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# Project Finance

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# VIETNAM

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## LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law and Practice

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VILAF has ten partners and over 50 lawyers, and is one of the oldest and largest independent business law firms in Vietnam. The firm has represented multinational corporations, financial institutions, international organisations and major Vietnamese corporate clients in many of the most

complex and largest transactions and disputes in the country involving sophisticated legal, political and diplomatic considerations. It stands out for its work in the power, renewable energy, and oil and gas sectors, especially BOT power projects/project finance.

## Authors



**Tran Tuan Phong** is a founder and senior partner at the firm, and the head of the Energy/Infrastructure Projects Practice. He is a top-tier lawyer and “well-known for business law”. He has advised international sponsors and lenders on almost all BOT and high-profile infrastructure projects in Vietnam.



**Nguyen Vu Quynh Lam** is a partner at VILAF and focuses on power, energy and infrastructure projects, as well as corporate/M&A matters. He has notably been involved in the development and/or financing of several BOT projects.

## 1. Project Finance Panorama

### 1.1 Recent History and Expected Developments

Project financing in Vietnam has thus far focused on the energy and infrastructure sectors. Major power projects have generally been implemented on a Build-Operate-Transfer (BOT) basis, as the BOT legal scheme in Vietnam is more developed than other forms of investment, such as Build-Transfer-Operate (BTO) or Build-Transfer (BT), etc.

As Vietnam introduced new regulations on renewable energy in 2017 with a promoted mechanism, foreign sponsors and financiers have express interests in developing and financing in these sectors. However, there have been some concerns regarding certain bankability issues of these projects, including the template power purchase agreement with limited room for negotiation.

There is no single or consolidated legal instrument that specifically governs project finance in Vietnam. Rather, it would be subject to different sets of legislation, including investment laws, enterprise laws, tax laws, foreign exchange control, loan registration, etc, and may be subject to amendment from time to time. The sponsors and financiers should take these factors into account when considering investments.

### 1.2 Institutions Typically Acting as Sponsors and Lenders

Generally speaking, sponsors can be foreign or local companies, or individuals who carry out investment activities. In practice, the sponsors of investment projects in major sectors (eg, infrastructure or energy) are normally organisations with appropriate financial and technical capabilities.

On the other hand, lenders are credit institutions with appropriate financial and credit capacity, including foreign credit institutions (and their subsidiaries or branches in Vietnam) and local commercial banks.

### 1.3 Public-private Partnership Transactions

In Vietnam, the public-private partnership (“PPP”) is a form of investment on a contractual basis among the competent State authorities on one side, and the sponsors and the project company on the other side using the following contracts, among others: Build-Operate-Transfer (BOT); Build-Transfer-Operate (BTO); Build-Transfer (BT); Build-Own-Operate (BOO); Build-Transfer-Lease (BTL); Build-Lease-Transfer (BLT); and Operate & Management (O&M). PPPs are mainly used for infrastructure projects or the provision of public services.

PPPs are subject to certain key legislation, including the Law on Investment 2014, the Tendering Law 2013 and the Law on Construction 2014 and their respective guiding and detailing legal instruments, including, in particular, Decree 63/2018/ND-CP dated 4 May 2018 of the Government on PPP investment.

Noteworthy points on the legal requirements for PPP projects include the following:

- *Project registration*: Different ways of investment are subject to different licensing processes. Depending on the sector, scope and impact of the project, an in-principle approval may be required from the National Assembly, the Prime Minister, or the provincial People’s Committee in the process of registering the project.
- *M&A approval*: A foreign investor who wishes to make a capital contribution into or purchase shares or equity capital in a Vietnamese company (a) that engages in a conditional business or (b) that will result in an increase of foreign ownership in such company to 51% or more must obtain an acquisition approval from the provincial Department of Planning and Investment, showing the satisfaction of investment conditions and specifying whether the foreign investors are qualified to make capital contributions or to purchase shares. In practice, the process may still be

required by the local licensing authority regardless of the above conditions not being met.

