the power balance, the contractual freedoms and consumer protections to safeguard the lenders and protect other parties. The mortgage regulations further ensure fair financing, transparency and borrower’s rights through consumer protection rules that protects the borrowers from any exploitative practices.

According to Zheng & Zhang (2021), China and Vietnam are global real estate players with strong economic expansion and urbanization. The two countries have witnessed varying levels of changes of property mortgage regulations attributed to the rising housing and mortgage finance needs. A proper understanding of the mortgage laws and regulations in China and Vietnam is important in revealing their efficiency, fairness and convenience, and can be beneficial to policymakers, legal practitioners and involved stakeholders in both countries. An analytical comparison of the existing mortgage legal frameworks for residential construction projects can further illuminate the associated regulations, procedures, and safeguards of the two dynamic Asian economies and shed
more light on the mortgage systems by comparing the existing similarities, differences, advantages and disadvantages. The focus of the current analytical research review is to provide a detailed comparative analysis of residential mortgage laws and regulations of China and Vietnam, with an emphasis on aspects such as the origination of mortgages, the registration processes, the responsibilities and obligations of the associated parties, the associated foreclosure processes and the consumer protection legislation. The research further evaluates how the mortgage rules protect borrowers and identifies the existing strengths and weaknesses and the systems, and provide the necessary recommendations.

2 THEORETICAL FRAMEWORK

As a legal doctrinal scholarship, the academic embedding of the current analytical review adopts the form of a summary of the existing state of the current laws and regulations associated with the topic of research by combining reference to primary sources including legislation, existing court cases with reference to secondary sources including handbooks, policy papers and most recent journal articles. The review is driven by the current developments in the mortgage legal practice, and the fact that the comparative analysis of the doctrinal debate is enough justification for conducting the research. To this end, the theoretical framework for the legal scholarship is the existing mortgage legal system itself, but further extends to include a perspective or opinion on the legal system in the form of incorporation of secondary sources. The primary component of the theoretical framework is the application of the mortgage legislative elements to describe the existing debate on originalism in constitutional interpretation by using the legislator’s intentions. Based on the framework, the review describes the state of the existing legislations not only through what has been done before, but also on account of the relationship between the different views and results of the doctrinal debate. By using the legislator’s initial intentions in relation to constitutional interpretation, the review focuses on legal intent as a form of legal reasoning by focusing on the mechanisms of reconstructing the said intentions.

The review pursues normative and prescriptive questions associated with the doctrinal debate and, therefore, adopts a normative framework that assesses the positive and negative qualities of the associated legal elements as applicable in China and Vietnam. To answer the normative and prescriptive questions, the review employs the
normative framework as a yardstick that outlines a set of standards or values to support a specific judgment. Considering the focus of the review is based on an analysis of public law, the framework recognizes that the associated legal elements are basic principles that are either explicitly stated or implicitly presupposed in positive law (Taekema, 2018). However, it is important to note that the legal elements and principles associated with the analysis are not completely contained in the sources of law and, therefore, requires the inclusion of perspectives on opinions on the legal system by incorporating secondary sources such as handbooks, policy papers and most recent journals. To this end, the basic principles and values of the mortgage laws serve as an internal normative framework that yields standards for evaluation to form the fabric of the external normative framework that involves looking at the law from an external perspective. The external normative framework is based on the basic principles and values that support the ideals of the internal normative framework.

3 METHODOLOGY

The primary objective of the current study is to conduct a comparative analysis of the residential construction investment project mortgaging laws in China and Vietnam. The aim is to examine the existing legal frameworks associated with residential mortgages in the two countries and the analysis of areas of similarity, differences, strengths, flaws and drawbacks. Further, the study intends to provide the appropriate recommendations to the identified negative qualities of the existing mortgage laws and provide the necessary insights for the policy makers, legal practitioners and other associated stakeholders. To achieve the aforementioned objectives, the research review adopt an in-depth review of residential property mortgage legal literature in China and Vietnam. The research methodology involves the identification of existing primary sources of laws in both countries, including legislative documents, court cases and government records, and secondary sources.

The primary sources of the law are used as a foundational element of analysis of the existing literature on the residential property mortgages and for identification of secondary sources of information including legal research, policy papers, academic publications and scholarly articles that discusses the legal frameworks, mortgage registration, the responsibilities and obligations of the associated parties, the associated foreclosure processes and the consumer protection legislation in both countries. Also, the
research incorporates data collected through interviews or surveys of experts in the field to provide additional insights on the topic. The collected data and information is categorized based on critical aspects of analysis including the registration procedures, the interest rate regulations, the foreclosure processes, the mechanisms for borrower protection and associated government initiatives. A comprehensive and detailed table framework is used to present the research findings in a systematic manner.

