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YKVN LLC has more than 90 legal professionals in offices in Hanoi, Ho Chi Minh City and Singapore. It provides legal services on a unique platform that combines Vietnamese and international experience (inbound and outbound) and execution capabilities and resources in its home market matching those of international and major regional firms. The banking and finance group is highly regarded in the Vietnamese marketplace, having served as counsel in connec-

tion with some of the largest project finance transactions to close in recent years in a range of sectors including electricity, power, cement, petroleum and mining. YKVN are the counsel-of-choice in many of the most complex, groundbreaking and high value transactions in Vietnam and its lawyers are very experienced in representing both lenders and borrowers in commercial banking matters.

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1. Project Finance Panorama

1.1 Recent Trends and Development

For the last two decades, Vietnam has enjoyed strong economic growth. This growth has required significant resources to meet the increasing demand for investment. A heavy focus has been placed on investment in the energy and infrastructure sectors, which have traditionally been financed through the state budget of Vietnam and official development assistance (ODA) from developed countries. However, these sources no longer sufficient to accommodate the existing and future investment needs of the energy and infrastructure sectors. Leveraging domestic and international capital markets and attracting private investment have emerged as new sources to meet this demand. They make up the bulk of the project finance market in Vietnam.

The participation of the private sector, including foreign investors, in the Vietnamese project finance market for energy and infrastructure projects is usually on the basis of public-private partnership (PPP), including the build-operate-transfer (BOT), build-transfer-operate (BTO) and build-transfer (BT) investment forms.

Currently, Vietnam does not have a consolidated legal document regulating project financing in Vietnam. As such, various regulations are considered when deciding on PPP investment forms such as investment laws, enterprise laws, tax regulations, foreign exchange control regulations and other legal regulations on specific industries (such as solar energy, construction and transport). Large PPP projects have typically been implemented in the investment form of BOT since the BOT regulations are more developed than any other.

However, in recent years, the legal framework for project financing (including PPP) has developed toward greater transparency, stability and fairness to encourage business investment. Notably, on 4 May 4 2018, the Government issued Decree 63/2018/ND-CP providing the framework for PPP investment activities (Decree 63) replacing Decree 15/2015/ND-CP. Decree 63 took effect on 19 June 2018 with the aim of improving and streamlining the legal framework governing PPP projects. Further, the Ministry of Planning and Investment is preparing a draft Law on Public-Private Partnerships (draft PPP Law), which is expected to serve as a consolidated framework for PPP investment activities. The Ministry of Planning and Investment is collecting opinions from market participants and the draft PPP Law is expected to be discussed in the National Assembly's meeting session in November 2019 and to be adopted in mid-2020.

1.2 Sponsors and Lenders

Sponsors can be either foreign or local organisations or individuals who carry out investment activities. However, due to the large scale of investment projects, the sponsors are usually big corporations with sufficient financial and appropriate technical capabilities.

Lenders are normally credit institutions including foreign credit institutions and local commercial banks. Major foreign credit institutions have been significant lenders for financing projects. Local commercial banks are also becoming more involved in the project finance market in Vietnam.

1.3 Public-Private Partnership Transactions

PPP is an investment form based on contracts between government authorities, investors, and the project companies to build, operate and manage large projects in certain sectors. PPP investment activities are governed by various regulations such as the Investment law, the Construction law, the Tendering law and the Tax law, which are high-level legal documents in Vietnam's hierarchy of legislation (only below the Constitution). Under these laws are decrees, of which Decree 63 is currently the main legal document specifically guiding PPP projects.

The key effects of Decree 63 are set out below:

Sectors

Investment is encouraged in a variety of sectors under PPP investment forms, such as power, transportation, commercial infrastructure, water treatment infrastructure and information technology.

Capital Requirements

The most important requirement is the capital requirement applicable to the PPP investors. Specifically, upon registration of a PPP project, the investor is required to register both the equity capital and the total investment capital (which includes equity capital and loan capital) of the project. The

project company can obtain loan capital not exceeding the difference between the total investment capital and the equity capital. The equity capital ratio must not be less than 10-20% of the total investment capital depending on the amount of the total investment capital. This requirement is to ensure that only investors with sufficient financial capability can participate in PPP projects.

Assignment

Another key provision is that the investor is not allowed to assign its rights and obligations under the signed PPP contract to any third party until completion of the construction phase, or after the start of the operation phase of the PPP project. As a consequence, the investor must ensure that it has sufficient capability to implement the PPP project until the exit event is triggered, this prevents circumstances where an investor bids for the project merely to later assign it to an unqualified investor without implementing any part of the PPP project.

Regarding the draft PPP Law, key changes relate to:

- the sectors for PPP investment activities;
- a minimum level of total investment capital and debt/equity ratio;
- restrictions on business activities engaged in by the PPP project company; and
- the issuance of government guarantees for the minimum project revenue.

