



Legal Due Diligence Major Red-Flags for IPP Energy Projects M&A in Vietnam

Power sector acts as the backbone for the global economies and the brightest star of SE ASIA (Vietnam) is catching up fast with the international race towards countering alarming concerns for the rapid climate change.

M&A plays a critical role for the industry to flourish with a boosted financial model for the investors having distinct appetite. Mentioning of M&A leads our focus to the existing assets, assets under construction or planned projects that have a special purpose vehicle (commonly called as a Project Co.).

Driving any M&A deal through is a challenging task for not only the lawyers but for financial, tax and technical advisors. The key remains to have an eagle eye to sight the red-flags and provide a workable solution for the acquirers (investors). Negotiations on the other hand play a vital role in convincing the transacting parties to agree and not to agree to disagree on the table.

Outcome of the legal due diligence (“**Legal DD**”) decides the fate of the planned deal. Lawyers play an important role to row the boat to the shore in high and low tide scenarios while conducting the due diligence.

Industry should be mindful of some major issues that strike during the Legal DD process. Below are certain key pointers that are witnessed in recent conventional and renewable energy M&A transactions in Vietnam:

Business lines

Local target may not face issues while subscribing for business lines under its constitutional documents with respect to the restrictions that might be applicable to foreign investors due to foreign ownership caps in certain business areas. Such restrictions could be based on the WTO commitment of Vietnam and/or the local laws permissibility for foreign access in a particular sector.

The definition of foreign-invested business organisation (**FIE**) under the Law on Investment of Vietnam leads to a change in the legal form of the target after the acquisition by a foreign investor i.e. it shall be considered as a FIE.

Solution could be to have a condition precedent (**CP**) under the transaction documents to obligate the seller for removing such unnecessary business lines in order to ensure accessibility for the foreign investor to acquire planned percentage of shares/capital in the target.

M&A Approval

Similar to any other M&A, in the power sector, for majority stake acquisition, an M&A approval is required if the planned acquisition stake crosses the threshold of 50%. However, even for minority stake acquisition transaction an M&A approval could be required from the provincial Department of Planning and Investment (DPI), for the reason being that certain business lines linked to the power generation business might be subject to market access conditions for foreign investors. It is noted that the transaction could not proceed without such an approval and thus, making this approval as a CP under the transaction documents could be necessary.

Contribution of Charter Capital and equity capital

Charter capital

A thin line between the registered charter capital and contributed charter capital may often surprise during the legal DD process. At laws, when the enterprise is incorporated, the registered charter capital should be contributed by the owner/shareholders within a timeline of ninety (90) days from the issuance of the enterprise registration certificate (ERC, known as the incorporation certificate in common law terminology).

However, the glitch under the laws relates to any subsequent contributions i.e. there is no timeline under the laws of Vietnam for contribution of any subse-

quent increase in the charter capital of an enterprise.

Foreign investors often fall into this trap when they review the registered charter capital amount under the ERC of the Project Co.

Safer way could be to request with the seller to provide proof of capital contribution, and if the seller fails to meet such requests from the foreign investors then the seller could either be asked to contribute fully the registered charter capital, if not possible then a CP for decreasing the charter capital amount equaling to the actually contributed capital amount should be put in the transaction documents.

Equity capital

Project capital is mainly divided in two forms under the investment registration certificate (IRC) of the Project: (a) equity capital (this normally forms as the charter capital of the Project Co. Note that if the equity contribution schedule is approved to be injected in multiple tranches then the first contribution portion shall essentially form the charter capital of the Project Co.); (b) mobilized capital (could be the debt portion in simple language).

The equity capital of the project should be injected as per the contents under the IRC. Foreign investors could request the seller to provide clear information on this matter to avoid later hassles.

Shares mortgage and loans to shareholders

Targeted shares/capital should ideally be free from any encumbrances to enable a smooth transfer. In case the target shares are mortgaged with the lenders then a prior assent from the lenders may be required in accordance with the terms of the mortgage agreements.

Further, any existing loans to the shareholders should be reviewed closely if such shareholder plans to exit the Project Co. after acquisition by the foreign investor.

