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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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YKVN LLC has a highly regarded Banking and Finance group, having served as counsel in connection with some of the largest project finance transactions occurring in recent years, across a range of sectors including electricity, power, cement, petroleum and mining. With more than 90 legal professionals in offices in Hanoi, Ho Chi Minh City and Singapore, YKVN provides legal services that combine

Vietnamese and international experience with execution capabilities and resources in the home market that match those of international and major regional firms. The firm has been involved in many of the most complex, groundbreaking and high value transactions in Vietnam. The firm's lawyers are very experienced in representing lenders and borrowers in commercial banking matters.

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1. Loan Market Panorama

1.1 Impact of Regulatory Environment and Economic Cycles

After a period of strong loan book growth during 2013-17, Vietnam has slowed down. Concerns about aggressive lending practices, and the possible risk in the real estate and non-production sectors, have resulted in a tightening of regulations by the State Bank of Vietnam (the “SBV”). The SBV also set a modest target of 14% credit growth for 2019, much lower than the 18% of the previous years.

The slowdown is attributed to the market’s conditions, the growing from a larger base, the increasing exposure to real estate loans, as well as the saturation of some of consumer finance key products such as instalment loans for home appliances and consumer electronics.

Banks traditionally focused on products such as project financing, housing and automobile loans, but in recent years they have expanded into other consumer finance products. Finance companies initially had strong growth, but now face stiff competition from retail banks and new entrants. At the same time, the players are being constrained with the SBV’s tightened supervision, a new set of regulations and lack of new products. Instalment products have started to reach saturation, whereas cash loans are facing the SBV’s restrictions.

Peer-to-peer lending is a new business model in Vietnam as evidenced by the establishment of several online lending companies, but it still lacks a legal basis. Peer-to-peer lending will soon be permitted as part of a pilot program before new laws are developed for the activity.

1.2 The High-yield Market

According to the Ho Chi Minh City Real Estate Association, tightening credit policies of bank on real estate lending has resulted in real estate enterprises having desire for project development seeking alternative sources of finance. Real estate enterprises have recently been issuing bonds at higher interest rates as an alternative source of finance. As a result, high-yield corporate bonds are becoming an attractive investment instrument. However, such high interest rates are also a sign of imbalances in the issuers’ financing structure.

1.3 Alternative Credit Providers

Besides the bank loans, Vietnam has witnessed the growth of alternative credit in the securities market, namely, the bonds issuances to both domestic and foreign investors, loans obtained through finance companies, and foreign loans from more and more investors fleeing low or negative interest rate jurisdiction.

Additional alternative credit providers mean more options in the capital mobilisation, thus leading to increased com-

petition between such providers and affecting the financing terms and structures such as creditworthy borrowers are able to obtain lower interest rates. New providers bring new ideas and technology solutions to the market such as online lending.

1.4 Banking and Finance Techniques

Given the development of Industry 4.0, digitalisation has been transforming Vietnam’s banking sector through a variety of initiatives by the Government, credit institutions, technology and others. In terms of product composition, new products include POS instalment products such as loans for home appliances and consumer electronics and e-wallets and other intermediary payment services such as MoMo reaching previously unbanked consumers. Peer-to-peer lending is becoming increasingly popular in Vietnam with the establishment of several online lending companies, but it still lacks a legal basis. Peer-to-peer lending will soon be permitted as part of a pilot program before new laws are developed for the activity

1.5 Legal, Tax, Regulatory or Other Developments

The SBV launched some tightening of credit in 2018 and 2019 by setting credit growth limits (14% compared to 18% in previous years) and controlling lending to high-risk sectors including real estate and security investments. Risky areas, such as consumer loans or BOT/BT transportation projects, require commercial banks to maintain their loan portfolio more conservatively. SBV is also considering a pilot program for peer-to-peer lending to facilitate the financial inclusion goals while minimising its potential risks. As a result, growths in 2019 are considered to be slow and steady, following government directions of policies.