Whether or not these changes will be adopted into law hinges on the National Assembly's meeting session in November 2019.

1.4 Structuring the Deal

Deal Issues

In addition to the issues mentioned above in **1.3 Public-Private Partnership Transactions**, the following issues need to be considered when structuring a PPP project in Vietnam:

Land use forms

Foreign invested enterprises (FIEs) are not entitled to own land in Vietnam; instead, FIEs can use land allocated from the state (for residential property development) or leased from the state or other real estate developers (for residential property development and other purposes).

Secured assets available to foreign entities

For the time being, Vietnamese law does not permit foreign entities to take a security interest in land and other immovable assets. Foreign entities are only permitted to take a security interest in movable assets and property rights (other than property rights relating to immovable assets such as land use rights). Vietnamese entities such as project companies can only mortgage land and other immovable assets to credit institutions licensed to operate in Vietnam. Further,

the mortgage right of the project company using the land is subject to the form of payment of land rental. Generally, the land user who makes a lump-sum payment for the entire land use term is entitled to mortgage both its land use right and the assets attached to the land, meanwhile the land user who makes land rental payment on an annual basis is only entitled to mortgage the assets attached to the land.

Foreign investment restrictions

Foreign investment restrictions exist primarily in the form of prohibitions on foreign investment, foreign ownership limits, requirements to joint venture with local partners, regulatory approval for foreign investment (such as investment registration certificate or M&A approval), capital requirements or a combination of these.

Fund flows

There exist uncertainties relating to how payment of the acquisition consideration would flow, especially in secondary market transactions. As such, banks where foreign investors and the foreign invested enterprises open their accounts have broad discretion on how the funds flow. In deals, parties will often consult their banks to clarify fund flow mechanics.

Currency

Under Vietnamese foreign exchange regulations, all transactions in Vietnam require VND denomination except for certain exceptions prescribed by the State Bank of Vietnam (SBV) such as foreign investors being permitted to make deposits or escrow in USD in the context of a privatisation/divestment of state assets. Before 2014, it was market practice for payments made in VND in transactions involving foreign investors to be indexed to, or calculated on, the basis of USD values. However, since 2014, the most prudent approach is to agree on VND amounts in contracts and for such VND amounts to not be indexed to or calculated on the basis of USD values. Therefore, the foreign investor should carefully consider the foreign exchange risk when making an investment.

Limitation on loan

The outstanding medium or long-term loan of the project company must not exceed the difference between total investment capital and the equity capital of the project as recorded in its investment registration certificate. A foreign medium or long-term loan is required to be registered by the project company with the SBV.

Funding Techniques

Standard debt financing (which is usually secured debt) and equity structures have been traditionally used in Vietnam. Large investment projects in Vietnam are primarily funded by a mix of external debt and equity finance. The funding is typically mobilised through shareholder loans and multi-tranche syndicated secured facilities from domestic and international lenders.

Bank financing is the most common type of financing in Vietnam and comes from both foreign and domestic banks. There have also been several export credit agency (ECA) financings. Most entities receiving ECA financing are state-owned corporations who are financed to develop top national priority projects in the fields of power, infrastructure, and air travel. The first ECA-supported facility extended to a private sector company was the USD950 million financing to VinFast in 2018 to support the country's first automotive and motorcycle manufacturing complex.

Besides the above typical funding techniques, certain project investors have started considering using project bonds to raise funds on a larger scale or to restructure former debts.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

The security customary for project financing in Vietnam typically includes:

- security over project assets of the project company which may include land use rights and assets attached to land (such as plants and buildings) and movable assets (such as equipment, machinery, receivables, bank accounts, contractual rights, and proceeds from investments);
- security over equity interests of shareholders in the project company; and
- in certain circumstances, guarantee issued by, and/or security over other assets of, the intermediary or ultimate owners of the project.

Security under Vietnamese law comprises pledges, mortgages, security deposits, performance bonds, escrow deposits, title retentions, guarantees, fidelity guarantees and liens on property. In project finance, mortgage is the most common form of security granted over property in Vietnam whereby the securing party can retain possession over the property.

With respect to moveable assets, property rights and equity interest, the security interest will be effective as from the execution date of the security agreement, unless otherwise agreed by the parties, and registration of the security is only to ensure the priority (based on time of registration) and enforceability against any third party in the event of enforcement. The registration can be made at the local Center for Registration of Transactions and Assets under the National Registration Agency for Secured Transactions (NRAST) under the Ministry of Justice of Vietnam. Registered security shall have priority over unregistered security. Priority payment among unregistered security is based on the date of creation of the security.

With respect to immovable assets (such as land use rights and assets attached to land), the security agreements are

required to be notarised by a competent notary office and registered with the Land Use Right Registration Office under the provincial Department of Natural Resources and Environment (DONRE). A security over immovable assets shall take effect as from the DONRE registration and the recording in the title document such as a certificate of land use right, house ownership and other assets attached on land.