- *Master plans*: Generally speaking, investment projects must fall within the plans approved by the Government (referred to as “master plans”). In practice, master plans for certain industries or localities may not be available for foreign investors’ verification and consideration. In addition, such master plans may be subject to change from time to time. Therefore, foreign investors are advised to consult with their advisers on master plans when considering an investment.
- *Conditional sectors*: Vietnam reserves its sovereign right to restrict investment in sensitive fields (referred to as “conditional sectors”) by setting conditions for foreign investments, such as foreign ownership limitation, the form of investment and requirements of Vietnamese parties, etc. Foreign investors are advised to consult with their advisers on conditions applicable to conditional sectors.
- *Minimum capital requirements*: The charter capital of the project company must meet a certain percentage of the total investment capital for the project (eg, real estate development projects, power production projects, etc).

#### 1.4 Main Issues Considered When Structuring the Deal

Other issues that need to be considered when structuring a PPP project financing include the following:

- *Limited Government guarantee on foreign currency exchange*: The Government only guarantees the conversion of 30% of the VND revenue of the project into USD. In recent practice, the State Bank of Vietnam may agree to “assist” the conversion of the remaining VND revenue into USD.
- *Narrower scope of Ministry of Justice (“MOJ”) legal opinion*: Effective from 15 July 2015, the MOJ only issues legal opinion on the legality of the project documents to which the State, the Government or a State authority of Vietnam is a party. This means that the documents to which a State-owned enterprise is a party (eg, the power purchase agreement with EVN, the coal supply agreement with Vinacomin or the gas supply agreement with PVN, etc) will not be covered in the MOJ legal opinion.
- *Security over land use right*: Immovable assets (including the land use right over the project site, and the immovable assets attached thereon) are among the critical assets of an investment project. In order to create security over the land use right, the project company needs to pay land rent to the State on a lump-sum basis in advance for the entire lease term. If the project company pays land rent on an annual basis, or is otherwise exempted from land rent, the project company can only create security over the immovable assets attached on the project site.
- *Total investment capital*: When registering an investment project, the sponsors will need to register, among other things, the equity capital and the total investment capital of the project. The sponsors will be required to contribute the registered equity capital, and the project company can ob-

tain loan capital not exceeding the difference between the total investment capital and the equity capital. In practice, the negotiation between the sponsors and the Government may take substantial time and be subject to unexpected delays. Therefore, the sponsors should take into account any potential contingencies when registering the total investment capital of the project.

- *Domestic coal reserve*: Generally speaking, the domestic coal reserve seems to be insufficient for the major projects that require coal (eg, thermal power plant). In recent practice, the sponsors have had to acquire coal from offshore. The sponsors and lenders should take this into account when considering the deal structure. In addition, the Government does not provide guarantees for the transport of coal.

## 2. Guarantees and Security

### 2.1 Assets Typically Available as Collateral to Lenders

Lenders normally require a comprehensive security package, which may include the following assets:

- equity interests in the project company;
- receivables and contractual rights under project contracts;
- equipment and other movable assets;
- immovable assets (ie, land use rights and assets attached to land); and
- bank accounts.

The collateral can include existing and future assets. Vietnamese laws recognise mortgages, pledges, liens, security deposits, performance securities, escrow accounts, guarantees, fidelity guarantees and title retentions. In the context of project financing, however, security is normally taken by way of mortgage, where the borrower retains possession over the secured assets.

For most types of assets, the security could be effective and binding on the contracting parties from the signing date of the relevant security documents, and security registration is only to ensure the priority right for lenders in case of enforcement. In such cases, security registration is conducted at the National Registration Agency for Secured Transactions of Vietnam (“NRAST”), and is normally quite straightforward. For some special assets, such as land use rights and assets attached to land, the security will only be effective and perfected upon registration with the relevant registrar, which is normally more complicated than the registration at NRAST. In addition, a security agreement with respect to immovable assets could be required to be notarised by a notary office at the province where the land is located.

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

Vietnamese law does not recognise the concept of a floating charge. A security interest over the whole business could be taken, although it is recommendable to take security over individual assets.

## 2.3 Costs Associated with Registering Collateral Security Interests

Security registration will be subject to a registration fee, although such fee is nominal. For security agreements that are subject to a notarisation requirement, the parties need to pay a notary fee, which is calculated based on the value of the relevant loan amount but capped at the amount of VND70 million (approximately USD3,000) per agreement.

## 2.4 Granting a Valid Security Interest

In general, collateral could be described generally, as long as it is identifiable. It is not necessary for each item of collateral to be individually identified under a security agreement.

