

Vietnam

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SECTION 1 – Collateral/security

1.1 What types of collateral/security are available?

(a) Movable property

Movable property including offshore and onshore bank accounts, receivables, contractual rights, and equipment, machinery, and inventory, maybe mortgaged to foreign lenders.

(b) Immovable property

Land use rights and assets attached to land may only be mortgaged to Vietnamese credit institutions. Authorities have consistently interpreted this as a prohibition of foreign lenders taking security interests over immovable property.

A Vietnamese branch of a foreign bank is treated as a Vietnamese credit institution. In the context of major infrastructure projects, such as thermal power plants, the project company will typically mortgage land use rights and assets attached to land to a Vietnamese branch of a foreign bank within the syndicate on behalf of the lenders. Lenders will obtain comfort on this structure through a special approval of the office of the Prime Minister supported by a legal opinion issued by the Ministry of Justice (MOJ). The government is reluctant to grant these approvals, and obtaining one is rare.

(c) Equity interests

Foreign lenders will typically take security over the sponsors' equity interests in the project company. Please refer to sections 3.1 and 3.2.

(d) Security interests in Vietnam

Certain types of security arrangements in common law jurisdictions such as charges and collateral assignments do not exist in Vietnam, though these are used in financings to grant security over contractual rights governed by foreign law. The two most prevalent types of security interests used with respect to financings in Vietnam are the pledge and the mortgage.

SECTION 2 – Perfection and priority

2.1 How is a security interest in each type of collateral perfected and how is its priority established?

A mortgage over land and assets attached to land must be recorded at the district or provincial land use registration office.

While registration is recommended to put third parties on notice, registration of security interests over movable property with the National Registry of Secured Transactions (NRAST), an agency under the MOJ, is generally not mandatory. Registration is required when a single asset is used to secure multiple obligations.

Priority between creditors is generally established under a first in line principle. One important exception is when a deferred sales contract is registered with the NRAST within 15 days of execution. In this case, the vendor will have a first priority security interest in the assets subject to the sales contract, regardless of whether another creditor has previously filed a registration statement covering those assets.

Separate registration procedures exist for security interests over forest rights, aircraft, and sea vessels.

2.2 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

A lender should conduct a NRAST database search against the borrower to ensure that there are no existing security interests against the same collateral.

Prior existing mortgages over movable property should be annotated on the land-use rights certificate, which is delivered to the secured party for the duration of the security interest. A lender may also inspect the records at the relevant land use registration office to ensure that there are no prior mortgages recorded against the property.

2.3 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

Fees associated with registering mortgages over immovable and movable property are negligible.

2.4 May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

Under Vietnamese law the term agency, as used in a security agreement, creates merely a contractual relationship between the agent and the secured parties.

Vietnamese law does not generally recognise agency structures where a Vietnamese bank holds security over immovable property on behalf of foreign lenders. The security interest extends up to the amount of the onshore lending tranche advanced by the secured party of record, and the surplus of enforcement proceeds is payable to the borrower.

The structure may offer some benefits to foreign lenders, as it provides a legal basis to foreclose on the property. Other security structures, such as equity and account mortgages in favour of the foreign lender, would still need to complement the security arrangements.

SECTION 3 – Foreign investment and ownership restrictions

3.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies?

A foreign investor is required to apply for an investment certificate from the licensing authority to identify the equity holders in the project company, its capital structure, and key information about the project, which is usually the Department of Planning and Investment (DPI) of the province where the project is located. The licensing authority may also be the Ministry of Planning and Investment, and for most investments in the oil and gas sector, the licensing authority is the Ministry of Industry and Trade (MOIT). Project sponsors may need to fulfil one or more of the following requirements:

- In-principle approval of the National Assembly. Certain projects of national importance require approval of the National Assembly, such as projects valued at D35 trillion or more (\$1.7 billion) of which the state capital is D11 trillion or more.
- In-principle approval by the Prime Minister. This approval is required for projects in key sectors, including airports, national ports, and oil and gas exploration and production.

- Conditional sectors. Sectors including banking and mining must meet sector-specific conditions, for foreign investors.
- Appraised projects. Projects of over D300 billion must be appraised by the relevant licensing authority. Criteria may include the requirement for a feasibility study and environmental impact assessment report (EIA report).

Any onshore transfer will require amendment of the investment certificate. This will trigger a new appraisal process. A capital assignment will generally require the approval of the government authority that initially approved the project.

Vietnam's schedule of exceptions to its World Trade Organisation (WTO) accession commitments, and its domestic law, contain other restrictions on foreign investment, which vary from sector to sector.

There are no fees or taxes on foreign investment or ownership of a project company.

3.2 Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

There are no existing bilateral investment treaties that would allow relief from the regulatory requirements on approving projects and equity transfers.

3.3 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic/national security or other reasons?

An expropriation or nationalisation may occur, subject to full compensation, for the limited reasons of national defence or security. In such a circumstance, however, compensation (if any) should be made to investors or to the project companies and not to offshore lenders unless there is relevant direct agreement in place. We note that in practice the government's exercise of such discretion is rare.