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

The concept of a floating charge does not exist in Vietnam. Nonetheless, Vietnamese law allows mortgage over “property being goods rotating during the production and business process” which may be similar to the concept of floating charge. Such kinds of property could be machinery, equipment, raw materials, fuel, or other inventory which can be sold, replaced or exchanged by the mortgagor at any time prior to the occurrence of an event of default. In this case, the rights to demand that the purchaser pay money, the rights to receive proceeds, the assets formed from the proceeds received or the substituted or exchanged assets shall be the secured assets. If inventory is the secured asset, the mortgagor may replace goods in the warehouse but must maintain the value of the inventory as agreed by the mortgagor and the mortgagee.

A single security interest over the whole business and assets of a company is not a market practice in Vietnam because Vietnamese law provides different regulations for each kind of security and each kind of secured asset. Therefore, a security interest over an individual type of asset is usually taken rather than a universal security interest.

2.3 Registering Collateral Security Interests

Administrative fees related to the security registration and the lien search carried out with the NRAFT are nominal and range from VND20,000 to VND80,000 (approximately USD1 to USD4) per registration or per lien search.

With respect to security agreements relating to immovable assets which require notarisation, the parties are required to pay a notary fee, which is calculated based on the value of the underlying transaction (eg, loan value) but not exceeding VND70 million (approximately USD3,000) per agreement. The DONRE also charges a nominal fee for security registration. For example, in Ho Chi Minh City, the fee for one immovable security registration is VND80,000 (approximately USD4).

2.4 Granting a Valid Security Interest

Collateral may be described generally but it must be identifiable. For movable assets, there is regulatory guidance on how to describe collateral for certain secured assets such as vehicle identification number for motor vehicles; or name, type, number of goods or warehouse address for property being goods rotating during the production and business

process. For immovable assets, applicants are required to fill in certain mandatory descriptions (such as location, area, ownership certificate/licence, attached buildings) in the pro-forma registration forms.

2.5 Restrictions on the Grant of Security or Guarantees

Whilst Vietnamese law does not permit foreign lenders to hold mortgages of land use rights and assets attached to land, it is permissible for foreign lenders to hold mortgages of moveable assets and property rights only. A mortgage of land use rights and assets attached to land, in favour of foreign lenders through the arrangement of an onshore security agent, may be permitted in important BOT power projects or infrastructure projects. However, this preferential treatment is an exception to the general rule and is only applied to these kinds of projects.

With regard to guarantees provided by local entities to offshore entities, the grant of a guarantee by a Vietnamese entity in favour of a foreign lender in order to secure the obligations of a Vietnamese borrower will be subject to the SBV's approval. Further, foreign exchange control regulations do not permit the remittance by Vietnamese residents of foreign currency overseas for payment under such a guarantee. In the absence of express permission, a remittance bank will likely be unwilling to remit funds in relation to the payment under the guarantee and may request that specific approval from the SBV (or the Prime Minister) be obtained for such remittance.

2.6 Absence of Other Liens

Security interests are, depending on the type of asset, searchable in the following sources:

- With respect to movable assets – a security registration can be searched at the NRAFT (either on the website of the NRAFT or by formal request at the provincial NRAFT office) on a charge basis. However, a security search at the NRAFT is not comprehensive because not all security transactions over movable assets must be registered with the NRAFT.
- With respect to land and immovable assets – any effective security over the land/immovable assets must be recorded in its title document (eg, land use right certificate). Hence, if a land user and/or an immovable asset owner gives a requester access to a valid title document, the requester will be aware of all and any mortgages over the land/immovable asset. Any organisation or individual can file a written request to search for security on specific land/immovable assets at the Land Use Right Registration Office under the provincial DONRE where the land/immovable asset is located. Practically, the Land Use Right Registration Office will provide search result in a timely manner if the applicant is the land user and/or immovable asset owner. Otherwise, if the applicant is not

the land user and/or immovable asset owner, the Land Use Right Registration Office will likely question the purpose of the search and may, at its own discretion, accept or refuse to provide the search result.

2.7 Releasing Forms of Security

The security can be released upon the secured obligation being fully discharged or, in other cases, as agreed by the relevant parties to the security agreements. If the security has been registered with the security registrar (ie, the DONRE or the NRAST), deregistration of that security should be conducted in order to be perfectly released.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

A secured lender can enforce its collateral if the borrower fails to perform, or performs incorrectly, its obligation under the security agreement, or in other circumstances as agreed by the parties in the security agreement or as provided by law. The enforcement of security over movable assets is subject to agreement between the secured party and the securing party but will usually be conducted as follows:

