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# Project Finance 2021

Vietnam: Law & Practice  
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LNT & Partners

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## Law and Practice

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## 1. PROJECT FINANCE PANORAMA

### 1.1 Sponsors and Lenders

In Vietnam, project sponsors come from very diverse backgrounds, including state-owned enterprises (SOEs) and both domestic and international private limited liability enterprises (LLCs). SOEs such as Electricity Vietnam, Vietnam Expressway Corporation, PetroVietnam Gas and PetroVietnam sponsor some of the largest infrastructure projects, such as thermal power plants, refineries, electricity transmission lines, steel mills or railways. Domestic and international LLCs are also big players, sponsoring diverse projects such as residential urban area developments, entertainment complexes, hotels and resorts, as well as production facilities. The growth in renewable energy development has also brought strong incentives for new LLCs to join the market.

Lenders are also diverse in Vietnam, with almost all major banks having a market share in sponsoring projects, including Vietcombank, Vietinbank and Techcombank. International credit is also available in Vietnam, through a diverse selection of financial institutions, ranging from commercial lenders to export credit agencies to investment funds, especially Credit Suisse and SMBC. China Construction Bank and China Bank have featured among the major lenders of late.

For big projects, the syndication mechanism is applied, in which a foreign lender can form a partnership with a Vietnamese bank to provide loans and to authorise the domestic bank as security agent for the foreign lender in signing and managing encumbrances. This often occurs when Vietnam laws do not allow foreign lenders to receive a mortgage over land and assets attached to the land associated with a project.

### 1.2 Public-Private Partnership Transactions

#### Development of Vietnam Legislation

#### Governing Public-Private Partnerships (PPP)

In the past decade, Vietnam has tried to introduce, revise and improve the legal framework governing PPPs four times, with the following legislation:

- Decision No 71/2010/QĐ-TTg by the prime minister in parallel with Decree No 108/2009;
- Decree No 15/2015/ND-CP, which replaced those two documents;
- Decree No 63/2018/ND-CP, which replaced Decree 15; and
- the new Law on PPP adopted on 18 June 2020.

The issuance of Decree No 35/2021/ND-CP providing detailed guidance on the Law on PPP 2020 (Decree 35) and Decree No 28/2021/ND-CP providing guidance on the financial control mechanisms of such projects (Decree 28) marked an important milestone for potential businesses.

#### Workable Law on PPP

The Law on PPP 2020 introduced mechanisms for sharing revenue risks and foreign currency convertibility guarantees. Accordingly, the government decides to apply a revenue risk-sharing mechanism for qualified PPP projects in the form of the adjustment of product prices, service fees or contract terms.

When the actual revenue is 75% lower than the revenue specified in the financial plan under a PPP project contract, the state will share with the investor or PPP project enterprise 50% of the difference between 75% of revenue in the financial plan and the actual revenue, provided the following conditions are met:

- projects are developed and executed under build-operate-transfer (BOT), build-transfer-operate (BTO) or build-own-operate (BOO) contracts;
- changes in relevant planning, policies and laws result in a reduction in revenue;
- measures to adjust the prices and charges of public products and services and PPP contract terms have been fully taken, but the minimum revenue requirement of 75% has not yet been met; and
- the reduced revenue has been audited by the State Audit.

In exchange, the investors and enterprises commit to sharing no less than 50% of the increase in revenue with the government (if the actual revenue is 125% higher than the revenue specified in the financial plan).

In terms of foreign currency convertibility guarantees, if the PPP project enterprises implementing the projects have exercised the right to buy foreign currency to meet the needs of current capital and other transactions, or transfer capital, profits or other liquidated investments remitted abroad, but the foreign currency market cannot accommodate their legal foreign currency demands, then they shall be entitled to use no more than 30% of Vietnamese dong revenues generated from each project after the deduction of Vietnamese dong spending amounts as a guarantee for foreign currency balancing.

### **More Optimistic Changes in Decree 35 and Decree 28**

Decree 35 has expanded the types of incentives available to an investor for having an approved PPP (another 5% if they use sufficient local contractors, goods and products for project implementation). It has laid out in detail the selection process for PPP investors, from qualifying requirements, applicable selection methods and selection time limit to guidance for each selec-

tion method, including principles to review bids. Potential investors will appreciate this transparency, having received legal insurance that authorities will review their proposals transparently and fairly.

One significant difference of Decree 28 compared to previous regulations is that the cash flow to calculate a PPP project's financial plan is now expressly specified as after-tax. Investors will appreciate this change when formulating their financial plan for bidding proposals, as they can now better account for a critical cost for the PPP project company. Secondly, Decree 28 has removed the caps on loan interest rates previously imposed on companies, giving firms much greater flexibility in estimating costs and arranging finances for their projects.

### **Obstacles**

Decree 28 has arguably failed to address the long-standing problems with PPP projects in Vietnam, such as long delays in capital contributions from the state. Numerous projects have experienced this issue. For example, in the Deo Ca Tunnel project the government failed to contribute VND1.18 trillion (USD513 million) even after the company had completed construction and commissioning. Another notorious example is the Hanoi-Haiphong BOT project, where the government's promised capital support of more than VND11.7 trillion (USD510 million) was never contributed.

Another issue is that the procedure for the payment of shared revenue is also arguably too long and too complicated. Under Decision No 03/2020/QĐ-KTNN of the State Audit Office of Vietnam (SAV), an audit by the SAV could take up to 60 days. The signing authority reviews revenue differences and the authorised financial bodies review whether to approve the revenue sharing (up to 60 days). Finally, the State Treasury has to examine the payment dossier. This

whole process could take over six months or more to complete.