4 FINDINGS

The results of the analysis produced seven thematic areas of analysis associated with mortgage laws for residential property in China and Vietnam. The seven thematic areas included the mortgage registration procedures, the loan-to-value ratios regulations, interest rate regulations, foreclosure process regulations, borrower protection laws and legal government initiatives. In terms of mortgage registration procedures, the results indicated three primary thematic areas of focus including the type of mortgage registration system, the registration process and documentation. In respect to loan-to-value regulations, the results indicated two major thematic areas of focus including the regulative authority and the legally existing mortgage LTV ratios. In relation to the interest rate regulation, the findings indicated three areas of focus including the regulative authority, the legally existing interest rates and the laws that govern volatility of interest rates. The three legal thematic areas of analysis associated with foreclosure processes included the definition of foreclosure processes, steps and timeline for foreclosure, and the legal protection for the involved parties. In terms of borrower protection mechanisms, the thematic areas of analysis included the legal consumer protection measures and the legal cooling-off period, while the thematic areas associated with legal government initiatives included government policies and development of mortgage backed securities. A detailed comprehensive table of the research findings of the comparative analysis is presented as below;

<table>
<thead>
<tr>
<th>General Thematic Area of Analysis</th>
<th>China</th>
<th>Vietnam</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loan-To-Value Regulations</td>
<td>Centralized Mortgage System</td>
<td>Limited monitoring of factors of development associated with the LTV ratios.</td>
</tr>
<tr>
<td>---------------------------</td>
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<tr>
<td>Maximum mortgage loan-to-value (LTV) ratios raised to 80% from 60% or 70% at origination.</td>
<td>Fragmented registration procedures and processes that vary by locality.</td>
<td></td>
</tr>
<tr>
<td>Separate or co-signing of the underlying contract by the mortgagor.</td>
<td>Limited legal recourse for borrowers.</td>
<td></td>
</tr>
<tr>
<td>LTV ratios based on the agreement between the lender and the borrower.</td>
<td>Properly defined steps and timeline for foreclosure processes.</td>
<td></td>
</tr>
<tr>
<td>Separation of the underlying contract</td>
<td>Lack of clear and enforcement of foreclosure procedures.</td>
<td></td>
</tr>
<tr>
<td>LTV ratios based on the type of property of interest and its location.</td>
<td>Legal protection for both the mortgagor and mortgagee.</td>
<td></td>
</tr>
<tr>
<td>Regulated by the People's Bank of China</td>
<td>Mortgages must purchase home insurance for projects with a LTV of 70% in order to protect the mortgage lender's interests in the event of damage.</td>
<td></td>
</tr>
<tr>
<td>Regulated by the State Bank of Viet Nam (SBV) according to Article 478 of Criminal Code of Vietnam</td>
<td>Borrowers must purchase home insurance in order to protect the mortgage lender's interests in the event of damage.</td>
<td></td>
</tr>
<tr>
<td>The five-year rate is between 4.2 and 4.3 percent. Home buyers and homeowners often pay another percentage point above that level.</td>
<td>Borrowers must purchase home insurance in order to protect the mortgage lender's interests in the event of damage.</td>
<td></td>
</tr>
<tr>
<td>Gradual interest rate liberalization.</td>
<td>Properly defined steps and timeline for foreclosure processes.</td>
<td></td>
</tr>
<tr>
<td>The rate of interest for a loan shall is agreed by the parties. However, the rate of interest for a loan agreed by the parties may not exceed 20% per year, unless otherwise prescribed by law.</td>
<td>Legal protection for both the mortgagor and mortgagee.</td>
<td></td>
</tr>
<tr>
<td>Interest Rate Regulations</td>
<td>Mortgage Foreclosure Regulations</td>
<td>Gradual interest rate liberalization.</td>
</tr>
<tr>
<td>Interest Rate Volatility.</td>
<td>Borrower Protection Regulations</td>
<td>Borrowers must purchase home insurance in order to protect the mortgage lender's interests in the event of damage.</td>
</tr>
<tr>
<td>Source: Selt-created by Author.</td>
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</tr>
</tbody>
</table>