- Notification on enforcement – the secured party is required to send a notice to the securing party to commence enforcement of the security. That notice should state, among other things, the reason for the enforcement, details of the secured property, the secured obligations, and the method and timing for enforcement.
- Possession of secured assets – if directed to do so by the secured party, the securing party is required to hand over possession of the secured assets to the secured party within the timeline specified in the enforcement notice. If the securing party fails to hand over possession, the secured party is entitled to repossess the same in accordance with the security agreement. Vietnamese law allows the secured party to take possession of the secured assets with prior notice and to request assistance from local People's Committees or local police authorities. However, such assistance is not available all the time.
- Possible enforcement method – disposition of the secured assets can be effected within the timeframe agreed between the secured party and the securing party, or after seven days from the date of the enforcement notice in the absence of an agreed timeframe. Vietnamese regulations permit the following methods for enforcement of security (in addition to such other methods as may be agreed by the secured party and the securing party):
 - (a) selling the secured assets; and
 - (b) taking an assignment of secured assets in lieu of performance of the secured obligations.
- Receipt of enforcement proceeds – the securing party receives enforcement proceeds up to the value of the

secured obligations and returns any excess amount to the securing party. The securing party remains liable for any deficiency.

In practice, enforcement by the secured party requires co-operation from the securing party, especially in respect of repossession of the secured assets by the secured party. If the securing party is not co-operative, and repossession of the secured assets is necessary for the purpose of enforcement, the secured party will, in most cases, have to bring the dispute to the agreed dispute resolution forum in order to enforce.

3.2 Foreign Law

Parties to a contract involving a foreign element are permitted to choose a foreign law as the governing law of that contract. The foreign law may not apply if, among other things, the consequences of its application are inconsistent with “the fundamental principles of Vietnamese laws”. In addition, there are some contracts, such as security agreements in relation to immovable assets, that must be governed by Vietnamese law even if they involve a foreign element.

Apart from certain matters being subject to the exclusive jurisdiction of Vietnamese courts (such as cases in relation to immovable assets), submission to a foreign jurisdiction is permissible if the relevant matter involves a foreign element.

3.3 Judgments of Foreign Courts

To be enforceable in Vietnam, a foreign court judgment or a foreign arbitral award must go through the recognition and enforcement process in Vietnam. In principle, to recognise and enforce a foreign court judgment or foreign arbitral award, the Vietnamese courts will not review the merits of the case. However, Vietnamese courts may refuse such recognition and enforcement on the grounds that doing so in Vietnam is contrary to “the fundamental principles of Vietnamese laws.”

Vietnamese courts will only consider the recognition and enforcement of foreign judgments when they are issued by courts of countries that have entered into judicial assistance treaties with Vietnam or on a reciprocal basis. To date, Vietnam has entered into limited judicial assistance treaties with other countries and territories. Given the absence of a system to track which countries have granted Vietnam judicial assistance, the application of the reciprocity principle is difficult in practice, and as a result, is subject to the sole discretion of the courts. In practice, very few judgments issued by foreign courts have been recognised and enforced in Vietnam.

Vietnamese courts will consider the recognition and enforcement of a foreign arbitral award where the award has been made in, or by arbitrators of, a country that is a member of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

An application for recognition and enforcement of foreign arbitral awards may be rejected by Vietnamese court on certain grounds as provided in the New York Convention.

3.4 A Foreign Lender's Ability to Enforce

Foreclosure upon enforcement of a security over equity interests in a limited liability company is subject to the right of first refusal. If a member of a limited liability company transfers its equity interests in the company, other members have the right of first refusal over that transfer. Transfer of shares held by a founding shareholder in a joint stock company during the first three years after incorporation of that joint stock company to a party who is not a founding shareholder of that joint stock company is subject to the approval of the general meeting of the shareholders.

Since the transfer of equity interest to a foreign entity requires approvals of the local licensing authorities and could be subject to foreign investment restrictions, such as foreign ownership limitation, enforcement will be subject to regulatory procedures at the time of transfer.

Enforcement also requires assistance from companies in which equity interests are mortgaged. Such assistance includes, among other things, issuance of new certificates evidencing ownership of equity interests and recording the names of purchasers as owners of those equity interests.

The above-mentioned requirements will make the enforcement process more complicated.

With regard to security of project licences and permits, the enforcement of that security is uncertain given that those rights are granted specifically to certain eligible investors and the transfer of such licence rights is subject to strict conditions.

4. Foreign Investment

4.1 Restrictions on Foreign Lenders Granting Loans

Foreign loans (ie, loans extended by offshore entities) are classified depending on their maturity as either short term loans (those with a maturity of twelve months or less) or medium/long term loans (those with a maturity of more than twelve months).

Vietnamese individuals are unable to borrow loans from offshore lenders. Vietnamese law requires "[...] individuals to borrow and repay foreign loans on the principle of self-borrowing and self-liability for repayment in accordance with Government regulations." To date, there has been no regulation promulgated by the Government of Vietnam allowing Vietnamese individuals to borrow foreign loans. It appears that the Government would be reluctant to per-

mit Vietnamese individuals to borrow from offshore lenders because their failure to repay the debts would adversely affect the national creditworthiness of Vietnam.