## 2.5 Restrictions on the Grant of Security or Guarantees

A mortgage of land use rights and assets attached to land needs to be taken with a licensed credit institution in Vietnam, including branches of foreign banks in Vietnam. It is not permissible for offshore lenders to take security over land use rights or assets attached to land. In practice, a mortgage of land use rights and assets attached to land in favour of offshore lenders through the arrangement of an onshore security agent may be permitted for BOT power projects and important infrastructure projects. However, this should be seen as a special preferential treatment applied to promote these types of projects, rather than a recognition of the onshore security agent arrangement in general.

A guarantee by a Vietnamese entity or individual, except for a licensed credit institution in Vietnam, to secure obligations of an offshore entity will require approval from the Prime Minister.

## 2.6 Absence of Other Liens

As security interests are not centrally searchable, lenders mainly rely on appropriate representations and warranties given by the borrower to satisfy themselves with respect to the absence of other securities on their collateral. Lenders may conduct a search for information on security transactions on the online database of NRAFT, but this search is not exhaustive because not all security transactions are required to be registered, and not all types of security transaction are registered at NRAFT. For certain types of immovable assets, lenders may request information on security transactions over such assets at the relevant local land registration office.

## 2.7 Releasing Typical Forms of Security

A security interest could be released once the secured obligation(s) has been fulfilled, or in other cases as agreed

between the parties. If a security has been registered, deregistration of the security should be done so that the security is completely released.

## 3. Enforcement

### 3.1 Secured Lender Enforcing its Collateral

A secured lender could enforce its collateral if the borrower fails to perform or performs incorrectly the obligation when it falls due, or in other circumstances as agreed by the parties or as provided by law. Upon the occurrence of an enforcement event, enforcement of the security will generally be carried out in the following procedures:

- *Notice of enforcement:* The secured party must issue a notice of enforcement to the securing party and other registered secured parties (if the collateral has been secured in favour of the other party or parties).
- *Waiting period:* The secured party can only enforce the security after the expiry of the waiting period as agreed between the parties, but no less than seven days from the date of the notice of enforcement for moveable assets, or 15 days for immovable assets.
- *Handover of secured assets:* The secured party must give notice to the securing party or a third party who has possession of the secured assets for the purpose of enforcement. The notice must stipulate the period for the handover of the secured assets. Upon the expiry of the handover period, the secured party can seize the secured property itself or take legal action before a Vietnamese court. If the secured party chooses to seize the secured property, it must give reasonable prior notice to the party that has possession of the secured property, and the notice should specify a reasonable period.
- *Enforcement of secured assets:* The parties may agree on the following enforcement methods:
  - (a) sale of the secured property (by way of auction or private sale);
  - (b) takeover of the mortgaged property; or
  - (c) other enforcement methods as agreed by the parties.

If no agreement is made between the parties, the collateral shall be put up for auction.

In practice, lenders may have difficulty in requiring the securing party to hand over the secured assets to the secured party for enforcement. By law, the secured party may seek assistance from the People's Committee at the ward level or from the local police with respect to the handover of secured assets. However, it is difficult to obtain such assistance in practice.

It is also noteworthy that the transfer of equity interest may require approvals from competent authorities and appropriate corporate approvals, which makes the enforcement process more complicated. Also, the transfer of equity interest



to a foreign entity could be subject to a foreign ownership limit, as may be applicable to the business activities of the securing party. Meanwhile, the enforcement of listed shares could be subject to regulations on the stock exchange, such as a trading band in case of a transfer of listed shares.

### 3.2 Upholding Foreign Law

A foreign law could be chosen as the governing law of a contract if said contract involves a foreign element (eg, where at least one party is a foreign entity or where secured assets are located outside Vietnam). Certain types of contracts, however, are required to be governed by the laws of Vietnam even if they involve a foreign element, such as a security agreement with respect to immovable assets. In addition, the application of foreign law must not go against the “fundamental principles of the laws of Vietnam”, although there is currently no specific guidance on the meaning of this term.

Similarly, submission to a foreign jurisdiction is also permissible if the relevant matter involves a foreign element, except for certain matters over which Vietnamese courts have exclusive jurisdiction. Typically, a case involving immovable assets will be subject to the exclusive jurisdiction of Vietnamese courts.

In practice, Vietnamese judges are not familiar with foreign laws and it is also not common for Vietnamese courts to invite foreign law experts to advise on foreign law matters. Vietnamese judges may, therefore, at their sole discretion, apply Vietnamese law and ignore the parties’ choice of foreign law as the governing law.