The likelihood of delays in receiving state capital contribution commitments, complicated payment procedures for shared revenue and the lack of safety nets have meant that, for Vietnam PPP projects (except in energy projects with power purchase agreements), sponsors have historically been domestic entities, who are generally more willing to take risks and have better capacity to navigate local administrative and regulatory issues.

### 1.3 Structuring the Deal

One of the major issues when structuring a deal is how to make the project bankable.

The capability of the investors, including their financial soundness, is always a consideration as it secures the success of the project to a certain extent. An experienced investor can handle the local bureaucratic and political issues, and projects often resort to the investors' financial conditions to withstand difficult times.

Income stream is the next issue. Basically, a concession contract can be divided into two types:

- contracts that generate cash flow (such as an electricity project with an official off-taker); and
- contracts where the cash flow is unclear and unstable (such as BOT transportation projects, whose revenues are based on citizens' usage).

The former is more financially secured as there is often one off-taker who is state-backed, sometimes with government guarantees (such as power plants), so has seen more international investments and often provides financing on more favourable terms. In the latter case, lenders

often consider the project revenue assumptions, together with additional plus factors such as minimum revenue guarantee or the mechanism for sharing revenue risks (see **1.2 Public-Private Partnership Transactions**).

Last but not least, foreign currency convertibility guarantees are a specific feature of projects involving foreign parties. In principle, the loan from the offshore entities must be paid in the foreign currency. The currency convertibility can be affected if the money supply of the host state is insufficient due to incidents such as a commercial war or if the national economy recesses, resulting in the establishment of a barrier to trade with foreign countries that have no need for the domestic currency. In Vietnam, this has not been a practical issue of late, with most projects being able to comfortably secure foreign currency convertibility. Depending on the size of the project and the time period involved, however, some sponsors have considered and implemented hedging mechanisms.

Other concerns include the following.

- The value of the loan over the total investment capital of the project must not exceed the difference in amount between the total investment capital of the project and the charter capital contribution registered in the investment registration certificate of the project.
- The types of fees available to the lenders – in particular, local lenders may collect four types of fees in consideration for providing loans: (i) prepayment fee, (ii) facility commitment fee, (iii) arrangement fee (in the case of syndication), and (iv) utilisation commitment fee. International lenders are not restricted in the type of fees they may collect; however, for the restructuring of foreign loan transactions, the fees paid to the restructuring lender may

not be higher than the fee paid to the original lenders.

- For sponsor support loans, sponsors must ensure that the interest rate is not 0%, otherwise they may incur tax liability based on the market price as determined by the tax authorities.

## 1.4 Active Industries and Sectors

### Highways and Power Plants

With transparent processes, increased incentives and much more flexibility granted to companies, the PPP Law, Decree 28 and Decree 35 have the potential to attract more private interest and investments to PPP projects, especially in infrastructure. Drafts of Vietnam's development plans for crucial infrastructure, including electricity and transport, for 2021–2030 were first circulated for opinions in 2021. Under these draft plans, Vietnam aims to construct an additional 5,700 km of highway and 137.2 GW of electricity capacity.

The Power Master Plan VIII commits Vietnam to increase renewable projects in the coming years, to reach the proportion of electricity produced from this source (about 11.9–13.4% in 2030). LNG power is also a rising trend. For instance, the Son My 2 Power Plant project will accompany the Son My LNG Terminal project in Binh Thuan province, performed by AES and PVGas, and Nhon Trach 3-4 LNG combined cycle power plants expect to receive LNG from Long Son LNG terminal in Baria Vung Tau province. Project finance was a major consideration in both these projects.

Real estate residential housing projects is another area that is likely to see further growth, with the development of new urban areas and a transition from city centres to the peripherals areas in major cities such as Hanoi, Ho Chi Minh City and Da Nang.

## 2. GUARANTEES AND SECURITY

### 2.1 Assets Available as Collateral to Lenders

Assets typically available as collateral include movable assets, immovable assets and property rights, as follows:

- immovable assets, including land use rights and constructions attached to land, such as houses, factories, buildings and warehouses;
- equipment and machinery;
- property created from surface rights;
- valuable instruments, securities and deposits in bank accounts;
- property rights arising from contracts such as construction contracts, contracts for the supply of raw materials, and sale or purchase contracts;
- shares, stakes and rights to purchase stakes or interests arising from shares and stakes;
- project company claims against third parties and insurances;
- rights to extract natural resources or host government concessions; and
- property rights deriving from industrial property rights, information technology, science and technology activities.

The Civil Code 2015 provides for various securities over assets, including pledge, mortgage, deposit, collateral, escrow, title retention, guarantee, mortgage and lien. However, the security is typically in the form of a mortgage because of its ability to fit a wide range of assets. Under Vietnamese law, a mortgage allows the use by the mortgagor of assets under its ownership as security for the performance of obligations to the mortgagee without transferring such assets to the mortgagee.

A security agreement over immovable assets only takes effect once it is notarised by a notary

office. In addition, securities over the following assets are required to be registered with the Land Use Right Registration Office under the provincial Department of Natural Resources and Environment (DONRE):

- land use rights; and
- assets attached to land which are recorded in a certificate of rights to use land, ownership of house and property on land (LURC).

In terms of movable assets, there is no requirement regarding notarisation for a security agreement. A pledge or mortgage over aircraft or seagoing ships is required to be registered, but otherwise it is optional for the party to register securities over movable assets. The registration should be made with the National Registration Agency for Secured Transactions (NRAST) of the Ministry of Justice of Vietnam. Generally, upon the registration, the secured party shall have priority over unregistered secured parties.

Whilst the security agreements will remain effective, securities will only take effect against a third party after they are registered with NRAST. In effect, whereas Vietnam recognises the concept of the tracing of assets, the actual tracing of assets shall be conditioned upon whether or not there has been registration with NRAST.