**5 DISCUSSION**

5.1 REGISTRATION OF RESIDENTIAL PROJECT MORTGAGES

The results of the analysis indicate that both China and Vietnam have definitive laws which outlines the registration processes of mortgages for residential project construction projects. In China, the registration of mortgages is outlined by Article 388, 395, 400 and 402, *Civil Code* and Article 2, *Real estate Registration Regulation 2019*. According to Article 388 of the Civil Code in China, a mortgage is defined as a form of security granted over real estate, and can refer to land, fixed objects or construction projects such as residential buildings under the Chinese law and sea areas. In China, the law requires that a mortgage must be executed in formal writing in form of a separate contract signed by the mortgagor or the mortgagee or a co-signed document that
incorporates the terms of the mortgage by the mortgagor. The Chinese law as prescribed by Article 388, 395, 400 and 402 of the *Civil Code* requires that a mortgage over a residential real estate project is only valid at the date at which the mortgage is registered with the relevant real estate registry. The validation and perfection of the mortgage is achieved by registering the mortgage with a law-designated and relevant registration authority. According to the Chinese law, a mortgage for any residential investment project including state-owned land use rights to construction land, contractual management rights to rural land, urban buildings and other objects to rural land must be registered at the local real estate registration issue centre, and an unregistered mortgage cannot be used to defend against a bonafide third party (Article 388, 395, 400 and 402 of the *Civil Code*).

In Vietnam, the registration of residential real estate mortgage is governed by Article 317, 318, 320-324 of Civil Code 2015 and MOJ Circular 07/2019/TT-BTP. According to Article 317 of the *Civil Code 2015*, a mortgage is used in reference to the use of a property by one party under the ownership of the obligor as a security for performance of an obligation to another party, without transfer to the latter. According to Clause 1, Article 4 of the MOJ Circular 07/2019/TT-BTP, the mortgage registration of residential investment projects in Vietnam must involve the registration for land use rights, assets attached to the land, off-the-plan assets attached to the land and investment projects for construction of houses, investment projects for construction of buildings other than houses or other investment projects for construction as per the law. Also, the MOJ Circular 07/2019/TT-BTP requires the registration for revision of mortgaged contents, notice on disposal of mortgaged assets in case of registering for mortgage, and the withdrawal of registration for mortgage. Pursuant to Clause 1 Article 8 of Decree 102/2017/ND-CP, the land registration offices shall only register a residential construction mortgage if the mortgagors are owners of land rights use and attached assets. The law further requires that the project developer must apply to revise mortgaged contents to withdraw collateral in case they have mortgaged and registered for mortgage of investment projects for construction of houses or off-the-plan houses.

5.2 PARTIES RIGHTS AND OBLIGATIONS

The results of the review indicate existing similarities and differences in the parties’ rights and obligations in relation to mortgaging residential real estate projects. In China, according to *Real Estate Registration Regulation 2015*, a mortgage is only valid
if executed in writing, even though entering into a mortgage contract does not mean that the mortgagee has secured the mortgage rights. An interpretation of the Supreme People’s Court on the Application of the Security System of the Civil Code of the People’s Republic of China shows that the mortgage contract must specify the name of the mortgagor and the mortgagee and specify the title of the contract and the details of the property of interest. The Chinese mortgage law is based on the common law principle that every party has an obligation of undertaking their contractual responsibilities and obligations, failure to which a legal procedure is followed to protect both the lender and the borrower (Chu & Minh, 2023). In Chinese law, the parties to a purchase and sale contract can agree that the seller will retain ownership of the subject matter if the buyer fails to pay the required price or perform other obligations (Article 641, Civil Code). Article 396 of the *Civil Code* stipulates that if the debtor defaults or any contractual condition for enforcement of security are satisfied, the creditor has priority in having their claim paid with the movable property determined for the mortgage including existing and anticipated production equipment, raw and semi-finished materials, semi-finished products and finished products.

In Vietnam, the responsibilities and obligations of parties of a mortgage contract are governed by the provisions of Articles 299, 320-324 of the Civil Code 2015. According to the Articles, the mortgagor of a residential real estate property has the obligation of transferring the associated documentation related to the property of interest, and take care of the property. Also, the mortgagor has an obligation of delivering the mortgaged property to the mortgagee for realization and provide accurate information about the actual condition of the property. According to Clauses 4 and 5 of Article 321 of the Civil Code 2015, the mortgagor shall not sell, exchange or give out the mortgaged property and notify the mortgagee of any third party that might be associated with the mortgaged property. The law further stipulates that the mortgagor has the right of recovering the mortgaged property and associated documentation held by any third party upon the termination of obligations secured by the mortgage. On the other hand, the mortgagee has an obligation of following the necessary procedures for realization of mortgaged property in accordance with the law. Article 321 of the Civil Code stipulates that the mortgagee has the right of holding the documentation related to the mortgaged property as agreed by the parties as prescribed the law. The law further requires any third party associated with the mortgaged property to have the right to exploit the property as
contractually agreed but have an obligation of ceasing the exploitation of the property if there is a possibility of depreciation of its value as a result of misuse or mishandling by the third party, or as prescribed by the law.