Vietnamese law allows foreign lenders to extend foreign loans to companies incorporated in Vietnam subject to certain conditions and requirements, these include:

- The SBV regulations on foreign loans that provide that a company is permitted to borrow foreign loans for:
 - (a) implementation of a "business and production plan" or "investment project" using the foreign loan capital of the borrower or its investee companies; or
 - (b) restructuring of the foreign loan debt of the borrower without increasing the costs of borrowing.
- If the borrower obtains medium- or long-term loans for its project and that project is licensed under an investment certificate or investment registration certificate (IRC), the balance of the foreign loan, together with all other outstanding medium- and long-term foreign and domestic loans, must not exceed the difference between the total investment capital and the equity capital recorded in the relevant IRC. Short-term borrowing is not subject to this limit. If the borrower's project does not have an IRC, the balance of a foreign loan, together with all other outstanding medium- and long-term foreign and domestic loans, must not exceed the total borrowing needs of the project as approved by the competent authority.
- A medium- or long-term foreign loan must be registered with the SBV prior to drawdown and the registration is essentially an approval process. Short-term loans are, however, not subject to this registration requirement. Any change to the details of the loans recorded in the foreign loan registration certificate issued by the SBV will have to be re-registered by the borrower with the SBV.
- The foreign loan must be within Vietnam's foreign commercial debt limit, which is approved by the Prime Minister on an annual basis.
- There is no specific cap on interest rates for a foreign loan. However, since the foreign loan has to be registered with the SBV, the SBV may raise question if the interest rate agreed by the borrower and the offshore lender is much higher than the common interest rate in the Vietnamese market.

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

Vietnamese law permits foreign lenders to hold mortgages on moveable assets and properties only (eg, equipment, inventory, bank accounts and securities); it does not allow foreign lenders to hold mortgages on land use rights and immovable assets located on land. As a matter of common practice, a foreign lender may appoint an onshore security agent to take security over land and immovable assets on its behalf in BOT projects based on Official Letter 1604/TTg-

KTN issued by the Prime Minister on 12 September 2011. However, this arrangement is not workable with respect to other projects.

There is no restriction on the granting of guarantees by a Vietnamese entity in favour of a foreign lender in order to secure the obligations of a Vietnamese borrower; however, these guarantees must be registered with the SBV together with the registration of the foreign loans that are secured by the guarantee.

4.3 Foreign Investment Regime

Foreign investors are defined as foreign citizens, organisations incorporated in foreign jurisdictions and organisations incorporated in Vietnam in which foreign investors hold 51% or more of the charter capital.

There are three key modes for foreign investors to invest in Vietnam:

- setting up a new foreign invested enterprise;
- acquiring equity interests or shares in an existing company; or
- using contractual arrangements (eg, investment through a business co-operation contract or in the form of PPP).

In addition to these methods, foreign investors may invest in Vietnam by way of subscription of securities issued by existing companies (including convertible securities) or granting loans (including convertible loans) to those companies.

Vietnam limits foreign investment in certain sectors by setting conditions and requirements. Foreign investment restrictions are provided in Vietnam's WTO commitments and other international or bilateral treaties to which Vietnam is party, as well as domestic law. Vietnam's WTO commitments are the most important and comprehensive international treaty provisions in relation to foreign investment. They provide for Vietnam's commitment to give foreign investors market access (and the limitations thereon) to all key service sectors. Vietnam's WTO commitments and other treaties are supplemented by a set of domestic laws, including the Law on Enterprises, the Law on Investment and other specialised laws regulating specific business sectors. Foreign investment restrictions exist primarily in the form of prohibitions on foreign investment, foreign ownership limits, requirements to joint venture with local partners, regulatory approval for foreign investment, or a combination thereof.

A foreign invested enterprise can be set up in one of the following corporate forms:

- limited liability company;
- joint stock company;
- partnership; and
- private enterprise.

However, in practice, the two forms that foreign investors most often use are the limited liability company and the joint stock company.

In order to set up a new company in Vietnam, a foreign investor must at least obtain an investment registration certificate (IRC) and an enterprise registration certificate (ERC). The IRC is to record information of the investment project in Vietnam. Upon the IRC being issued, the foreign investor must submit the application dossier for issuance of the ERC which serves as the certificate of incorporation of the company and enables the company to conduct business activities in Vietnam.

In cases where equity interests or shares in an existing company are acquired, a foreign investor must register and seek consent from the provincial Department of Planning and Investment for its intended acquisition of new or secondary shares or equity interest in an existing Vietnamese company (M&A Approval) if the investee company operates in conditional business sectors applicable to foreign investors or 51% or more of charter capital of the investee company would be held by foreign investors post-acquisition even if the investee company does not operate in conditional business sectors applicable to foreign investors. The M&A Approval must be obtained before such an acquisition. Further, the IRC and ERC of the investee company may need to be amended if there is any change in their content as result of the acquisition.