### 3.3 Judgment Without Retrial

A judgment of a foreign court could be recognised and enforced in Vietnam in accordance with a judicial assistance treaty or based on the principle of reciprocity. To date, Vietnam has limitedly entered into around 20 judicial assistance treaties with other countries and territories. On the other hand, given the lack of clear criteria and procedure and the absence of a system to track which countries have granted Vietnam judicial assistance, the application of the reciprocal principle is difficult and challenging in practice, and subject to the sole discretion of the courts. As a matter of fact, there are limited cases where a judgment of a foreign court has been enforced in Vietnam on the grounds of the reciprocal principle.

Meanwhile, a foreign arbitral award could be recognised and enforced in Vietnam in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention). In principle, for the purpose of the recognition and enforcement of a foreign arbitral award, a Vietnamese court will not need to review the merits of the case. However, Vietnamese courts do have the power to refuse such recognition and enforcement on the grounds as prescribed in the New York Convention. In practice, the courts may review the merits of the case to

determine if the foreign arbitral award is contrary to the “fundamental principles of the laws of Vietnam”, which is sometimes a subjective ground for refusal of recognition and enforcement of a foreign arbitral award.

### 3.4 Other Matters Impacting a Foreign Lender’s Ability

There are no other major issues that might affect a foreign lender’s ability to enforce its rights under a loan or security agreement.

## 4. Foreign Investment

### 4.1 Restrictions on Foreign Lenders Granting Loans

Foreign lenders are allowed to grant loans to local borrowers, subject to certain conditions:

- *Borrowing purpose*
  - (a) Foreign lenders can only grant medium- or long-term loans (which are defined as loans with a tenure of more than one year) to finance (i) a business plan or an investment project of the borrower, or of an enterprise in which the borrower makes a direct investment; or (ii) a restructuring of the borrower’s existing offshore debts without increasing the borrowing expenses.
  - (b) A short-term loan (which is defined as a loan with a tenure of less than one year) must not be used for medium- or long-term use. In practice, regulators and banks in Vietnam understand that short-term offshore loans can only be used to finance working capital.
- *Borrowing limit*
  - (a) With respect to medium- or long-term loans, if the financed project of the borrower has been issued with an investment registration certificate (“IRC”), the balance of all medium- and long-term loans together with all other outstanding medium- and long-term loans (including outstanding domestic debt) of the borrower for such project must not exceed the difference between the total investment capital and the equity capital of the investment project as recorded in the relevant IRC.
  - (b) If the financed business plan or investment project of the borrower does not have an IRC, the balance of all medium- and long-term loans (including outstanding domestic debt) of the borrower must not exceed the total borrowing needs of such plan or project as approved by the competent authority.
  - (c) Short-term borrowing is not subject to this limit.
- *Registration*
  - (a) The borrower must register all medium- or long-term foreign loans with the State Bank of Vietnam

(“SBV”) within 30 days of the execution of the loan agreement but prior to the drawdown.

- (b) A short-term foreign loan that is extended beyond one year, or that is not extended but has outstanding principal, must be registered with the SBV within ten days of the date of one year after the first drawdown. It must be registered by the borrower within 30 days from the extended date or the date of one year after the first drawdown.

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

Foreign lenders can take security over all assets except for “immovable assets”, which include land use rights and assets attached to land. As a result, a foreign lender may appoint an onshore security agent to take security over immovable properties on its behalf. This practice is more common in BOT projects, as under BOT regulations investors have a right to mortgage assets attached to land use rights or authorised licensed credit agents (Official Letter No 1604 of Prime Minister dated 12 September 2011). In non-BOT projects, state authorities often take the view that, as foreign lenders themselves are not entitled to take securities over immovable assets, they could not authorise such non-existent right to an agent to act on their behalf.

There is no restriction on the granting of guarantees in favour of foreign lenders for the obligations of a borrower who is a resident in Vietnam.

### 4.3 Foreign Investment Regime

A foreign investor can invest in Vietnam in several ways, including:

- establishing a new enterprise, which can be either a wholly or partly foreign-owned enterprise;
- making a capital contribution to or purchasing shares or equity capital in Vietnamese companies;
- investing through a business co-operation contract between foreign investors and local investors; or
- investing in the form of a public-private partnership.

Similar to other countries, Vietnam reserves its sovereign right to limit foreign investment in certain sections by setting conditions on the following:

- foreign ownership limitation;
- form of investment and requirements of Vietnamese partners;
- other contents.

