

A guide to cross-border financing in Vietnam

Hung Quang Nguyen of law firm **VILAF** provides a practical guide to cross-border financing in Vietnam, including recent transaction trends, regulatory developments and the latest in offshore financing structures

Market overview

In Vietnam, cross-border financing normally takes place by way of foreign lenders making loans to onshore borrowers only. It is extremely rare (and relatively difficult due to regulatory reasons) for onshore banks to provide financing to offshore entities or individuals. Such outward loans can largely be ignored as a matter of practice.

In terms of structuring, similar to other jurisdictions, financing into Vietnam takes the form of either APLMA-style syndicated or bilateral loans. The number of bilateral loans seem to far exceed syndicated ones, given that there is still a trend for banks in some jurisdictions to finance the investment of foreign investors from the same jurisdiction in Vietnam.

Not surprisingly, syndicated loans have taken on larger facilities and have played an especially important role in project financing. Recently, several major infrastructure projects have achieved financial close with syndications in amount up to \$1 billion. Smaller syndications have involved export credit agencies (ECAs) from Europe, China and the US.

Since land, buildings and other assets affixed on land are generally not available as security in favour of foreign lenders, most syndicated loans have had to rely on corporate guarantees from borrowers' parents, other moveable assets (notably shares) or both of these. We also notice that in some recent transactions, lenders have tried to use certain creative structures to indirectly have access to security over land use rights and buildings in Vietnam.

In terms of lenders, as noted above, the trend is that bilateral loans come more from lenders from the same jurisdiction as the borrower. As a result, Japanese banks tend to lend more to Japan-invested companies in Vietnam. The same can be said of Chinese banks as well, and so on. In relation to syndicated loans, we think the major Japanese banks (the likes of Sumitomo Mitsui Banking Corporation – SMBC and Mitsubishi UFJ Financial Group – MUFG), Standard



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About the author

Hung Quang Nguyen is a partner in VILAF who specialises in banking and finance, capital markets, corporate and commercial transactions.

Hung has been a recognised leading lawyer in banking and finance and capital markets by various international legal magazines, such as the International Who's Who of Capital Markets Lawyers, IFLR1000, Legal500, Chambers & Partners and AsiaLaw. Hung's significant transactions include: the \$800 million financing by a group of Korean financial institutions for the Keangnam Landmark Tower; the first domestic syndication of \$225 million by Vietnamese banks led by PVFC for an energy offshore investment project; the \$180 million refinancing of the Bitexco Financial Tower; and the acquisition of Prudential Vietnam Finance Company by Shinhan Card. Hung has also worked on the majority of corporate bond issues guaranteed by the ADB's Credit Guarantee and Investment Facility (CGIF), as well as recent domestic bond issues by the Vingroup JSC and its subsidiaries, which have a total value of over \$1 billion.

Peers say that Hung is "skilled at taking on finance work" and that he is "an adept handler of capital markets matters".

market. Government lenders such as the Japan Bank for International Cooperation (JBIC) and China Development Bank (CDB) are also very active in financing major infrastructure projects developed by investors from Japan and China, respectively.

Recent trends

During the last 12 months or so, there has been an increase in interest from foreign banks in financing acquisitions of shares listed on Vietnam's stock market. Various banks have successfully tried alternative structures, in order to take effective security over the listed shares subject to the acquisition. In addition, such financing would normally benefit from an additional offshore security over shares in the offshore borrower.

Another notable trend in the last year is that the refinancing of real estate projects has received more attention from offshore lenders. We experienced a number of attempted syndications to re-finance existing onshore loans, although some of which could not complete due to various reasons.

There has been no material development in the structure of the banking sector in Vietnam in the last few years. A trend worth noting is the continued interest from foreign institutions in expanding their local presence into fully fledged subsidiaries. Examples of this trend are the recent licensing of the wholly owned subsidiaries of UOB, Malaysia's CIMB Group and Citibank (although the latter one has not officially commenced operations for its subsidiary), as well as the acquisition by Shinhan Bank of the retail operations of ANZ Vietnam.

Financing structures

Recent transactions

Towards the end of 2018, Novaland, a major listed property developer in Vietnam, successfully closed the first tranche of a share-backed financing worth \$60 million. Although the amount of the loan was not very significant, it represented a new structure which allows foreign lenders to have an effective mortgage over shares listed on the stock exchange to secure the financing. Prior to this transaction, there were hesitations from foreign lenders for this type of financing since

local regulations have certain obstacles which could pose significant risks on the enforcement of a mortgage or pledge over listed securities. Novaland's transaction is the first major syndicated deal which used a creative structure to overcome these obstacles and it may well set a precedent for future similar transactions.

Another recent notable transaction is the financing of the acquisition of Thanh Thanh Cong Education Joint Stock Company, a company under the ownership of a famous business tycoon. This transaction was worth \$100 million and it is notable because for the first time, an onshore pledge over shares in Vietnam is used to secured a loan entirely offshore (between an offshore lender and an offshore borrower).

Cross-border developments

There have been no significant developments for cross-border lending, although there have been some alternative structures devised to give effect to better enforcement certainty in relation to onshore security assets.

Legislation and policy

Key legislation and regulatory bodies

In Vietnam, cross-border financing is regulated by the following key legislation:

- Decree 219/2013/ND-CP dated December 26 2013 of the Government on management of enterprises' foreign loans and repayments which are not guaranteed by the Government;
- Circular 12/2014/TT-NHNN dated March 31 2014 of the State Bank of Vietnam (SBV) on the requirements for enterprises' foreign loans which are not guaranteed by the Government; and
- Circular 03/2016/TT-NHNN dated February 26 2016 of the SBV guiding the regulations on foreign exchange control in respect of foreign loans and repayments of foreign loans.