Updating the project approvals

An approved project comes with an implementation schedule by way of milestones under the IRC.

An investor is required to comply with the said milestones to avoid sanctions from the authorities, which may even lead to project revocation in extreme cases.

Often, it is seen that the Project faces delays due to a number of reasons including but not limited to admin-

istrative delays from the authorities, financing hurdles, EPC delays, land clearance, unexpected challenges with the terrain etc.

In case where the Project Co. is unable to comply with the contents of the Investment In-principle Approval and the IRC, the Project Co. need to apply for the required amendment, which could be for the project timelines, or capital contribution towards the project.

It is noted that pursuant to the provisions under the Law on Investment, for a project which is issued with an Investment In-principle Approval, the investor is not permitted to extend the implementation schedule of the project beyond twenty four (24) months as compared to the implementation schedule of the project provided in the initial Investment In-principle Approval, except in any one of the following cases:

1. To remedy the consequences of an event of force majeure in accordance with the civil law and the law on land;
2. The implementation schedule of the project is extended due to late allocation or lease of land or late permission to convert land use purpose provided by the State;
3. The implementation schedule of the project is changed pursuant to a request of the State administrative agency or due to late conduct of administrative procedures by a State agency;
4. The project is amended as a result of a State agency changing master planning; and
5. The objectives set out in the Investment In-principle Approval are changed; or objectives requiring Investment In-principle Approval are added.

Further, there are a number of issues in relation to the estimated COD of the Project as mentioned under the PPA, GCA.

Such estimated COD also requires amendment to the PPA, GCA and related documents to avoid breach circumstances.

Another linked matter relates to escrow deposit that is paid by the Project Co. as a security to implement the Project in accordance with the Investment In-principle Approval.

In case, if the Project faces delays and is unable to begin with the construction activities of the Project, it could be likely that the Project would be unable to

be put into operation by the approved COD timelines under the project approvals. As such, so as not to forfeit the escrow deposit amount, an amendment to the Investment In-principle Approval to extend the schedule for implementation of the Project shall be required.

Land issues concerning the Project land (including transmission lines)

Land is the most crucial part for the project and it is always a complex matter to handle with in almost all jurisdictions, Vietnam is no exception.

Right from the inception the foreign investors feel the heat with land matters, but different energy sources provides bright sides with some craving for heat (solar irradiation), some for a comparative dry climate (conventional), while some are refreshing with H₂O and others give a cool breeze windy effect.

Land approvals are prolonged and often be the star for project delays. It is not merely from the administrative side but also from the land resettlement costs that is majorly challenging to meet the expectations of the current land users.

Then comes the compensation phase which is a tedious task even for the authorities in many cases.

Further, land could attract complications based on its type i.e. forest land, agricultural paddy land etc. that further prolongs the process and requires repurposing of the land into the relevant land master plan.

Foreign investors are seen wandering around the land matters at various instances. Briefly, the land approvals comprise of the following:

- Land decision
- Land lease agreement (LLA)
- Land handover minutes signing with a public ceremony
- Land use rights (LURC)

Land decision inks that the land parcel belongs to the Project and which is perfected with the signing of LLA. Remaining ones could be time consuming due to administrative formalities on the authorities part. Foreign investors should also closely review the land area under the land approvals.

In addition to the abovementioned matters, there could be possible issues related to labor, financing, issues flowing from project related material contracts, environmental aspects, intellectual property and some may even have a litigation background in

certain cases.

While conducting Legal DD such issues are prominent and based on the negotiations among the transacting parties, these matters are generally resolved by agreeing to appropriate CPs and condition subsequent (CS) under the transaction documents.

On some matters, for an added layer of security, the parties could even consider on adding appropriate

representation and warranties, and indemnities under the transaction documents.

Depending on the transaction structure, CPs are linked to payment milestones, it acts as KPIs for the seller to fulfill before the payments are released by the buyer (investor).

Legal DD exercise provides clarity to the investors on the deal path they are heading towards.

FOR MORE INFORMATION PLEASE CONTACT:



Vaibhav Saxena
Counsel
Hanoi
(84-24) 3934 8530
vaibhav.saxena@vilaf.com.vn

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