The basic foreign investment conditions are found in the Schedule of Specific Commitments in Services contained in Vietnam’s WTO accession package. Less restrictive conditions are available for foreign investors from countries that have regional co-operation arrangements with Vietnam, such as ASEAN countries under the ASEAN Economic

Community framework. Conditions for sectors that are not opened to foreign investment under treaties can also be found in domestic regulations.

### 4.4 Restrictions on Payments Abroad or Repatriation of Capital by Foreign Investors

Offshore investors are entitled to repatriate their legal profits earned from investment activities in Vietnam, which can be either in cash or in kind. The repatriation can be made annually (ie, at the end of each fiscal year following the audited financial statements), or upon the termination of investment activities in Vietnam.

The repatriation of profits shall be subject to the following conditions:

- the investors must have fulfilled their tax obligations (applicable to such profit portions) to the State of Vietnam;
- the audited financial statements and tax finalisation form of the Vietnamese company (where the investors made the investment) must have been submitted to the tax authority;
- there can be no accumulated loss for the same fiscal year as reflected in the audited financial statement of the Vietnamese company; and
- the investors (or the Vietnamese company if so authorised by the investors) must have served a written notice to the tax authority on profit repatriation.

Cash remittance must be made through the specialised investment account opened at authorised banks in Vietnam (ie, a direct investment capital account or an indirect investment capital account, as the case may be). The investor will be required to convert VND into foreign currency at a licensed credit institution (including a foreign bank’s branch) in Vietnam before repatriating its dividend offshore. The purchase and conversion of VND into foreign currency for repatriation will be subject to the availability of foreign currency at the repatriating bank.

As a matter of practice, offshore investors in a BOT project may enjoy certain special treatments provided in the Foreign Currency Regime under the project documents with the authorised state’s bodies, including the guarantee on the offshore remittance of foreign currency, convertibility of VND to foreign currency, and availability of foreign currency for conversion.

### 4.5 Maintenance of Offshore Foreign Currency Accounts

A project company can maintain offshore foreign currency accounts for the following purposes after it has obtained licences from the SBV to open such accounts (Article 3 of Circular 20/2015/TT-NHNN):

- establishing and operating offshore branches and representative offices;
- repaying foreign loans;



- performing commitments toward offshore parties if the project company is eligible for a particularly important investment under Government programmes, or if it invests in the form of public-private partnerships (PPP); and
- fulfilling commitments, agreements and contracts with foreign partners (including contracts on overseas construction, ship purchases and sales, and other commitments, agreements or contracts).

## 5. Structuring and Documentation Considerations

### 5.1 Registering or Filing Financing or Project Agreements

Generally speaking, project agreements do not need to be registered or filed with the Government authority, and do not need to comply with any local formality in order to be valid or enforceable, except that a power purchase agreement non-PPP project in particular sectors (eg, a solar or wind power project) needs to comply with a prescribed template, with limited room for negotiation.

There is no local formality applicable to financing documents. However, foreign loans with a term of more than 12 months will need to be registered with the State Bank of Vietnam as a condition for drawdown (this requirement also applies to foreign loans that have a term of 12 months or less if they have been extended so that the total term loan is more than 12 months). On the other hand, security agreements will need to be registered with the competent authority to ensure the enforceability thereof (eg, a security over land use rights should be registered with the local land authority; a security over other assets, such as equity or receivables, should be registered with the National Registration Agency of Secured Transaction (under the MOJ), etc).

### 5.2 Licence Required for Owning Land or Natural Resources

There is no private ownership of land in Vietnam. The land belongs to the people, represented by the State, and the State grants land use rights over certain land areas to a particular land user or for particular purposes (eg, to the project company to implement the investment project). The use right over a land area of the project company is evidenced by, among other things, a “certificate of land use right, house ownership and other assets attached on land”.

Similarly, there is no private ownership of natural resources in Vietnam, and the State will grant the right to explore or exploit the natural resource to the relevant companies by virtue of the relevant licence (eg, a mining licence is required for mining activities; water permits are required for the use of water, etc).

### 5.3 Recognition of Agent and Trust Concepts

Vietnamese laws are silent on the trust concept.