5.3 TAXES AND FEES ON MORTGAGED RESIDENTIAL PROPERTY

The review show significant differences in terms of the legal aspects of taxes and fees on mortgaged residential property in China and Vietnam. According to the Chinese Law, the Chinese stamp duty of mortgaged property is payable by both the mortgagor and mortgagee at a rate of 0.05%. While the law requires a joint payment of the stamp duty, it does not require any stamp duty or documentary taxes for granting and enforcement of the mortgage. Further, in China, there is no governmental fee on granting of a security interest even though a registration fee may be payable. As a matter of fact, in the case mortgages of real estate, the involved parties are required to pay a registration fee at the real estate registration office. As a general rule in China, there is no legal requirement for witnessing or notarization requirements for a loan or mortgage facility arrangement and, therefore, the involved parties are not required to pay any notarization fees unless otherwise as required by the law. In Vietnam, there are tax implication on interest payments on mortgages for residential real estate since the interest income from the mortgage is recorded as other income and subject to Corporate Income Tax (CIT) at the standard rate of 20 per cent. However, the interest income from the mortgage is not subject to value-added tax (VAT) but it is important to allocate input VAT proportionally against the revenue.

5.4 GOVERNMENT AND LEGISLATIVE REFORMS ON MORTGAGING OF RESIDENTIAL PROPERTY

Both China and Vietnam have recorded a wide range of reforms and changes to the law and regulations that govern the mortgaging a residential construction investment project. In China, the review reported that the People’s Bank of China (PBOC) published the Measures for Unified Registration of Security of Movable Assets and Rights that facilitated the implementation of Civil Code that came into effect in January 2021 and became effective in January 2022. The primary objective of the legislative reform was to create an online system called "Uniform Registration and Publicity System for Chattel Financings" (Online Uniform System) for registration of security interests associated
with loans, mortgages and other rights. Also, the reform was aimed at supporting a nationwide implementation of a uniform registration of processes associated with mortgages. The initial proposal of the reform was to update and revise different aspects associated with registration of mortgages. In Vietnam, in November 2019, provided a new guidance on registration of mortgage of land use right and construction works under the Circular 07/2019/TT-BTP which took effect from 10 January 2020. As compared to the previous provision, the new legislative requirement no longer classifies housing construction investment project and non-housing construction investment project as future assets attached to land. Also, the new regulation recognizes the registration of the mortgage of construction investment projects as a different case of mortgage registration.

6 CONCLUSION

In recent decades, China and Vietnam have witnessed varying levels of changes of property mortgage regulations attributed to the rising housing and mortgage finance needs. The two countries have found themselves in a puzzling position of establishing free market economies while still nominally adhering to the Communist ideologies which has led to constant update of the existing legislative regulations on mortgaging residential construction investment projects to accommodate the changing economic landscape while still subscribing to the existing doctrinal laws. The current analytical review provided a detailed comparative analysis of residential mortgage laws and regulations of China and Vietnam, with an emphasis on aspects such as the origination of mortgages, the registration processes, the responsibilities and obligations of the associated parties, the associated foreclosure processes and the consumer protection legislation. The review provided a deeper understanding of the mortgage laws and regulations in China and Vietnam and revealed their efficiency, fairness and convenience, and can be beneficial to policymakers, legal practitioners and involved stakeholders in both countries. To achieve its intended objectives, the analysis performed an in-depth review of residential property mortgage legal literature in China and Vietnam.

According to the review, both China and Vietnam have definitive laws which outlines the registration processes of mortgages for residential project construction projects. The analysis reports that the Chinese law requires that a mortgage must be executed in formal writing in form of a separate contract signed by the mortgagor or the mortgagee or a co-signed document that incorporates the terms of the mortgage by the
mortgagor, while the Vietnamese law requires that the mortgage registration of residential investment projects in Vietnam must involve the registration for land use rights, assets attached to the land, off-the-plan assets attached to the land and investment projects for construction of houses, investment projects for construction of buildings other than houses or other investment projects for construction as per the law. Also, the results of the review showed existing similarities and differences in the parties’ rights and obligations in relation to mortgaging residential real estate projects, and significant differences in terms of the legal aspects of taxes and fees on mortgaged residential property in both countries. It is further reported that both China and Vietnam have recorded a wide range of reforms and changes to the law and regulations that govern the mortgaging a residential construction investment project.
REFERENCES