## **2.2 Charges or Interest over All Present and Future Assets of a Company**

Vietnamese law does not recognise the concept of a floating charge. In practice, NRAST will not accept the registration of floating charges or wording that is too general, such as “all rights associated to or in connection with the project”.

Nevertheless, a project owner may create security over the investment project and property rights associated with the project, provided that they are specified, including the exploitation rights, the management rights of investment

projects and other property rights or other properties affiliated to investment projects. As such, the de facto result is often the same.

Some new collaterals are stipulated in Decree No 21/2021/ND-CP – eg, assets created from surface rights, usufruct rights, an investment project and assets belonging to an investment project. Moreover, the investor may use the entire investment project, which is not prohibited by law from being transferred, a property right in terms of exploitation or the management of an investment project to ensure the performance of obligations; in the case of investing in a mortgaged property that causes the value of these properties to increase, the additional investment value belongs to these mortgaged properties.

Future assets are also permitted by law to be used to secure the performance of an obligation. Accordingly, secured parties shall have the rights over the future assets from the time at which the future assets are formed. However, it is important for lenders to note that security over future assets does not apply to land use rights.

## **2.3 Registering Collateral Security Interests**

According to NRAST, the registration fees (per dossier) applicable from 1 July 2021 to 31 December 2021 are as follows:

- registration fee – VND64,000 (approximately USD2.80);
- registration fee to change registered content – VND48,000 (USD2.10);
- deregistration fee – VND16,000 (USD0.70); and
- fee for the issuance of a copy of the document certifying the registration content: VND20,000 (USD0.90).

For securities over immovable assets, the current fees in relation to registration (per dossier) in Ho Chi Minh City are as follows:

- registration fee – VND80,000 (approximately USD3.50);
- registration fee to change registered content – VND60,000 (USD2.65); and
- deregistration fee – VND20,000 (USD0.90).

The fees are similar in Hanoi.

The fee for notarisation is determined according to the value of the asset or the value of the transaction, but will not exceed VND70 million (approximately USD3,000).

## **2.4 Granting a Valid Security Interest**

Each item of collateral is not required to be individually identified in the security document in order for the security to be valid. A general description that is satisfactory to the parties is acceptable, but the collateral should be identified in as much detail as possible in order to avoid disputes in the future.

In addition, for the registration of movable assets, NRAST may require the collateral to be described in accordance with the guidance for collateral description stipulated by Circular 08/2018/TT-BTP, as amended and supplemented by Circular 06/2020/TT-BTP.

For the registration of immovable assets, the collateral must be described in accordance with the form and the guidance for description stipulated by Circular 07/2019/TT-BTP.

## **2.5 Restrictions on the Grant of Security or Guarantees**

Under Vietnamese law, there are no restrictions on domestic entities granting security or guarantees, except in the following circumstances.

Firstly, if an entity grants guarantees regularly to make a profit, such entity shall be deemed to have committed a violation due to engaging in banking activity, which is only allowed to be conducted by credit institutions.

In addition, it is not permitted to create securities over immovable assets in favour of foreign lenders, including land use rights and assets attached to land.

## **2.6 Absence of Other Liens**

Liens are not officially recognised under Vietnam law, except for two specific cases: retention of title and lien on the property. Retention of title is provided under Article 331 of the Civil Code 2015, which is an agreement between the seller and the buyer in a purchase contract and can be registered with NRAST. Under this mechanism, the ownership of the property remains with the seller until the purchaser fulfils his or her payment obligation.

Liens are provided under Articles 346 to 350 of the Civil Code 2015 and do not need to be registered at NRAST. There is also no centrally recorded and searchable database of liens. Liens shall arise from the due time for the performance of an obligation that the obligor failed to perform or performed incorrectly. Liens on property shall take effect against a third party from the time of possession (eg, the contractor has the lien against the employer for unpaid construction works until handover to the employer). The lien is a statutory right, but it is unclear whether it can be waived.

The lien holder can only hold the assets until his or her interests are satisfied, and may not sell them. The interests of the banks can be protected against liens only for immovable assets, because in this case the bank may still proceed with an auction even if it does not hold possession of the assets (ownership of assets is

transferred based on property registration). With respect to movable assets, the bank has to possess the assets before it can enforce a lien. If the movable assets are under lien, it is impossible to enforce until the lien is terminated. In that sense, the lien holder takes priority over the bank.

With regard to securities over immovable assets, NRAST has operated an online registration system allowing access to the NRAST database of registered securities. Accordingly, an online search can be made based on the registration number or information of the securing party, without the user incurring any fees. In addition, lenders may request NRAST to provide information regarding the registered securities, with a fee of VND24,000 (approximately USD1) per request. However, because registration is optional in most cases, the search result may not cover all the securities created in fact.

For immovable assets, lenders may check information related to securities over land use rights or assets attached to land by reviewing the relevant LURC. However, not all assets attached to land are recorded in a LURC. Moreover, in certain cases, there may be a delay in updating the status of securities in a LURC. For the most comprehensive and updated information related to securities over immovable assets, it is highly recommended to submit a request to DONRE where the immovable asset is located. The provision of related information is subject to the determination of DONRE. However, the request may be more acceptable for DONRE if it is submitted by the owner of the immovable asset.

## 2.7 Releasing Forms of Security

Under Vietnamese law, a security shall be released in the following cases:

- if the secured obligation has terminated or discharged;

- if the security has been cancelled or substituted with another security;
- if the security has been enforced or disposed; or
- as agreed by the parties.

If the security has been registered with DONRE or NRAST, the party may conduct the procedure for deregistration.