Vietnamese law provides a list of 243 conditional business sectors (Conditional Business Sectors List), which includes among others, trading, distribution, real estate and advertising. Prior to conducting any conditional business subject to the Conditional Business Sectors List, a company must obtain, in addition to the IRC and ERC, sub-licences from relevant regulatory authorities or satisfy certain requirements to be eligible to engage in such conditional business lines (eg, electricity operation permit (for the energy sector), certificate on food safety eligibility (for production or trade in foodstuff), certificate of satisfaction of security and order conditions (for entertainment services)).

4.4 Restrictions on Payments Abroad or Repatriation of Capital

Foreign investors are entitled to repatriate their legal profits earned from investment activities in Vietnam. The repatriation can be made on an annual basis or upon termination of investment activities in Vietnam. The maximum repatriated amount is the annual pre-tax profit, minus losses carried forward for corporate income tax purpose, minus the corporate income tax amount.

Foreign investors who wish to remit overseas their legal profits gained from indirect investment activities in Vietnam are entitled to use the VND amount of those legal profits to

purchase foreign currency at an authorised credit institution and then remit the same overseas. Foreign investors are only allowed to conduct spot transaction with authorised credit institutions to purchase foreign currency. Such purchased foreign currency must be remitted overseas within two business days from the spot transaction date. With respect to direct investment, the overseas remittance is required to be made within 30 business days upon converting the VND amount into foreign currency. The overseas remittance must be made through a capital account opened at a commercial bank licensed to operate in Vietnam (ie, a direct investment capital account of the investee company or an indirect investment capital account of the foreign investor).

4.5 Offshore Foreign Currency Accounts

Subject to obtaining the SBV's approval, a project company in Vietnam is permitted to open and use an offshore foreign currency account to:

- establish and operate offshore branches and representative offices;
- repay foreign loans;
- perform 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 PPP; and
- fulfill 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 of Project Agreements

Generally, project agreements do not need to be registered or filed with any government authority, and do not need to comply with any local formality in order to be valid or enforceable, except that power purchase agreements (PPA) in particular sectors (eg, a solar or wind power project) need to comply with a prescribed template.

No local formality is applicable to financing documents. However, medium- or long-term foreign loans must be registered with the SBV prior to drawdown. In addition, security agreements with respect to certain kinds of secured assets (eg, land use rights and immovable assets, aircraft, or seagoing vessels) must be notarised or registered or both in order to be enforceable.

5.2 Licence Requirements

In Vietnam, there is no private ownership of land. The land is owned by the people of Vietnam and exclusively administered by the Government of Vietnam. Accordingly, land use

rights therefore represent the maximum ownership interest that an individual or organisation may have in land. Individuals and organisations (land users) can use land allocated by the state or leased by the state or other real estate developers to develop and operate real estate projects in Vietnam. The land users using allocated land are requested to pay the land use fee up-front for the entire term, while land users using leased land can make payments on an annual basis or in one lump sum for the entire term. Land is generally allocated or leased for a term equal to the term of the land user's licensed investment project, but not exceeding 50 years, or 70 years in special cases. The land use right is evidenced by, among other things, the certificate of land use right, house ownership and other assets attached on land. A foreign entity can only hold the land use rights through a company incorporated in Vietnam.

By law, there is no private ownership over natural resources in Vietnam. They are owned by the people and are managed by the state. Private parties may acquire rights to conduct exploration and production exercises by entering into contractual agreements (such as production sharing contracts in exploring and producing oil and gas) or obtaining relevant licences and approvals (such as licences to explore or extract mineral resources).

5.3 Agent and Trust Concepts

The concept of "trust" is generally not recognised in Vietnamese law.

Agency arrangement is not a well-developed concept in Vietnam, although it is recognised in the Civil Code and the regulations on syndicated loans of credit institutions in Vietnam. However, it is not clear whether an agent, such as the security agent, can hold security on behalf of its principals. In foreign loan transactions, the security interest is normally created in favour of all secured parties and the security agent is authorised to carry out the administration and the enforcement of the security.

Whether a commercial bank is able to act as a security agent (for onshore lenders or offshore lenders) remains unclear, though there have been a number of precedents in practice. There are two reasons for this:

- as a general principle, any action taken by a commercial bank should be within the scope of business stated in its establishment licence and acting as a security agent in loan transactions is not expressly stated as one of the business activities in the licences of commercial banks; and
- the creation of security over land use rights or immovable assets in favour of offshore lenders is not legally permissible, and therefore the use of a commercial bank as agent for security over those assets might be consid-

ered as a circumvention of that prohibition and accordingly invalid.

5.4 Competing Security Interests

Registration helps establish priority based on the time of registration. Registered secured transactions have priority over unregistered secured transactions. The priority of payment among unregistered secured transactions and registered secured transactions is based on the date of creation.