In 2019, the SBV released two new drafts for amendment of Circular No. 39/2016/TT-NHNN and Circular No. 43/2016/TT-NHNN, regulating the lending activities of banks and non-banks, respectively. In these drafts, the SBV is considering taking a stronger stance in managing the risks and impact from lending activities. In light of slower credit growth, profitability ratios have been decreased while prudential ratios such as NPL have been increased slightly for the sector as a whole.

Undercapitalisation has continued to be a pressing issue to the banking sector as the Basel II compliance deadline of 2020 is just six months away. Currently, only nine out of 45 banks have officially been given approvals from the SBV to apply Basel II Standards. Basel II Standards maintain the capital adequacy ratio of at least 8% but changes the calculating method. Specifically, total capital is unchanged, however, the calculation of risk weighted assets has been changed with the introduction of credit risk and operational risk in the Basel II Standards, which are measured via a variety of methods. The goal is to ensure that all risks are clearly reflected in the formula of capital adequacy ratio calculation.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

Vietnamese credit institutions include banks, non-bank credit institutions, micro-finance institutions and people's credit funds. Non-bank credit institutions include finance companies, finance-leasing companies and other non-bank credit institutions. Under the banking regulations, only credit institutions are allowed to provide financing to Vietnamese organisations and individuals. In particular:

- A bank is authorised to provide financing to a company or an individual in Vietnam. In order to do so, it must obtain, from the SBV, the approval-in-principle and the establishment and operation licence, and from the provincial Department of Planning and Investment obtain the enterprise registration certificate. Notably, there are several conditions and requirements under banking regulations applicable to, among others, the bank, owner/shareholders of the bank and key personnel.
- A non-bank credit institution in Vietnam is not allowed to provide financing to Vietnamese organisations. Only individuals can obtain financing from a non-bank credit institution in Vietnam.
- As for other organisations which are not credit institutions, though there are several cases of these organisations providing financing, Vietnamese organisations that are not licensed to engage in lending activities are not allowed to regularly grant loans. If they fail to comply with these restrictions, their lending activity may be considered an illegal act and monetary fines and criminal penalties may be imposed. In practice, there are some lending transactions made between affiliated Vietnamese companies where no penalties have been imposed and the activities have yet to be challenged by regulatory authorities, thus far.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

Foreign loans (ie, loans extended by offshore entities) are classified depending on their maturity as follows: short term loans (those with a maturity of 12 months or less) and medium/long term loans (those with a maturity of more than 12 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, from the viewpoint of the regulators, that the Government would be reluctant to permit Vietnamese individuals to borrow from offshore lenders because their failure to repay the debts will 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, among others:

- The SBV regulations on foreign loans provide that a company is permitted to borrow foreign loans for implementation of a “business and production plan” or “investment project” using foreign loan capital of the borrower or its investee companies or restructuring 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 the 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 the 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 not however subject to the 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 of 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 Vietnamese market.

3.2 Restrictions on Granting Security to Foreign Lenders

Vietnamese law permits foreign lenders to take mortgage of moveable assets and properties only (eg, equipment, inventory, bank accounts and securities), but it does not allow foreign lenders to take mortgage of 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 No. 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 granting of guarantees by a Vietnamese entity in favour of foreign lender in order to secure obligations of a Vietnamese borrower; however, the guarantee must be registered with the SBV together with the registration of foreign loans that are secured by the guarantee.

3.3 Restrictions and Controls on Foreign Currency Exchange

Foreign exchange control regulations provide that the foreign loan must be made in a foreign currency, save for certain cases such as

- the borrower being a micro-finance institution;
- the lender being an investor making direct investment in the borrower, and the loan is sourced from the dividends in Vietnamese currency distributed by the borrower to the foreign lender; or
- other circumstances as approved by the SBV Governor on a case-by-case basis.

The borrower of foreign loans is permitted to purchase foreign currency at an authorised credit institution for the purpose of payment of loan principal, interest and fees.