## 3. ENFORCEMENT

### 3.1 Enforcement of Collateral by Secured Lender

A secured lender can enforce its collateral in one of the following cases (Article 299 of the Civil Code 2015):

- if an obligor fails to perform an obligation when it falls due, or performs it a manner other than was agreed;
- if an obligor must perform the secured obligation before a time limit due to his/her violation against the obligation as agreed or prescribed by law; and
- in other cases as agreed by the parties or prescribed by law.

The secured lender does not need court approval to enforce the collateral if the security agreement already specifies the way of enforcement, such as enforcement methods, the trigger events and the timing of enforcement. Prior to enforcement, a secured lender must notify any other secured creditors (Article 300 of the Civil Code 2015), and there are minimum notice periods before the collateral can be enforced (Article 51 of the Civil Code 2015). If the holder does not give collateral for enforcement, the secured lender can request settlement from the court (Article 301 of the Civil Code 2015).

The security agreement can deal with the methods of realising collateral, including auction, putting the collateral up for sale, and accepting the collateral as substitutions. If not, enforcement will generally take the form of an auction (Article 303 of the Civil Code 2015).

In practice, the enforcement of collateral is challenging due to certain restrictions and concerns, including the following:

- there is no provision that allows the secured lender to capture the collateral in the event that the obligor deliberately fails to deliver the collateral for enforcement; and
- there are cases where the collateral cannot be enforced because it is related to a criminal case or to a civil case of a third party.

To avoid this hurdle, Decree 21/2021/ND-CP recently devoted Chapter IV, from Article 49 to Article 59, to the enforcement of security. Under these new provisions, security holders are allowed to take security assets and sell security assets, and the buyers of those assets will be given ownership title, regardless of whether or not there was a power of attorney from the security providers, if such scenario is anticipated in advance. Decree 21 is expected to provide stability in the security enforcement and further boost project finance in Vietnam.

### **3.2 Foreign Law**

Parties can choose the governing law of a contract if two criteria are met:

- the transaction involves a foreign element; and
- international treaties do not determine a compulsory choice of governing law over the transaction.

Please also note that PPP projects must be governed by Vietnamese law.

The application of Vietnamese law as the governing law of the concession contract is reasonable and consistent with international practice. Despite different opinions concerning the governing law of the concession contract, it is unarguable that the United Nations Commission on International Trade Law (UNCITRAL) and The World Bank recommend that project finance contracts should be governed by the laws of the host country in order to avoid disputes.

In any event, whether a country is under a common law system or a civil law system, it usually provides for the application of the laws of the host country by general reference to domestic law or by mentioning special statutory or regulatory texts that apply to the concession contract.

In some legal systems, there may be an implied submission to the laws of the host country, even in the absence of a statutory provision to that effect.

Therefore, UNCITRAL guides parties to select the law of host countries as the applicable law of PPP contracts, and suggests that foreign law should only be selected where there are substantial deficiencies with the governing law. As Vietnamese law recognises freedom of contract as a fundamental principle, contracts will be deemed acceptable as long as the form contains common law concepts like liquidated damages or indemnity.

A choice of foreign law may not be upheld if the application consequences are inconsistent with the fundamental principles of Vietnamese law, or if the contract does not involve consumers, labour or real estate (Article 683 of the Civil Code 2015).

Regardless of the applicable law, cases involving foreign elements can be settled at foreign courts as long as the relevant international trea-

ties allow this, and as long as they do not fall under the exclusive jurisdiction of Vietnamese courts. Certain cases cannot be resolved by a foreign court (Article 470 of the 2015 Civil Procedure Code), including:

- cases related to real estate in Vietnam;
- cases related to divorce between individuals who reside permanently in Vietnam; and
- cases where parties choose Vietnamese courts.

### 3.3 Judgments of Foreign Courts

According to Vietnamese law, foreign judgments or arbitral awards may be enforceable in Vietnam if they satisfy certain requirements. However, the court shall not re-examine the content of the case – it will only address the procedural aspect (res judicata principle).

In particular, for foreign judgments, the court would look at the following:

- whether the judgment satisfies the test for recognition under international treaties to which Vietnam is a contracting party;
- the effect of the award/enforcement of award under relevant jurisdictions;
- the procedure of summoning relevant parties and serving of documents;
- whether a Vietnamese court has already settled/accepted the case; and
- whether the case can be settled via foreign courts under Vietnam laws.

Another ground for enforcement is based on the doctrine of comity. In the past, Vietnamese courts maintained a practice of requiring the applicant to show that the foreign court has already accepted and given enforcement to a decision from the Vietnamese courts. This created significant difficulty for the application of the comity principle. Nevertheless, this practice has been overturned in recent years and local

courts are showing an increasing propensity towards accepting the enforcement of foreign court judgments on the principle of comity.

For arbitral awards, the court would look at the following:

- the validity of the arbitration agreement;
- the appointment of arbitrators;
- whether the award exceeds parties' requests;
- the effect of the award/whether the arbitral award has been cancelled or terminated elsewhere; and
- whether the case can be settled via arbitration under Vietnam laws.

Regardless of the res judicata principle, in practice, the court might not enforce foreign judgments/arbitral awards due to the violation of the “fundamental” principles of Vietnam laws. Another key issue that often arises is whether the parties have been properly informed of the case, received all documents of the case, and been given the best chance to present their case.

Vietnam is considering joining the treaty for enforcing foreign court judgments. Once the participation is completed, there will be more certainty to the enforcement of foreign judgments in Vietnam.