SECTION 4 – Documentation formalities and government approvals

4.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

For disputes between a government authority and foreign investors or the project company, the parties may provide in the concession agreement and project documents that such disputes may be referred to international arbitration.

Vietnamese courts will only consider recognition of judgments issued by courts of countries that have entered into judicial agreements with Vietnam, generally with former or current communist states, or on a reciprocal basis. In practice, very few judgments issued by foreign courts have been recognised and enforced in Vietnam.

Vietnam acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention) with the reservation that Vietnam will apply the NY Convention only to disputes arising from legal relationships considered commercial under Vietnamese law. In practice, few foreign arbitral awards have been enforced in Vietnam.

A state and its assets benefit from immunity which may be restricted, or absolute. Vietnamese law does not define the limits of sovereign immunity. When foreign investors enter into contracts with a government authority or a state-owned enterprise (SOE), that government authority or SOE should acknowledge that the arrangement is a commercial one and waive its right to sovereign immunity. However, the enforceability of these waivers is unclear.

4.3 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority?

The National Assembly and Prime Minister must approve certain projects of national importance. See section 3.1.

MOIT is responsible for power, oil and gas, energy, and other important infrastructure projects, and the Ministry of Transportation (MOT) is responsible for road, airports and other transportation projects. The Ministry of Natural Resources and Environment (MONRE) is in charge of land, water, mineral resources, other natural resources, and environmental matters. MONRE often acts through the local Department of Natural Resources and Environment (DONRE).

Local people's committees and other government authorities have the authority to issue the investment certificate (and amendments) for most projects, including those which have been approved by the Prime Minister. The boards of management of industrial zones and export processing zones are responsible for issuing investment certificates and amendments to projects located in an industrial zone or an export processing zone.

4.4 What government approvals are required in relation to environmental concerns for typical project finance transactions? What fees and other charges apply?

In a typical project finance transaction, the investors must prepare an EIA report and obtain the approval of MONRE (or the relevant DONRE). A fee is payable to MONRE or the relevant DONRE for review of the EIA. These fees range from D6 million to D96 million, depending on the project type and size.

SECTION 5 – Bankruptcy proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?

Upon a court's acceptance of an insolvency petition, a secured creditor's ability to enforce its rights is subject to a stay. Only the bankruptcy judge may permit enforcement against the security while the stay is in effect. The stay is lifted by the court upon entry of a liquidation order.

5.2 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

Secured creditors may enforce security without the need for judicial proceedings. The party holding collateral is first required to deliver the collateral to the secured party upon prior reasonable advance notice. If it fails to do so before the expiry of the time set out in the notice, the secured party may seize the asset or may refer the matter to the courts. In practice, it is difficult for foreign lenders to enforce security without a court order.

5.3 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral/security?

If security is registered with the NRAFT, the secured lender should file a notice of enforcement with the NRAFT. This notice sets out information such as the assets to be enforced against, the reason for enforcement, and the method of enforcement. With respect to both movable and immovable property, the property must be disposed of through an auction, unless otherwise agreed by the parties. Security agreements should clearly set forth various options under which lenders can enforce the security.

SECTION 6 – Foreign exchange, remittances and repatriation

6.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

In order to issue offshore bonds, an entity is required to have been in existence for three years. As project companies are unlikely to fulfil this requirement, bonds are unlikely to be a source of international financing for projects under the existing legal framework.

Investment returns may be remitted offshore either through the sale of equity or through dividends.

6.2 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

A project company in Vietnam will likely not have earnings in foreign currency.

Revenue in dong may be converted into foreign currency and exported offshore, subject to the availability of the currency (see section 7.2).

Major infrastructure projects may benefit from a government guarantee of availability of foreign currency. Historically, thermal power projects developed under the build-operate-transfer (BOT) model have benefitted from such provisions. Under Official Letter 1604 of the Prime Minister, September 12 2011 (OC 1604), the guarantee of foreign currency availability is limited to 30% of the project company's turnover.

6.3 What, if any, tax incentives or other incentives are provided preferentially to foreign investors or creditors? What, if any, taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Project in certain fields and geographical areas are entitled to favourable corporate tax treatment, tax-free importation of equipment and supplies, and exemptions or discounts on land use fees.

Thermal power projects developed according to the BOT framework enjoy additional incentives as outlined in OC 1604, including exempting lenders from payment of withholding tax on loan interest, and duty exemptions on the import of materials unavailable domestically.

Electricity tariffs may be paid in foreign currency to protect against depreciation. Thermal BOT projects are entitled to specific provisions of government, guarantees which historically have been difficult to negotiate, such as foreign currency availability and performance guarantees of SOEs that are off-takers (EVN) and suppliers (Vinacomin with respect to coal).

The government is considering new legislation that would expand the scope of benefits offered to BOT and build-transfer-operate (BTO) projects to those that operate according to a public private partnership model (see section 7).

SECTION 7 – Public private partnerships

7.1 Is there a public private partnership act or similar statute authorising PPPs and are both greenfield and brownfield PPP projects permitted?

