

**Summary of Recommendations by the Commission on Inquiry on
Processes/Practices for Granting of Loans Secured on Immoveable Property
and Sale by Levy (2014)**

RECOMMENDATIONS

1. Information to borrowers and guarantors

The letter of offer of financial facilities to potential borrowers should contain specific information as required by the law.

Equivalent standards to those laid down in the French Code de la Consommation on "*credit immobilier*" and the EU Directive about credit agreements relating to residential immovable property should be incorporated in the law.

2. Drawing up of authentic deed

All loan agreements secured on immoveable property/fixed and floating charges should be by authentic deed.

3. Loan agreement and Charge document

The borrower and guarantor should be provided with a copy of the loan agreement and charge document prior to the signing of the said agreement as provided by law.

The contents of the loan agreement and charge document would be much better explained by persons entitled to give legal advice (third party) instead of a bank manager or bank clerk.

The practice whereby bank managers call on their clients at their houses for signature of documents pertaining to loans should be discouraged. In the case of a client who is physically ill and unable to go to the bank, the bank should request that the person gives a Power of Attorney to another person to represent him.

4. '*Délai de réflexion*' and '*délai de rétractation*'

The borrower be given a '*délai de réflexion*' of ten days as well as a '*délai de rétractation*' of ten days.

5. Information on outstanding debts

Clients should be informed by the financial institution/lender of the precise procedure in case of incapacity to service a debt, and that it would be essential for the client to contact the financial institution upon receipt of the claim/notice or soon after.

Debtors should regularly be informed in writing of the exact amount of any outstanding debt, capital and interest separately, even when a case is pending before the Master's Court.

(i) The financial institution should inform the guarantor of :

- the amount of capital, interest and fees still due by the borrower as at 31 Dec of the preceding year;
- the failure to reimburse the credit *'dès le premier incident de paiement non-régularisé dans le mois de l'exigibilité de ce paiement'* and the failure to do so be sanctioned

Failure of the financial institution to comply with such an obligation would result in its disqualification to claim penalty and interest as from the date of the last notice

(ii) As laid down in Article L 341-4 of the French Code de la Consommation, provision be made in our law that *'un créancier professionnel ne peut se prévaloir d'un contrat de cautionnement conclu par une personne physique dont l'engagement était, lors de sa conclusion, manifestement disproportionnée à ses biens et revenus, à moins que la patrimoine de cette caution, au moment ou celle-ci est appelée ne lui permette de faire face à son obligation.'*

6. The Family Residence/'Logement familial'

- (i) The family residence should not be given in guarantee of loans except when the loan is for the purpose of purchasing land to erect the family residence or the improvement of such residence.
- (ii) As in the case of France under Article L526-1 of the Code de Commerce, that *'une personne physique exerçant une activité professionnelle agricole ou indépendante peut déclarer insaisissables ses droits sur l'immeuble ou est fixée sa résidence principale ainsi que sur tout bien foncier bâti ou non bâti qu'elle n'a pas affecté à son usage professionnelle'*.

7. Measures to counteract over indebtedness

- (i) The current legislative scheme for the *'désendettement du consommateur de crédit immobilier'* is limited in scope. The Borrower Protection Act is applicable to a credit agreement for a sum not exceeding Rs2 million. The regime laid by the BPA should be further strengthened so as to deal more effectively with hardships a borrower may face which affect his capacity to repay the debt. The BPA should be amended so as to cover all loans secured on immovable property contracted for a residential purpose.
- (ii) The provisions of the French Code de la Consommation relating to *'traitement des situations de surendettement'* should, with necessary adaptation, be incorporated in our Code Civil.
- (iii) Article 1244 of the Code Civil Mauricien be repealed and replaced by appropriate Articles from the French Civil Code (see Report)

8. Independent Valuation

The borrower and guarantor should be given the opportunity to have the property/properties given in guarantee independently valued.

9. The Alternative to the system of Sale by Levy

To replace the current system of Sale by Levy by a system in line with current best international practices, inspired mainly by the rules laid down by << l'Acte Uniforme de l'OHADA du 10 avril 1998 portant organisation des procédures simplifiées de recouvrement et des voies d'exécution >> (Articles 249 to 251, 253 to 323) as well as some of the rules of the French "décret du 27 Juillet 2006 relatif aux procédures de saisie immobilière et de distribution" (Articles 77 to 79).

A New Titre Huitieme containing provisions on 'La Saisie Immobilière' which can be added to the Livre Quatrième Civile on 'Les Procédures D'exécution' of the draft New Code de Procédure Civile prepared by the Law Reform Commission.

The new regime lays down the formalities under which a creditor may obtain the sale of an immovable property belonging to his debtor:

- (a) Conditions for the attachment of the property;
- (b) The procedure for the << la mise de l'immeuble sous main de justice >> (<<commandement>>);
- (c) The procedure for << la preparation de la vente >> (<<cahier de charge>>); and
- (d) The procedure for sale.

In order to better safeguard the interests of debtors and creditors, it is expressly provided that << la mise à prix fixée par le poursuivant ne peut être inférieure à la moitié de la valeur vénale de l'immeuble. La valeur de l'immeuble doit être appréciée, soit au regard de l'évaluation faite par les parties lors de la conclusion de l'hypothèque conventionnelle, soit, à défaut, par comparaison avec les transactions portant sur des immeubles de nature et de situation semblables. >>

The new regime also contains Rules as to the << incidents de la saisie immobilière >> (incidents arising from the plurality of seizures, "les demandes en distraction", << les demandes en annulation.>>, rules against irresponsible bidding).

10. Legal Aid and Assistance

To amend the provisions of the Legal Aid and Assistance Act so that debtors even if they do not meet the eligibility criteria for legal aid in a civil case are not left unrepresented.

11. National Solidarity Fund – Provision of Financial Assistance

NSF should continue to provide assistance to deserving families who have lost their residence by the system of sale by levy or who find it extremely difficult to service the home loan taken for their 'logement familiale'.

12. Protection of borrowers

- To abolish the Office of Commissioner for the Protection of Borrowers and replace it by a Commission for the Protection of Borrowers, which shall consist of :-
 - (a) A Chairperson who shall be a person who has been –
 - (i) A judge
 - (ii) A Magistrate for not less than 10 years
 - (iii) A law practitioner for not less than 10 years
 - (iv) A Magistrate and a law practitioner for an aggregate period of not less than 10 years
 - (b) A Deputy Chairperson who shall be a person who has been –
 - (i) A Magistrate for not less than 5 years
 - (ii) A law practitioner for not less than 5 years
 - (iii) A Magistrate and a law practitioner for an aggregate period of not less than 5 years
 - (c) Such other members not exceeding 4 in number who have experience in the field of banking, finance, valuation or property transactions

The Chairperson, Deputy Chairperson and members shall be appointed by the President of the Republic on advice of the Prime Minister

- To provide for the Commission to sit in one or more divisions constituted of the Chairperson/Dep. Chairperson and 2 other members and that a determination made by a division shall be deemed to be a determination of the Commission

13. '*Dation en Paiement*' / '*Gage immobilier*' / '*Pacte Commissaire*'

There is need for 'une simplification des modes de réalisation des hypothèques' when it does not concern 'un immeuble à usage exclusive d'habitation'.