### 3.4 A Foreign Lender's Ability to Enforce

Foreign lenders are unable to obtain security over land and other assets affixed to land (Articles 3 and 179 of Law on Land 2013 and Articles 144 and 159 of the Law on Housing 2014). Only credit institutions have access to both securities over land use rights and housing, including foreign bank branches operating in Vietnam (Articles 174 and 179 of the Law on Land 2013 and Article 144 of the Law on Housing 2014). In practice, foreign lenders may appoint a local

security agent to enforce their rights under a loan or security agreement.

On the other hand, a foreign lender can enforce share security by taking ownership of the shares or selling them to a third-party purchaser. Nevertheless, they should be aware that foreign ownership in Vietnamese companies may be subject to foreign ownership caps and approvals of the competent authority, which vary depending on the operating sector.

## 4. FOREIGN INVESTMENT

### 4.1 Restrictions on Foreign Lenders Granting Loans

The law allows Vietnamese companies to borrow from foreign lenders, with some conditions and requirements.

Firstly, the following foreign loans must be registered with the State Bank of Vietnam (SBV):

- mid-term and long-term loans (more than one year);
- renewed short-term loans that have more than one year of maturity term; and
- short-term loans that are not covered by any loan renewal contract but remain the outstanding principal owed on the anniversary of the date of first fund withdrawal in a full calendar year, except to the extent that borrowers have already fulfilled their debt obligations within a permitted duration of ten days after the anniversary of the date of first fund withdrawal in a full year.

Confirmation of foreign loan registration by the SBV is a condition precedent for the banks in Vietnam to carry out money transactions in relation to the loan, including drawdown and repayment. Except for some cases, if there is any change to the content relating to loans referred

to in the confirmation of foreign loan registration, the borrower must register the changes of the foreign loan. Any state-owned company that wishes to take a mid-term and long-term foreign loan must have a plan appraised and approved by the competent authorities.

In terms of purpose, a foreign loan is only allowed to be made for the following purposes.

- To implement the business plans or investment projects of the borrower or a company to which the borrower makes a direct capital contribution (only applied to mid-term and long-term foreign loans). In this case, the ratio of the loan serving that business plan or project of investment to the total loan taken by the borrower must not exceed the proportion of contribution to the aforesaid company by the borrower. In addition, if the investment project of the borrower has an investment registration certificate, the total midterm or long-term loan (including the domestic loans) taken by the creditor to serve the project must not exceed the difference between the total capital and the contributed capital in the certificate of investment.
- To restructure the foreign debts incurred by the borrower without increasing the loan expense.
- To replenish the short-term loan capital of credit institutions and branches of foreign banks (short-term foreign loans only).

Foreign loan expenses, including interest rates and fees, are agreed by the relevant parties, unless they are otherwise subject to conditions and the ceiling of foreign loan expense decided and announced by the Governor of the SBV from time to time.

## 4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

As mentioned in **2.5 Restrictions on the Grant of Security or Guarantees**, a foreign lender is not permitted to take securities over immovable assets, including land use rights and assets attached to land. An alternative solution may be set up in the form of a guarantee or standby letter of credit issued by a local bank that will take securities over immovable assets. However, these structures may incur additional costs for the parties.

With regard to guarantees, if a Vietnamese entity grants a guarantee in favour of a foreign lender in order to secure the obligations of another Vietnamese entity under a long-term (more than one year) foreign loan, a copy of the guarantee must be submitted together with the dossier for foreign loan registration at the SBV.

In addition, in order to make payment for the foreign lender, the guarantor is required to submit a package of documents to the bank, including the loan agreement, guarantee, confirmation of the borrower's account bank and confirmation of the loan registration.

## 4.3 Foreign Investment Regime

The Foreign Investment Law 2015 (direct investment) and the Law on Securities (portfolio investment) govern foreign investment. Under the Foreign Investment law, foreign investors are those that are established abroad (foreign investor – F0 level) or that own more than 50% of a locally incorporated company (foreign invested enterprises or FIEs – F1 level). This regulation presupposes that FIEs are treated as “foreign enterprises” only if foreign investors directly own and/or indirectly own equity through an FIE.

Vietnamese law provides the following forms of direct investment:

- the establishment of a business organisation;
- a capital contribution or purchase of shares or stakes;
- the execution of an investment project;
- an investment in the form of a business co-operation contract; and
- new forms of investment and types of business organisations prescribed by government regulations.

Enterprises can be set up in the form of a limited liability company, a joint stock company, a partnership company or a private company. However, investors usually prefer limited liability companies and joint stock companies. In order to establish a company in Vietnam, a foreign investor must obtain an enterprise registration certificate (ERC) and an investment registration certificate (IRC).

In some cases, in order to make a capital contribution or a purchase of shares or stakes, a foreign investor must register for such. Accordingly, foreign investors must register with and obtain the approval of the provincial Department of Planning and Investment for share acquisitions (M&A Approval).

Regarding business lines, Vietnamese law provides a list of business lines in which investment is prohibited and a list of business lines in which investment is subject to conditions. For foreign investors, the investment is also subject to any international or bilateral treaties to which Vietnam is party, including Vietnam's WTO commitments. Accordingly, Vietnam's WTO commitments provide some conditions regarding the capital ownership ratio of foreign investors, investment forms, the scope of investment activities and the conditions for Vietnamese partners participating in investment activities.

Foreign investors can also conduct indirect/portfolio investments in the following forms:

- by providing convertible loans;
- by buying shares in a Vietnamese enterprise without directly participating in the management and administration of the business;
- by buying and selling bonds and other securities on the Vietnamese stock market;
- by buying and selling other valuable papers in Vietnamese dong;
- through an investment trust in Vietnamese dong through a fund management company or securities company; and
- through a capital contribution or transfer of contributed capital of foreign investors (not directly involved in management) in securities investment funds and fund management companies.