Vietnamese law is silent on methods of subordination as well as procedures to change the priority of security interests. Generally, secured parties may contractually agree to change the order of priority between/among themselves if that agreement is not contrary to the fundamental principles of Vietnamese law. Such an agreement would be expected to survive the insolvency of a borrower in Vietnam.

5.5 Local Law Requirements

A project company must be organised under Vietnamese law in order to implement an investment project in Vietnam. Depending on the investment structure and foreign investment restrictions, the project company can either be a 100% foreign invested company or a joint venture between foreign and domestic investors. A project company can be set up in one of the following corporate forms: limited liability company, joint stock company, partnership and private enterprise. However, in practice, the two forms that the foreign investors often use are the limited liability company and the joint stock company.

6. Bankruptcy and Insolvency

6.1 Company Reorganisation Procedures

Under Vietnamese law, the term “bankruptcy procedures” is used to describe the processes beginning from the filing of a petition with the Vietnamese court for a determination on whether the debtor is insolvent and for initiating “bankruptcy proceedings”. This will lead to either “recovery procedures” or “liquidation procedures”. A debtor is deemed to be insolvent when a debt is payable, requests have been made for payment of the debt and the debtor has failed to pay the debt within three months of the due date.

There are two main types of processes under the Bankruptcy Law: recovery procedures, which are for the recovery of the business operations, and liquidation procedures, which are to liquidate the debtor’s assets and to write off its debts. The liquidation procedures will be implemented in cases where the debtor is already declared bankrupt (in other jurisdictions, this is commonly referred to as dissolution). After the commencement of the bankruptcy procedures, the judge will make a decision on whether the debtor should be subject to the recovery procedures or the liquidation procedures.

Within 30 days of the date on which the creditors’ meeting passes a resolution on application of the recovery procedures, the debtor must formulate a plan for the recovery of its business operations (the rescue plan) and send it to the judge, the creditors, and the asset management officer or asset management and liquidation enterprise (hereinafter collectively referred to as the insolvency trustee) for their opinions. The rescue plan must specify the measures for the recovery of business operations; and the conditions, time-limit and a plan for payment of debts. Once the rescue plan is prepared, it will be submitted to the court for its consideration and approval prior to submission to the creditors’ meeting for their consideration and approval. If approved by the creditors’ meeting, the judge will issue a decision recognising the resolution of the creditors’ meeting for approval of the rescue plan and will then send that decision to the debtor, creditors and the procuracy at the same level.

The recovery procedures will be implemented within the time period approved by the creditors’ meeting. If the creditors’ meeting fails to approve the time period for implementation of the recovery procedures, they must be implemented no later than three years from the date of approval of the rescue plan by the creditors.

The debtor will proceed with the liquidation procedures if, among other things, the rescue plan is not approved; the parties fail to implement the approved rescue plan; or, upon the expiry of the recovery procedures, the debtor is still insolvent.

6.2 Impact of Insolvency Process

After the commencement of bankruptcy proceedings, the contractual rights and remedies of the debtor are primarily limited to the statutory rights and remedies under the Law on Bankruptcy. In particular:

- the business activities of a debtor continue to be operated and conducted as usual but are subject to the supervision of the judge and the insolvency trustee;
- the following transactions will be deemed void if they were conducted by the debtor within six months (or eighteen months if parties related to the debtor are parties to the transaction) of the date of commencement of the bankruptcy procedures:
 - (a) assignment of assets not based on their market price;
 - (b) conversion of unsecured debts into debts secured or partly secured by the debtor’s assets;
 - (c) payment or set-off which benefits a creditor in respect of undue debts or with a sum greater than the due debts;
 - (d) donation of assets; and
 - (e) other transactions for the purpose of disposing of assets or outside the purpose of the debtor’s business operations;

- the debtor is required to report to the insolvency trustee prior to carrying out, among others, the following activities:
 - (a) activities in connection with borrowing or a pledge, mortgage, guarantee, purchase, sale, assignment or leasing out of assets;
 - (b) the sale or conversion of shares;
 - (c) transfer of ownership rights in any asset; and
 - (d) stopping the performance of an effective contract (therefore, a secured creditor can only foreclose on a secured asset with the court's approval);
- interest on any debt shall continue to accrue in accordance with the signed agreements, but the payment thereof shall be temporarily suspended (if the debtor is declared bankrupt, the interest shall no longer accrue);
- if the secured assets are used for the rescue plan the handling of the secured assets must comply with the resolutions of the creditors' meeting, if they are not used or not necessary for the rescue plan the assets will be disposed of according to the relevant secured loan agreement which has become due;
- for a secured loan agreement which has not become due, prior to declaration of bankruptcy, the court will suspend the agreement and settle the secured loans, the settlement of the secured assets is as follows:
 - (a) secured loans established prior to the court's acceptance of jurisdiction over the petition for commencement of bankruptcy proceedings will be repaid by the secured assets;
 - (b) if the value of the secured assets is not sufficient for repayment of the debt amount, the unpaid amount will be repaid under the liquidation procedures; and
 - (c) if the value of the secured assets exceeds the debt amount, the excess will be incorporated into the value of the assets of the debtor.