3.4 Restrictions on the Borrower's Use of Proceeds

The proceeds from foreign loans must be used for permitted purposes, which include:

- implementation of business and production plans and investment projects of the borrower or its investee companies; and
- restructuring of current foreign loan(s) of the borrower without increasing the cost of funding.

In Vietnam, corporate bonds are typical debt securities. Bonds can be issued by a company privately or publicly and on the domestic market or international market. A company can use the proceeds from privately issued bonds to implement its investment programs and projects and increase working capital or to refinance the company's debts. There is no restriction relating to the use of proceeds from bonds which are publicly issued on either the domestic market or the international market.

3.5 Agent and Trust Concepts

The concept of "trust" is generally not recognised.

Agency arrangement is not a well-developed concept in Vietnam, although it is recognised in the Civil Code and regulations on syndicated loans of credit institutions in Vietnam.

However, it is not clear whether a 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.

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

Firstly, as a general principle, any action taken by a commercial bank should be within the scope of business stated in its establishment licence. However, acting as a security agent in loan transactions is not expressly stated as one of the business activities in licences of commercial banks.

Secondly, 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 can be considered as circumvention of that prohibition and accordingly, is not valid.

3.6 Loan Transfer Mechanisms

Vietnamese law provides the transfer mechanism for onshore loans granted by credit institutions in Vietnam, but not foreign loans extended by foreign lenders.

A foreign loan can be transferred from an existing foreign lender to a new foreign lender if there is no restriction on transfer of the loan under the loan documents and such transfer is permissible under the law of the jurisdiction in which the lenders are located. Since the transfer of foreign loan causes a change in lender, the borrower is required to register such change with the SBV.

Circular No. 09/2015/TT-NHNN, which regulates debt purchases and sales by local credit institutions and foreign bank branches, allows a local credit institution or a foreign bank branch to sell its loans to either a Vietnamese or an offshore debt purchaser and such sale of loans is generally not subject to any approval of or prior notification to the SBV. As a general rule, under Article 370 of the Civil Code a transfer of loan requires the consent of the borrower if the lender has obligations under the loan agreements (such as keeping clients' information confidential or notifying clients of change in lending interests or fees, etc). In the absence of such consent, the transfer may become voidable. In case there is no such obligation by lender to the borrower, it is not required to obtain their consent; instead, a notification shall be made by the lender to the borrower.

According to Article 368 of Civil Code and Articles 14 and 17 of Circular 09, the debt purchaser will assume all of the rights and obligations of the bank relating to the transferred loan including, but not limited to, those relating to

the security attached to a loan. In case the security is registered with security registration authority/agency, the registration should be amended to update the new lender as the new secured party without compromising the priority of the security.

3.7 Debt Buy-back

Circular No. 09/2015/TT-NHNN only regulates the sale of debts arising from the extension of loans by local credit institutions and foreign bank branches pursuant to which a local credit institution or a foreign bank branch may sell its loans to either a Vietnamese or an offshore individual, and organisations which may include borrower and sponsor. Since Circular No. 09/2015/TT-NHNN does not prohibit a borrower to buy-back debt, the borrower or sponsor may be permitted to buy-back debt if there is no such restriction under a loan agreement.

In case of foreign loans, it appears that the Vietnamese borrower and Vietnamese sponsor are unable to buy-back debt. Since the buy-back of foreign loan causes a change in lender and the foreign loan becoming the local loan which must be denominated in Vietnamese Dong, the borrower is required to register any changes with the SBV. The SBV may not accept the registering of changes because the buy-back of foreign loans is not provided elsewhere under Vietnamese law. With regard to the debt buy-back by a foreign sponsor, it is a matter of law of the jurisdiction in which the lender and foreign sponsor are located rather than a matter of Vietnamese law.

3.8 Public Acquisition Finance

Vietnamese law does not explicitly provide a “certain funds” requirement, however, an offeror in a public acquisition of a part or all of the voting shares of a Vietnamese public company for the purpose of taking control of the public company (a “public tender offer”) must ensure fair chance for sale by all shareholders of the public company.