The government issued in 2010 regulations on the pilot investment in PPP form under the Prime Minister's Decision 71/2010/ND-CP. These pilot regulations have had limited import to date as the country's first ever PPP project – Dau Giay Phan Thiet expressway – is governed by a project specific decision, Prime Minister's Decision 1597/QD-TTg of October 26 2012 and not the pilot regulations.

The government is in the public consultation phase on new legislation on PPP investment, which is scheduled to be passed by the end of 2014. This new PPP legislation aims to consolidate the existing legal framework on BOT and BTO and the pilot regulations on PPP investment issued under the Prime Minister's Decision 71/2010/ND-CP.

Under the draft legislation, the PPP model is permitted for both greenfield and brownfield projects.

7.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

Under the existing legal framework on BOT and BTO and the pilot regulations on PPP investment, investors and project companies may create security interests over assets of the project company (including immovable assets) subject to the contracting authority's consent. This principle remains unchanged under the draft PPP legislation.

7.3 Are government guaranties or other payment obligations of the government or contracting authority subject to appropriations or other periodic authorisations?

Government guaranties or other payment obligations of the government or contracting authority are not subject to appropriations or other periodic authorisations. However, obtaining a government guarantee in Vietnam is a time-consuming process involving various ministries and agencies, including the office of the Prime Minister, the Ministry of Justice, and the Ministry of Finance. Once issued, government guaranties are irrevocable and remain in full force and effect for as long as the guaranteed obligations remain outstanding.

7.4 May the government or contracting authority unilaterally amend or terminate a concession?

Neither the government nor a contracting authority has an explicit statutory right to unilaterally amend or terminate a concession. In the contractual negotiations of investment projects in the BOT form (which by far, the legal framework in Vietnam for PPPs with the most successful examples to date), the investors in the project have generally been able to negotiate contractual protections and damage triggers in the event that a concession is unilaterally terminated or amended by either the government or contracting authority.

SECTION 8 – National update

8.1 In no more than 250 words, please describe any relevant project finance developments within your jurisdiction. This can include noteworthy projects, new structures or techniques.

As of the date of this update, the latest draft PPP decree dated September 2014 was available for comments by the public. It resembles the existing decree that governs the BOT framework (Decree 108) and aims to provide a comprehensive legal framework for both BOT and PPP projects. The draft PPP decree has mostly adopted verbatim the language of Decree 108 and there appears to be some reluctance to take the opportunity to address existing concerns raised by project developers. The most notable issues include: (i) the developer and the project company's unambiguous right to mortgage land; (ii) assurances that the government will meet the foreign currency needs of the project; and (iii) smooth transition of existing projects from

the existing legal framework (be it Decree 108 on BOT or Decision 71 of the Prime Minister on the PPP pilot programme). For instance, Article 72 of the draft PPP decree provides that 'projects which have been approved prior to the effective date [of this decree] do not require re-approval in accordance with [this decree]', but it leaves open the question of whether the new PPP decree will become the project's applicable legal regime, and if so, whether the project needs to bridge the gap between any requirements of the previous legal regime and the one set out by the new PPP decree.

There are numerous capital-intensive energy and infrastructure projects in Vietnam with funding needs in excess of \$15 billion, which have been struggling to find funding in the last five years. The new draft PPP decree in its current form does not offer any grounds for optimism that there will be some rapid inflow of funds for those projects.

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Nathan Dodd is a partner of Mayer Brown's global projects group. He is a highly experienced projects and infrastructure lawyer with more than 14 years' experience in the development and finance side of projects in Asia, and regularly works on Asian investments into the Middle East and Africa. In addition to project finance, he has extensive experience in energy, natural resources and infrastructure M&A. He has worked on a number of award winning transactions, acting on the government, sponsor and lender side. Deal locations include Australia, Bangladesh, Brunei, Cambodia, Gabon, Ghana, India, Indonesia, Kenya, Mozambique, Myanmar, Oman, Pakistan, Philippines, Sierra Leone, Singapore, Sri Lanka, Thailand, the UAE and Vietnam. Dodd is named a 'leading lawyer' in project finance in *IFLR1000* (2014).

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David Harrison is a consultant and a member of Mayer Brown's global projects group. He is named a 'rising star lawyer' in Vietnam in *IFLR1000* (2014) and 'up and coming' in *Chambers Asia Pacific* (2014). He has practised in both New York and Vietnam.

Harrison has advised multilateral and commercial lenders and agents on a broad range of project financings and secured and subordinated credit facilities extended to banks and corporations in Vietnam and other Asian jurisdictions such as Cambodia, Mongolia, and Sri Lanka. He has advised foreign investors on numerous mergers and acquisitions, including Vietnamese commercial banks and corporate targets in Vietnam and other Asian jurisdictions, such as Sri Lanka and Bangladesh. He has also advised lenders and borrowers on out-of-court workouts and insolvency and restructuring matters in both Vietnam and the US. He speaks Vietnamese, Spanish, and French.