

real estate mortgage/hypothecation/guarantee in China

Description

Recently, a foreign trading company importing a production line from a manufacturer in Shanghai inquired about what should be considered when accepting a contract performance guarantee in the form of real property hypothecation provided by the Chinese exporter which offered to collateralize its buildings and underlying land to guarantee the production line will be in line with their contractual quality standards.

Real estate or real property is probably the primary and best collateral in any security/guarantee transaction in the world. Given the high value of Chinese properties, it will confer great comfort on foreign creditors to have Chinese debtor offer real estate as guarantee for their performance under contracts.

The first question is how to legally and effectively collateralize real estate in China for guaranteeing contractual obligations. Two basic points for reference.

1. Guarantor Having Legal Title to the Real Property in Question

This is the first question that should pop up in the mind of the creditor party. Basically, creditors shall take a look at the title deed or ownership certificate of the real properties to be hypothecated. In many cases, it won't be as simple as a general look at the title deeds.

The title deed can offer a general idea about the ownership, size and nature of the property. There is much more to be looked into beyond the information thereon.

You need to go to local real estate registrar to find out whether the property has been seized or attached or otherwise been involved in any legal proceedings. Properties that have been subject to court's conservatory measures such as property attachment shall not be mortgaged. The real estate registrar will also tell you about whether the property has been mortgaged or hypothecated in favor of others who will have the priority in order in enjoying the collateral interests in the property.

Unlike the simple title deed of residential property, often a number of properties are built on the same parcel of land but registered in the same one title deed. In practice, it is very common that illegal properties are constructed without obtaining proper government approvals or licenses in particular those from local zoning office.

Further, there is a lot of allocated land used by factories in reality. Allocated land is land that is used by users without paying the land grant fee/premium to local governments. Mortgage of allocated land will be different in legal procedure and in assessing the value of the buildings on such land compared with land that is obtained through land granting procedure.

2. Mortgage Registration Perfecting Your Security

The client asked what should be done to make the guarantee effective. The key point is to have your

mortgage over the real properties duly registered with Chinese real estate registry authority in the place where the collateral property is located. Very often creditors are doped into believing that a contract stipulating the mortgage of the property will be enough. If the other transaction party is trying to persuade you into that belief, you need to seriously consider whether your deal is a scam after all.

In China, the property law has made crystal clear that mortgage or hypothecation of the real estate must be registered in order for the mortgage or hypothecation of the property to be legally effective. In other words, without the registration, a simply contract simply does not mean you have created your intended mortgage protection.

There are more to consider when you are to accept a security transaction involving Chinese real estate, particularly the realization of your security interests in the case of default on the part of your debtor.

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Author

admin

Shanghai Landing Law Offices