On an annual basis, the Prime Minister is responsible for approving the overall limits on the total amount of medium- and long-term foreign loans into Vietnam. The foreign loan quota for 2018 was set at \$5 billion, although the 2019 quota has not been published. The SBV ensures compliance with the limits set,

Chartered Bank, Shinhan Bank, United Overseas Bank (UOB) and Qatar National Bank seem to be the most active in the

while processing the registration of the foreign loans. In particular, medium- and long-term foreign loans must be registered with the SBV within 30 days of the signing date of the loan agreement. A medium- or long-term foreign loan is a foreign loan with a term of more than 12 months, which is measured from the date of initial drawdown to repayment of the entire amount outstanding under the loan.

Changes

There have been no recent changes to the applicable regulations and there is no material pending legal or policy framework that may impact cross-border financing.

Market norms

Common mistakes

One common misunderstanding that international lenders have is that most think a local borrower can receive financing for any purpose. In fact, Vietnamese law only permits a local company to borrow from offshore for the purposes of: (i) financing its business or investment projects; or (ii) re-financing existing offshore loans with the condition that the new loan must be more economical than the original [re-financed] loan. As a result, many proposed cross-border financing transactions funding investments in the stock market or the re-financing of existing onshore debt need certain alternative structures to overcome the limits set out in the regulations.

Another common misconception is that borrowers are familiar with international standard documentation. This is not true for a number of state-owned borrowers, although nowadays local companies are much more familiar to APLMA style loan documents.

One particular area that we find international lenders seem to have overlooked is the way they impose the various financial ratios on borrowers. Since Vietnamese corporate accounting and financial operations may not conform to international standards, certain calculations may be difficult to achieve. International bankers should carefully analyse well in advance the market's common issues with cross-border financing and prepare with the potential borrower the alternative proposals to achieve the finance's

objectives. This will save a lot of time during the documentation stage and could have also saved all parties' costs if no alternative is acceptable to both sides.

Taking security over different classes of assets

The law classifies assets into immovable assets (for example, land, buildings, construction facilities and other assets attached to land) and movable assets (assets other than immovable assets). Generally, offshore entities are not allowed to take security over immovable assets in Vietnam. In fact, organisations and economic entities in Vietnam can only provide security over immovable assets with onshore authorised credit institutions. Cross-border financings may benefit from security over things such as machinery and equipment, listed securities (although with certain limitations on enforcement that lenders should take note of), account receivables, bank accounts and equity interest (including shares in Vietnamese companies).

Practical considerations

Downstream, upstream and cross-stream guarantees

Under Vietnamese law, a public company is prohibited from granting a guarantee to shareholders and certain types of affiliates. An onshore bank may only offer a guarantee for an offshore borrower's obligations in the limited situations permitted under the law. Particularly, the lender or creditor must be a resident in Vietnam (for example, an onshore company) or the offshore borrower must have made a 100% cash deposit as security for the guarantee. On the other hand, a non-bank entity cannot guarantee the obligations of any offshore borrower, unless approved by the Prime Minister (with such approval being highly unlikely in most circumstances).

Restructuring or bankruptcy

Before declaring a company bankrupt, a business rehabilitation for the company might be conducted in accordance with the resolution of a creditors' conference, which

would delay the enforcement of the loans by the creditors. If the business is unable to be rehabilitated, the liquidation procedure is opened. Vietnamese law is, however, not clear on the enforcement of secured assets for secured creditors after the commencement of bankruptcy proceedings. Still, it can be interpreted from the law that the secured creditors will receive the repayment of the loan after the payment of: (i) bankruptcy fee; (ii) the unpaid salary, social insurance and other benefits for employees; and (iii) the debt for business rehabilitation after the opening of bankruptcy procedure. One particular issue of note is that if the loan is guaranteed by a third party, the creditor is not allowed to go after the bankrupt borrower and is forced to claim the debt against the guarantor only.

In the case of a restructuring, the acquiring company will inherit the rights and obligations of the acquired company, including all its debt; the splitting companies would be jointly responsible for the debts of the original company.

Foreign debt quotas

As mentioned above, overall limits on the total amount of foreign loans are approved by the Prime Minister. Separate limits apply to government guaranteed and non-government guaranteed foreign loans.

In addition to the overall limits, individual limits may apply to a borrower. Foreign invested companies (FICs) must register both equity capital and total investment capital so it can be recorded in their respective investment certificates/investment registration certificates. Once these figures are registered, they operate as limitations on the loans that a FIC can obtain. In fact, when a FIC registers a medium- or long-term loan with the SBV, if the registered amount means that its total investment capital exceeds the registered total investment capital, the SBV will reject the registration.

Non-performing loans

NPLs in Vietnam's banking sector reached a dangerously high level a few years ago, especially in the real estate sector. The Government has tried to contain and reduce NPLs using various measures, including the establishment of a Government owned asset-

management company (VAMC) and pilot legislation to accelerate the disposal of NPLs and assets securing NPLs. However, these measures have not been seen as a success, given that the VAMC itself cannot make NPLs evaporate while the legal and regulatory frameworks are still insufficient to encourage large number of investors (especially the framework is still

unfavourable to foreign lenders) to take part in the disposal of NPLs.

Outlook

We believe that more and more cross-border financing for share acquisitions will conclude in the next 12 months, given that this area

has been much underfinanced so far. We also think that interest in real estate financing and renewable project financing will be on the rise, since domestic banks have used up their limits for real estate, and renewable energy remains a sector that has been receiving the Government's rising support with keen interest from investors over the past year or so.