#### **4.4 Restrictions on Payments Abroad or Repatriation of Capital**

Foreign investors may transfer the following profits abroad:

- investment capital and investment liquidations;
- income from business investment activities; and
- money and other assets legally owned by the investor.

Profits can be transferred abroad annually or after the end of investment activities in Vietnam. The transfer is subject to some conditions provided by law, including:

- the fulfilment of financial obligations to the State of Vietnam;
- the submission of audited financial statements;
- corporate income tax finalisation declarations and fulfilment of all tax obligations; and

- notification to the tax authority of the profits transfer abroad.

Profits transferred from Vietnam to foreign countries can be in cash or in kind. The transfer abroad of profits in cash must comply with some conditions, as follows:

- it must be conducted through the direct investment capital account (DICA);
- if the DICA has been closed, foreign investors may use a foreign currency payment account or a VND payment account to transfer capital and profits abroad; and
- the transfer of profits abroad in kind must comply with the provisions of the law on the import and export of goods.

#### **4.5 Offshore Foreign Currency Accounts**

A project company is permitted to maintain offshore foreign currency accounts, subject to approval and licensing from the SBV. The opening and use of offshore foreign currency accounts must strictly follow the regulations provided in such licence. An offshore foreign currency account can be opened and used for the following purposes:

- to meet the conditions for the grant of licences for the establishment and operation of branches and representative offices in accordance with the laws of the host countries;
- to serve the operation of overseas branches and representative offices;
- to repay foreign loans to foreign lenders;
- to fulfil commitments with foreign partners if the company is eligible for particularly important investment under government programmes or is making investments in the form of a PPP; and
- to fulfil commitments, agreements and contracts with foreign partners, including con-

tracts on overseas construction, contracts on ship purchase and sale with foreign partners, and other commitments, agreements or contracts.

## 5. STRUCTURING AND DOCUMENTATION CONSIDERATIONS

### 5.1 Registering or Filing Financing of Project Agreements

Financing or project agreements are not required to be registered in order to be valid or enforceable under current Vietnam laws. However, in the case of foreign loans, not all projects in Vietnam are allowed to raise capital abroad: only projects with the purpose of financing specified in Article 5 of Circular 12/2014/TT-NHNN are allowed to take foreign loans.

Furthermore, pursuant to Article 9 of Circular 03/2016/TT-NHNN, the mid-term and long-term foreign loan, the renewed short-term loan with more than one year of maturity term and the short-term loan that is not covered by any loan renewal contract but remains the outstanding principal at the date in a full calendar year from the date of the first fund withdrawal must be registered with the SBV, except to the extent that borrowers have already fulfilled their debt obligations within ten days from the date of the first fund withdrawal.

### 5.2 Licence Requirements

Under Vietnam laws, foreign entities (ie, entities incorporated in a foreign country) are not currently entitled to use land or natural resources, nor to undertake any business in relation to land or natural resources. If a foreign entity intends to use land or conduct business in regard to land, it must establish a subsidiary in Vietnam. This foreign-invested enterprise may be allocated land with a land use levy to implement invest-

ment projects for the construction of houses for sale or for a combination of sale and lease, or may be leased land to implement investment projects in agriculture, forestry, aquaculture or salt production, for non-agricultural business and production purposes, for the construction of public facilities for commercial purpose, and for the implementation of investment projects on houses for lease.

A foreign-invested enterprise has a narrower scope of business activities in relation to real estate trading in Vietnam than a local enterprise. Under Article 11 of the Law on Trading of Real Estate 2014, a foreign-invested enterprise is not required to obtain any licence to conduct such business in Vietnam, except for the operation licence when establishing.

### 5.3 Agent and Trust Concepts

The concepts of agent and trust are not officially recognised under Vietnam law, but are introduced and endorsed under syndication lending. Under SBV Circular 42/2011/TT-NHNN on syndication loans, the loan participants may jointly appoint a bank to hold trust of security assets for all participants. This becomes the premise for many transactions in Vietnam.

### 5.4 Competing Security Interests

“Subordination agreements” and “senior debt” are stipulated under Vietnam law via the priority of debt payment; in particular, the lender may request the borrower to register security transactions and, accordingly, such transactions/mortgaged assets are registered first and will be paid first when the borrower falls into an insolvency event.

Subject to parties’ agreement, subordination may be applied for a loan in Vietnam. However, when a company fails into insolvency, the sequence of the redistribution of assets will comply with Articles 53 and 54 of the Law

on Bankruptcy 2014. Accordingly, the secured debts will be prioritised for repayment before the unsecured debts. Therefore, even if the parties enter into a subordination agreement, if other loans are registered for the security transaction, as mentioned above, the effectiveness of this agreement may be challenged.

Therefore, the only method to retain the effectiveness of contractual subordination provisions is registering this subordination agreement for a security transaction under Vietnam laws at NRAST or DONRE, as the case may be.

### **5.5 Local Law Requirements**

“Projects” and “companies” are governed separately under Vietnam law; in particular, a project is governed by the Law on Investment while a company is regulated in the Law on Enterprise. One company may have several projects. Vietnamese law does not directly stipulate which legal form the project company must adopt. Subject to the project’s activities, the company may be required to satisfy certain conditions. For instance, if the foreign investor intends to set up a subsidiary in Vietnam to conduct advertising activity, the project company must be organised as a multi-member liability company or a joint stock company because, according to the Schedule of Specific Commitments in Services, a foreign investor is only entitled to establish a joint venture to conduct advertising activity in Vietnam.