In order to implement a public tender offer, the offeror must submit an application to register the public tender offer with the State Securities Commission (the “SSC”) and the application must include, among others, audited financial statements of the preceding year and other documents certifying financial capability in accordance with specialised laws, or confirmation on financial capability of the offeror. In addition, a securities company acting as agent for public tender offer must ensure that the offeror has sufficient funds to make the offer.

After the SSC registers the public tender offer, the offeror will make a public announcement of the public tender offer to the media and implement it. Upon completion of the public tender offer, if the offeror holds at least 80% of total outstanding voting shares of public company, the offeror must continue to purchase the remaining shares within 30 days,

on prices and payments terms similar to those applicable in the public tender offer. In case the public company is a listed company, a public tender offer may reduce the pool of public shareholders of the listed company such that it no longer satisfies the public float. In this case, the listed company will be subject to delisting procedures.

Whether transactions have “certain funds” or financial capability provisions in the documentation depend on the transacting parties and whether short or long form documentation is to be used will normally depend on the credit requirements of the relevant lenders. Documents evidencing that the offeror complies with financial capability requirement will be submitted to the SSC and provided to the securities company, but not publicly disclosed.

4. Tax

4.1 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.

4.2 Other Taxes, Duties, Charges or Tax Considerations

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

4.3 Usury Laws

There is no specific cap on interest rates of a foreign loan. However, since the foreign loan has to be registered with the SBV, the SBV may raise a 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.

5. Guarantees and Security

5.1 Assets and Forms of Security

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 Centre for Registration of Transactions and Assets under the National Registration Agency for Secured Transactions under the Ministry of Justice of Vietnam (the “NRAST”). 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 competent notary office and registered with the Land Use Right Registration Office under the provincial Department of Natural Resources and Environment (the “DONRE”). A security over immovable assets shall take effect as from the DONRE registration and recorded in the title document such as a certificate of land use right, house ownership and other assets attached on land.

5.2 Floating Charges or Other Universal or Similar Security Interests

The concept of floating charges does not exist in Vietnam. Nonetheless, Vietnamese laws allow mortgage over “property being goods rotating during the production and business process” which may be similar to the concept of floating charge. Examples of properties include machinery, equipment, raw materials, fuel, or other inventory which can be sold, replaced or exchanged by the mortgagor at any time prior to occurrence of an event of default. In this case, the rights to demand the purchaser to 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. In case inventory is the secured asset, the mortgagor may replace goods in the warehouse but must maintain the value of 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 as Vietnamese law provides different regulations on each kind of

security and each kind of secured assets. Therefore, a security interest over an individual type of asset is usually taken rather than a universal security interest.

5.3 Downstream, Upstream and Cross-stream Guarantees

Generally, Vietnamese private companies are permitted to grant downstream, upstream and cross-stream guarantees to guarantee the obligation of Vietnamese individuals and organisations. Downstream, upstream and cross-stream guarantees may be considered related-party transactions, and thus corporate approvals for these transactions will be required.

In the case of Vietnamese public companies, the granting of guarantee by the public companies are subject to Decree No. 71/2017/ND-CP on providing guidelines on corporate governance applicable to public companies, which generally prohibits public companies from providing loans and guarantees to:

- its individual shareholders and related persons of such shareholders except for the case where the public company is a credit institution;
- its institutional shareholders and related persons of such shareholders being individuals, except for certain cases as follows:
 - (a) where the public company is a credit institution; and
 - (b) where the shareholder is also the public company’s subsidiary (without shareholding held by the State) and such cross ownership was established before 1 July 2015;
- related persons of shareholders being organisations, except for certain cases as follows:
 - (a) where the public company is a credit institution; and
 - (b) where the public company and the related person of the shareholder are in the same group of companies, provided that appropriate approval is obtained in accordance with the public company’s charter; and
- board members, general director, supervisory member, other managers and related persons of such persons, except for certain cases as follows:
 - (a) where appropriate approval is obtained from the general meeting of shareholders of the public company; and
 - (b) where the public company and the related person of the shareholder are in the same group of companies.