Vietnamese laws do not explicitly recognise the concept of security agency, and it is still uncertain whether the appointment of a local bank to take security for and on behalf of offshore lenders is valid. The main risk with this arrangement is the legal uncertainty of the authorisation of an offshore bank to take security over immovable assets for a local bank, as its security agent. Since offshore lenders are not allowed to take security over immovable assets, the courts of Vietnam may take the view that the local security agent is only allowed to take a security interest over assets to which the offshore lenders, being the principal, are legally permitted, which does not include immovable assets.

In practice, the Prime Minister has granted special approval on a case-by-case basis for the use of a local security agent to take security over immovable assets in the case of BOT power projects and important infrastructure projects, but this is a special preferential treatment for those sectors currently being promoted.

### 5.4 Rules Governing the Priority of Competing Security Interests

A security interest can be enforceable against a third party from the time when the security is registered or the secured party keeps or holds the secured assets. The priority of competing security interests is determined by the chronological order of the registration of each security. If a secured transaction is not registered, the priority of foreclosing security interests is determined based on the date of the security agreement.

The concept of contractual subordination is not explicitly recognised under Vietnamese law. Generally speaking, it could be expected that contractual subordination provisions will not be affected by the insolvency of a borrower in Vietnam, provided that such provisions are not contrary to the basic principles of Vietnamese law. With respect to project financing, inter-creditor agreements amongst the onshore lenders, offshore lenders and the borrower have been more common in recent practice.

### 5.5 Requirements of Local Law

A project company needs to be organised under Vietnamese law in order to implement an investment project in Vietnam. A project company is typically organised in the form of a limited liability company, although it can also be incorporated as a joint stock company.

## 6. Bankruptcy and Insolvency

### 6.1 Availability and Practice of Company Reorganisation Procedures

Under the law of Vietnam, insolvency is limited to two basic routes: reorganisation and liquidation.

The reorganisation process commences with a meeting of creditors before a judge approving the company's rehabilitation. Within 30 days of the creditor resolution, the enterprise is obliged to make a plan to rescue the business, detailing how it intends to repay its debt and restructure its business operations ("Rehabilitation Plan"). The Rehabilitation Plan must identify the measures to be taken for the recovery of the business operations and the conditions, time limit and plan for the payment of debts.

Once the Rehabilitation Plan has been prepared, it is submitted to the court for consideration and approval before being submitted to the creditors for approval, which requires a vote by a majority of unsecured creditors holding at least 65% of the total unsecured debts of the enterprise. Once the Rehabilitation Plan receives approval from both the court and the creditors, notice of the approval will be sent to all creditors and published in a newspaper, and the Rehabilitation Plan will become effective. Once the Rehabilitation Plan is approved, the parties will follow this plan to rehabilitate the company's status. If the Rehabilitation Plan is not approved, or if the parties fail to implement the approved plan, the insolvent entity will proceed to the liquidation process.

Unless otherwise approved by creditors, the Rehabilitation Plan must be implemented within three years of the date of the creditors' meeting that approved the Rehabilitation Plan.

### 6.2 Commencement of Insolvency Processes Impacting Lender's Rights

Under the law of Vietnam, the borrower may still continue its business operations following a decision to commence the insolvency process but must be subject to the supervision of the judge and the asset manager or asset management entity (Article 47.1 of Law on Bankruptcy 2014). Therefore, unless otherwise specified under the contract or subject to the decision of the judge or asset manager/asset management entity, the lender will continue to perform the existing loan agreements. After the date of the issuance of a decision to commence bankruptcy proceedings, interest on any debts shall continue to accrue in accordance with agreements, but payment of such accrued interest shall be temporarily suspended. If the insolvent entity is declared bankrupt, the interest on debts no longer accrues (Article 52 of Law on Bankruptcy 2014).

If security interests are used for the Rehabilitation Plan as approved by the relevant secured creditors, the handling of the secured assets will be in accordance with the resolution from the creditors' meeting. Where the security interests are not used for the Rehabilitation Plan, the assets will be disposed of according to the relevant security contract. With regard to any secured contract that is not due, the Court shall suspend the contracts and disposal of the secured debts before the declaration of bankruptcy.

If the assets put up as collateral are likely to be damaged or dramatically devalued, the asset manager and/or asset management entity shall request the judge to immediately dispose of such assets.

Pre-existing security interests shall be settled on the following principles:

- secured debts enforced before the Court receives the written request for the initiation of the bankruptcy process shall be paid by the collateral; and
- 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 of the insolvent entity. If the value of the collateral is higher than the debt, the difference shall be included in the value of the assets of the insolvent entity.