Project companies are mainly established as limited liability companies. They are able to borrow money from banks or issue bonds under Decree 153/2020/ND-CP. Decree 153 only grants corporate bond purchase permits to professional securities investors (as prescribed under the securities law provisions) and strategic investors, on a case-by-case basis, to participate in the purchase of corporate bonds. This is one of the government’s efforts to minimise the risks

of the mass issuance of corporate bonds, as in the past year for investors (especially individual investors) and the economy. Vietnam regulators are expected to provide a mechanism for Vietnam parent companies to provide guarantees to foreign lenders without seeking approval from the Prime Minister, making the issuance of international bonds more feasible.

## **6. BANKRUPTCY AND INSOLVENCY**

### **6.1 Company Reorganisation Procedures**

Under the Law on Bankruptcy 2014, a company will be regarded as falling into the state of insolvency if it is unable to pay its debts within three months of the debts’ due dates. The procedure for bankruptcy begins with the application for initiation of the bankruptcy process, and shall produce two possible outcomes:

- the company is declared bankrupt; or
- the company recovers and is considered solvent.

The second outcome ensues upon the occurrence of the following:

- the creditors’ conference – one of the most critical stages in the bankruptcy procedure, to assess the viability of the survival of the company and successfully pass a resolution to apply a rescue procedure to resume business operations (Rescue Plan); and
- the court issues a decision to recognise the Rescue Plan; and
- the company fulfils the Rescue Plan.

Failure to agree upon or devise the Rescue Plan or inability to implement such Rescue Plan within the statute of limitations shall result in the company being declared bankrupt.

## Bankruptcy Procedure

The primary statutory steps of a bankruptcy procedure are as follows.

- Step 1: application for the initiation of a bankruptcy procedure.
- Step 2: the court receives the application, checks and handles the application.
- Step 3: the court issues a decision initiating the bankruptcy procedure and appoints the bankruptcy trustee.
- Step 4: the bankruptcy trustee makes and publishes a list of creditors, makes and publishes a list of debtors, and co-ordinates in conducting a stocktaking and determining the value of the company's property.
- Step 5: the creditors' conference is summoned by the judges.
- Step 6: the creditors' conference is held, and a resolution is passed specifying one of three proposals:
  - (a) suspension of the bankruptcy procedure;
  - (b) applying the Rescue Plan; or
  - (c) declaring the company bankrupt.
- Step 7: the court sends the resolution to the competent procuracy department and the relevant parties for the implementation thereof.

## Content of Rescue Plan

The Rescue Plan may include the following solutions as provided by the law:

- capital mobilisation;
- debt relief and debt moratorium;
- changing products and goods;
- technological innovation;
- reorganisation of the governing board, and merging or separating the production division;
- selling shares to the creditors and others;
- selling or lending the assets; and
- other solutions under the regulations of the law.

## 6.2 Impact of Insolvency Process

Lenders' rights to enforce their loans or any security/ guarantee are restricted upon the commencement of the insolvency process, and the restriction extension varies depending on the type of debt.

### Enforcement for Lenders of Secured Debts

Lenders of secured debts may or may not enforce the secured assets to recover their debt subject to the court's decision and the resolution of the creditors' conference. If the creditors' meeting passes a resolution on a Rescue Plan that includes the usage of the secured assets for the rescue procedure, and if the creditors of such debts agree to such arrangement, the secured assets shall be contributed to the recovery of the debtor. Only if the secured assets are likely to be damaged or dramatically devalued, or if the secured assets are not used for the implementation of the Rescue Plan, may the lender enforce its loan, but such enforcement shall still be subject to the decision of the judges.

However, if the value of the collateral is not enough to cover the debt, the remaining value of the debt shall be paid during the liquidation of the assets, with low priority (see **6.3 Priority of Creditors**).

### Enforcement for Lenders of Unsecured Debts

Right after the commencement of the bankruptcy process, the following activities are prohibited for the company:

- paying the unsecured debts (with certain exceptions); and
- making an unsecured debt into a secured or partly secured debt with collateral that is an asset of the company.

The enforcement of the unsecured debt shall be made during the liquidation of the assets, with low priority (see **6.3 Priority of Creditors**).

### 6.3 Priority of Creditors

Under the law of Vietnam, the priority for debt settlement on a company's insolvency is as follows:

- secured debts under security contracts (which are initiated prior to the court's handling of the application for the initiation of the bankruptcy process);
- the cost of bankruptcy;
- unpaid salaries, severance pay, social insurance, medical insurance for employees and other benefits under the executed labour contracts and collective bargaining agreement;
- debts incurred after initiating the bankruptcy procedure for the purpose of resuming the company's business operations;
- financial obligations to the state;
- unsecured debts payable to creditors in the list of creditors; and
- unpaid secured debt because the value of the collateral is insufficient to cover such debt.

### 6.4 Risk Areas for Lenders

#### Non-recoverable Debts

If the value of the secured assets is not sufficient to cover all the debt, the lender shall have to wait until the asset liquidation stage when the court issues the declaration of bankruptcy to know whether or not the outstanding debt is recoverable. There are risks that the outstanding debt cannot be recovered, as the order of payment for such amount is pushed after certain other financial obligations. The same risks are applied to the unsecured debt.

#### Invalid Transactions Entered into before the Initiation of the Bankruptcy Procedure

Under the law, certain transactions made by the insolvent company within the six months prior to the court deciding to initiate the bankruptcy procedure shall be deemed invalid. These transactions include but are not limited to the conversion of unsecured debts into wholly or partly

secured debts using assets of the company, and the payment or offsetting of debts that are undue or offsetting the amount larger than the due debts. Such regulation puts a restraint on the method and timing for creditors to settle their debts and recoup their losses, even if the creditors identify the insolvency risk of the borrower at an early stage.

### 6.5 Entities Excluded from Bankruptcy Proceedings

Under the Vietnamese law on bankruptcy, a bankruptcy proceeding applies to all types of enterprises, including credit institutions, co-operatives and co-operative unions based in the territory of Vietnam.