6.3 Priority of Creditors

Where the judge issues a decision declaring bankruptcy, the assets of the debtor are distributed in the following order:

- first, the bankruptcy fees;
- second, the unpaid wages, severance allowance, social insurance and health insurance and any other payables to the debtor's employees;
- third, the debts arising after commencement of the bankruptcy procedures to recover the debtor's business activities;
- fourth, financial obligations owed to the Government, the unsecured debts, the secured debts if the value of secured assets is insufficient to pay all such secured debts; and
- lastly, the members of the company, owners of the private enterprise or the shareholders in a shareholding company (as the case may be).

If the value of the assets is insufficient to make the payments in accordance with the order above, each creditor in the same class will be paid the corresponding proportion of its debt.

6.4 Risk Areas for Lenders

Insufficiency of Secured Assets

If the debtor is declared bankrupt, the assets of the debtor will be distributed in the order prescribed under the Law on Bankruptcy. If the value of the assets is insufficient to make the payments in accordance with that order, the loan might not be repaid.

Enforcement of Secured Assets

Within five business days of the date on which the court accepts jurisdiction over the bankruptcy matter, any competent authority or organisation may temporarily suspend enforcement of the secured assets of the debtor by secured creditors.

Under the Law on Bankruptcy, secured creditors are permitted to enforce their security during any bankruptcy proceedings provided that:

- there are no recovery procedures applicable to the debtor or the secured assets are not used for the recovery procedures;
- the enforcement is made in accordance with the relevant security agreement; and
- the enforcement is subject to the judge's decision.

In other words, the secured assets may be only enforced after the first creditors' meeting and subject to the judge's decision. If the first creditors' meeting makes a decision to use the secured assets for the recovery procedures and the creditor of the secured assets agrees to such usage, the debtor will be entitled to use such assets for the recovery procedures.

Uncertainty Upon Enforcement of Secured Assets Provided by a Third Party Who Becomes Insolvent

It appears that the Law on Bankruptcy only stipulates the procedures for the foreclosure of secured assets owned by an insolvent company and used to secure its own obligation, rather than the foreclosure of secured assets owned by an insolvent company and used to secure the obligation of a third party (ie, the debtor). Given this uncertainty, the rights of creditors could be affected.

6.5 Entities Excluded from Bankruptcy Proceedings

The bankruptcy proceedings under the Law on Bankruptcy apply to all enterprises and co-operatives established and operating pursuant to the law of Vietnam.

7. Insurance

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

Except for certain exemptions as provided by law, the project company must obtain a construction-all-risks policy during the construction phase of the project. Other customary policies are also acquired for the operation of the project.

A project company established in Vietnam having foreign ownership of less than 49% can only obtain insurance policies from an onshore insurer. Only project companies with 49% or more of charter capital owned by foreign investors can obtain non-life insurance from an offshore issuer. To provide cross-border insurance services in Vietnam, offshore issuers must meet certain conditions such as credit rating, total assets, required deposit, etc.

7.2 Foreign Creditors

The insured party can designate foreign creditors as payees under insurance policies.

8. Tax

8.1 Withholding Tax

A withholding tax of 5% corporate income tax (CIT) shall apply to interest accrued on loans granted by foreign entities. Foreign loans provided by certain governments, or semi-government institutions, may obtain an exemption from interest withholding tax where a relevant double taxation agreement or inter-governmental agreement applies.

8.2 Other Taxes, Duties, Charges

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

8.3 Limits to the Amount of Interest Charged

There is no specific cap on interest rates applying to a foreign loan. However, since the foreign loan has to be registered with the SBV, the SBV may raise question if the interest rate agreed by the borrower and the offshore lender is much higher than the common interest rate in the Vietnamese market.

9. Applicable Law

9.1 Project Agreements

English law, or New York law, is normally chosen by the parties for project agreements (except for certain specific agreements listed in **1.3 Public-Private Partnership Transactions**). It should be noted that the draft PPP Law provides that agreements to which a Vietnamese authority is a party shall apply Vietnamese law.

9.2 Financing Agreements

English law, or New York law, is normally chosen by the parties for financing agreements (except for certain specific agreements listed in **1.3 Public-Private Partnerships Transactions**). It should be noted that the draft PPP Law provides that agreements to which a Vietnamese authority is a party shall apply Vietnamese law.

9.3 Domestic Laws

With respect to project financing, the following transactions, among others, are typically governed by Vietnamese law:

- a power purchase agreement in non-PPP solar or wind power projects (which is subject to a prescribed template);
- a shareholder agreement among the shareholders of the project company;
- 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.

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