### 6.3 Payment Order to Creditors on a Company's Insolvency

Under the Law on Bankruptcy 2014, the assets of an entity that has been declared insolvent by the court will be distributed in the following order:

- bankruptcy charges;
- unpaid salary, severance allowances, social insurance, health insurance and other benefits of its employees;
- the debts arising after the commencement of bankruptcy proceedings in order to recover the company's business activities; and
- due financial obligations to the State, unsecured debts payable to the creditors named in the list of creditors, and secured debts that have not been settled because the value of the secured assets is not enough to pay the debts (Article 54.1 of the Bankruptcy Law 2014).

In addition, if the company in bankruptcy is a financial institution and has received financial support from the Government, including special loans, then such Government support may take precedence over all other liabilities of such company (Article 100 of the Bankruptcy Law 2014).

Under Article 53 of the Law on Bankruptcy 2014, all secured assets will be enforced to fulfil the obligations towards secured creditors before the Court declares an entity insolvent. Therefore, the secured creditors shall not be listed in the order for the distribution of assets after the Court declares the entity bankrupt.

Any remaining amount of the asset value after every payment prescribed above has been made shall belong to the relevant members of the co-operative, private members or shareholders etc, as the case may be.

If the value of the assets of the insolvent entity is not enough to make the payment as prescribed above, entities with the same priority shall be paid in proportion to the available funds against the debt.

## 6.4 Risk Areas for Lenders

### Ambiguity if a third-party security provider becomes insolvent

If a security provider becomes insolvent and the secured obligation is due, the enforcement of the secured asset shall be conducted in accordance with the Bankruptcy Law (Article 57.2(a) of Decree 163/2006). However, the Bankruptcy Law appears to primarily regulate the enforcement of assets owned by an insolvent company used to secure its own obligation, rather than the enforcement of assets owned by an insolvent company (ie, the security provider) used to secure the obligation of a third party (ie, the borrower). The rights of creditors could be affected if the security agreement does not clearly resolve such issue.

### Enforcement of secured assets

An automatic moratorium arises from the date a bankruptcy petition is accepted by the court (Article 41.3 of the Bankruptcy Law 2014), during which a secured creditor can only enforce the secured asset with the approval of the court. In practice, the process to obtain this approval can be time-consuming.

## 6.5 Entities Excluded from Bankruptcy Proceedings

The bankruptcy process under the Law on Bankruptcy is applied to all enterprises and co-operatives that are established and operated in accordance with the applicable Law on Enterprise of Vietnam.

## 7. Insurance

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

The project company is required to obtain a construction-all-risk policy for the construction of the project. Other customary policies are also acquired for the operation of the project.

Only a project company with foreign ownership of more than 49% can obtain non-life insurance from qualified offshore insurers that satisfy certain conditions, including the following:

- having minimum assets, a credit rating and a minimum deposit in Vietnam;
- being located in a country that has executed a treaty on cross-border insurance business with Vietnam; and
- providing the cross-border insurance business via an insurance broker that is licensed to operate in Vietnam.

In other cases, project companies must insure their business and assets with insurers that are established and licensed to operate in Vietnam.

There are no specific fees and/or taxes on insurance policies over project assets.

### 7.2 Payable Insurance Policies over Project Assets to Foreign Creditors

Foreign creditors can be named as beneficiaries under insurance policies if they are so designated by the insured party.

## 8. Tax

### 8.1 Payments to Lenders Subject to Withholding Tax

In general, interest payments and relevant fees payable to offshore lenders are subject to a withholding tax of 5%. Certain offshore lenders, such as central banks or banks owned by governments or French lenders, may be exempted from such withholding tax in accordance with tax treaties between Vietnam and the relevant country.

### 8.2 Taxes, Duties, Charges or Tax Considerations Relevant to Lenders

Other than the withholding tax, there are no taxes or duties applied to foreign lenders making loans to local companies.

### 8.3 Usury Laws or Other Rules Limiting the Amount of Interest Charged

There are no legal restrictions under Vietnamese law on the interest rate of loans made by foreign lenders to a Vietnamese borrower. In practice, however, if the interest rate is unreasonably high, the registration of the relevant foreign loan with the State Bank of Vietnam could be challenged.