## 7. INSURANCES

### 7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

Insurance companies provide no restrictions or controls on project assets under insurance policies used in relation to project finance.

Under the Law on Insurance Business 2000 (amended in 2010), organisations and individuals that have insurance needs may only participate in insurance through insurance companies operating in Vietnam. Foreign-invested enterprises in Vietnam with insurance needs may choose to participate in insurance through insurance companies operating in Vietnam may or use cross-border insurance services.

If cross-border insurance services are used, the following conditions must be met:

- the country where the foreign insurance company's headquarter is located has signed international treaties on trade, including an agreement on the provision of cross-border insurance services in Vietnam;

- more than 40% of the capital of a foreign-invested enterprise that intends to purchase insurance is owned by foreign investors;
- the foreign insurance company has acquired a licence(s) from the state authorities managing overseas insurance in its home country to operate cross-border insurance services in Vietnam, as well as evidence of having legally operated for at least ten years before its provision of cross-border insurance services in Vietnam;
- the foreign insurance company has written permission(s) and confirmation(s) from the state authorities managing overseas insurance in its home country to provide cross-border insurance services in Vietnam, and that it has not violated any laws on insurance business and insurance brokerage and other foreign regulations in the three consecutive years prior to the year that cross-border services are provided in Vietnam;
- the foreign insurance company has assets worth at least USD2 billion in the fiscal year prior to the year that cross-border insurance services are provided in Vietnam;
- the foreign insurance company is ranked at least “BBB” by Standard & Poor’s or Fitch, “B++” by A.M. Best or “Baal” by Moody’s, or has earned an equivalent rank from other experienced ranking organisations in the fiscal year prior to the year that cross-border insurance services are provided in Vietnam;
- the foreign insurance company has carried out profitable business for the three years immediately preceding the year that cross-border insurance services are provided in Vietnam;
- the foreign insurance company must deposit at least VND100 billion in a bank licensed to operate in Vietnam and have a letter of guarantee from such bank that it undertakes to make payments when liabilities under cross-border insurance contracts in Vietnam exceed the mandatory deposit;

- the foreign insurance company must implement a procedure of claim settlement, which specifies the formalities, steps and time for settling damages and claims for insurance buyers in Vietnam; and
- the foreign insurance company shall provide cross-border insurance services in Vietnam through an insurance broker enterprise that is licensed to operate in Vietnam.

## 7.2 Foreign Creditors

There are no restrictions on foreign creditors receiving proceeds from insurance policies over project assets.

## 8. TAX

### 8.1 Withholding Tax

Interest payments are subject to withholding tax of 5% unless the country of the lender has entered into a tax treaty with Vietnam, in which case the withholding tax may be exempted or reduced in accordance with such tax treaty.

### 8.2 Other Taxes, Duties, Charges

Vietnam laws do not require other taxes or charges to be levied on foreign loan-making to entities incorporated in the territory. The withholding tax of 5% applies to any costs and fees payable by the borrower to the foreign creditor in accordance with the contract they have entered into.

### 8.3 Limits to the Amount of Interest Charged

The Civil Code 2015 provides a cap for interest rates, with a maximum ratio of 20% per year. However, the Civil Code 2015 also states that, if any other law regulates otherwise, such provision shall prevail. In fact, the SBV issued Circular No 12/2014/TT-NHNN to regulate that the foreign creditor, the borrower and related parties may agree on foreign loan expense, unless there

is another decision of the Governor of the State Bank on the application of foreign loan expense requirements. Foreign loan expense means the total expense expressed as an annual percentage of the loan, including the interest and other expenses that the borrower is obliged to pay to the creditor, the guarantor, insurers, agents and relevant parties. There has not yet been any decision from the Governor of the State Bank on the foreign loan expense requirements, so it is understood that there is no limit on the amount of interest charged.

## **9. APPLICABLE LAW**

### **9.1 Project Agreements**

The applicable law governing project agreements depends on the jurisdiction of the parties. Vietnamese law is usually chosen by Vietnamese parties, while foreign parties prefer the laws of their jurisdiction, which may be English, Chinese, Japanese or Singaporean, for example. However, it is a condition under Vietnamese law that the application of foreign laws shall not be in breach of any principles of Vietnamese law.

For a PPP project, under Vietnamese law, the project agreement and other relevant documents signed between a Vietnamese state authority and a PPP project investor or enterprise shall be governed by Vietnamese law.

### **9.2 Financing Agreements**

For financing agreements, the governing law is subject to the bargaining power between the parties and normally determined by the lender's preference. Vietnamese law usually governs loan provided by Vietnamese lenders. Foreign lenders prefer English law, especially international banks; in very limited cases, financing agreements are governed by the law of Hong Kong or Singapore.

### **9.3 Domestic Laws**

In Vietnam, agreements between the project company and an off-taker that is a state company are usually governed by Vietnamese law, especially for oil and gas or power generation projects. Security agreements over immovable assets are also governed by Vietnamese law.

**LNT & Partners** is a market-leading full-service, independent law firm based in Vietnam, which focuses on advisory and transactional work in the areas of corporate and M&A, real estate, infrastructure, and banking and finance, as well as complex and high-profile litigation and arbitration matters. The firm is one of the most prominent in Vietnam, having represented a wide range of multinational and domestic clients, including Fortune Global 500 and well-known Vietnamese listed companies. LNT has

set a high benchmark for providing highly innovative and effective legal services, and is noted for its continued success in negotiating complex deals and resolving high-stakes disputes. LNT maintains a highly qualified team of more than 70 professionals with international experience and connections, offering a diverse legal and business experience, and standing out in the market for its commitment to providing pragmatic solutions that bridge the gap between the law and commercial reality.

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