## 9. Applicable Law

### 9.1 Law Typically Governing Project Agreements

Generally speaking, a transaction involving a foreign element (eg, if there is a foreign contracting party or if the assets subject to the contract are located offshore) may be governed by foreign law if the parties so agree (except for certain specific transactions that must be governed by Vietnamese laws, as discussed below).

With respect to project financing, the project agreements can be governed by foreign laws, with English law normally chosen by the parties. However, land lease contracts are governed by Vietnamese law, as they relate to immovable assets in Vietnam.

### 9.2 Law Typically Governing Financing Agreements

With respect to project financing, the financing agreements can be governed by foreign laws, with English law normally chosen by the parties. However, security agreements over immovable assets in Vietnam (if any) are governed by Vietnamese law.

## 9.3 Matters Typically Governed by Domestic Law

With respect to project financing, Vietnamese law will be applied to the following, among others:

- a power purchase agreement in non-PPP solar or wind power projects (which is subject to a prescribed template);
- the incorporation and operation of the project company;
- a contract governed by foreign law if the application of such foreign law violates the basic principles of Vietnamese law;
- contracts or agreements with respect to immovable assets located in Vietnam; and
- labour contracts that do not ensure the minimum rights of employees as provided for under Vietnamese law.

## 10. Islamic Finance

### 10.1 Development of Islamic Finance

There is no particular domestic policy in Vietnam regarding Islamic finance.

Generally speaking, for transactions that can be governed by foreign laws, if the parties choose Islamic law as the governing law, such transaction will follow the applicable rules of Islamic law to the extent these rules do not contradict the basic principles of Vietnamese law.

### 10.2 Regulatory and Tax Framework

As discussed above, there is no particular domestic policy in Vietnam regarding Islamic finance (including the issuance of sukuk and the practice of takaful insurance). Generally speaking, the regulatory and tax frameworks for the provision of Islamic finance are similar to those applicable to the provision of non-Islamic finance in Vietnam.

### 10.3 Business Requirements for Islamic Banks to be Authorised/Admitted

As discussed above, there is no particular domestic policy in Vietnam regarding Islamic finance.

The requirements for Islamic banks to be authorised or admitted to carry out business in Vietnam are similar to those that apply to non-Islamic banks. Generally speaking, a foreign credit institution (regardless of whether Islamic or non-Islamic) may operate in Vietnam as a representative office, a joint-venture bank, a wholly-owned subsidiary, a branch or a financing company. Subject to the form of the presence, specific requirements will apply – eg, minimum capital, operating licence, capacity/credibility of shareholders/owners, qualification of board directors and managers, organisational structure, etc.

The requirements for takaful operators to be admitted in Vietnam are similar to those applicable to non-Islamic insurance companies. Generally speaking, a foreign insurance company (regardless of whether Islamic or non-Islamic) may operate in Vietnam as a joint-venture insurance company, a wholly-owned subsidiary, a branch (only applicable to non-life insurance) or a representative office. Subject to the form of the presence, specific requirements will apply – eg, minimum capital, operating licence, capacity/credibility of shareholders/owners, qualification of board directors and managers, etc.

### 10.4 Framework for Ensuring Shari’a-compliant Products

As discussed above, there is no particular domestic policy in Vietnam regarding Islamic finance or Shari’a-compliant products and transactions. Generally speaking, the frameworks that apply to Shari’a-compliant products and transactions are similar to those that apply to non-Shari’a-compliant products and transactions. It should be noted that the applicable Shari’a rules may not contradict the basic principles of Vietnamese laws.

The supervisory bodies of financing products and transactions depend on the specific category of such product or transaction. For example:

- the State Bank of Vietnam supervises loan/financing transactions, the incorporation and operation of credit institutions, foreign exchange matters, etc;
- the Ministry of Finance supervises the incorporation and operation of insurance companies and insurance businesses (or takaful operators and takaful products);
- the National Registration Agency for Secured Transactions (under the Ministry of Justice) supervises the security over assets in general (except for specific assets such as land use rights, aircraft, vessels, etc); and
- the relevant local Department of Natural Resource and Environment (under the local People’s Committee) supervises the security over land use rights and assets attached on lands).

#### VILAF

6F, HCO Building (Melia)  
44B Ly Thuong Kiet  
Hoan Kiem  
Hanoi  
Vietnam



Tel: +84 24 3934 8530  
Fax: +84 24 3934 8531  
Email: phong@vilaf.com.vn  
Web: www.vilaf.com.vn