Guarantees granted by Vietnamese economic organisations (which are not credit institutions) in order to secure the obligations of an offshore borrower are not possible, unless the prior approval of the Prime Minister is obtained.

5.4 Restrictions on Target

IF the target is a private company, it is not restricted from granting guarantees or security in connection with the

acquisition of its own shares. However, in the case of the target being a public company, it is prohibited from providing loans and guarantees to its institutional shareholders and their related persons, except for certain cases (where the shareholder is also the public company's subsidiary (without shareholding held by the State) and whose cross ownership was established before 1 July 2015 or where the public company and the related person of the shareholder are in the same group of companies).

For security granted by the target for acquisition of its own shares, the target can only mortgage land and other immovable assets to credit institutions licensed to operate in Vietnam. For the time being, Vietnamese law does not permit foreign entities to take security interest in land and other immovable assets. Foreign entities are only permitted to take security interest in movable assets and property rights (other than property rights relating to immovable assets such as land use rights). Therefore, if the lender is a foreign entity, it is not feasible for the target to grant security over its land and other immovable assets to such lender.

5.5 Other Restrictions

Whilst Vietnamese law does not permit foreign lenders to take mortgage of land use rights and assets attached to land, it is permissible for foreign lenders to take mortgage of moveable assets and property rights. 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 is only a special preferential treatment applied to such kind of projects.

For a guarantee provided by a local entity to an offshore entity, the grant of a guarantee by a Vietnamese entity in favour of a foreign lender in order to secure obligations of a Vietnamese borrower will be subject to the SBV approval. Further, foreign exchange control regulations do not permit the remittance of foreign currency overseas by residents for payment under such 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 a remittance of this kind.

5.6 Release of Typical Forms of Security

The security could 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 NRAFT), deregistration of the security should be conducted in order to be properly released.

5.7 Rules Governing the Priority of 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/registered secured transactions is based on the date of creation.

Vietnamese law is silent on the method of subordination as well as the procedure to change the priority. Generally, secured parties may contractually agree to change the order of priority between/among the secured parties, if this agreement is not contrary to the fundamental principles of Vietnamese law. The agreement is expected to survive the insolvency of a borrower in Vietnam.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

A secured lender could enforce the security 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 the 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. Such notice should state, among others, the reason for the enforcement, details of the secured property, the secured obligations and method and timing for enforcement.
- Possession of Secured Assets: if directed 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 an 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 as agreed between the secured party and the securing party, or after seven days from the date of the enforcement notice in the absence of such 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; and

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

6.2 Foreign Law and Jurisdiction

A transaction relation involving a foreign element is permitted to choose foreign law as the governing law of contract. The foreign law may not apply if, among other reasons, the consequences of its application are inconsistent with “the fundamental principles of Vietnamese laws”. In addition, some contracts are required to be governed by the Vietnamese Law even they involve a foreign element, such as security agreement, in relation to immovable assets.

Apart from certain matters being subject to 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.

6.3 A Judgment Given by a Foreign Court

To be enforceable in Vietnam, a foreign court judgement or a foreign arbitral award must go through the recognition and enforcement process in Vietnam. In principle, for the purpose of the recognition and enforcement of a foreign court judgement or a foreign arbitral award, the Vietnamese authorities will not review the merits of the case. However, Vietnamese courts may refuse this recognition and enforcement on the ground that the recognition and enforcement of a judgement or awards in Vietnam are contrary to “the fundamental principles of Vietnamese laws”.

Vietnamese courts will only consider recognition and enforcement of judgments 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, in practice the application of the reciprocity principle is difficult and, as a result, is subject to the sole discretion of the courts. Very few judgments issued by foreign courts have been recognised and enforced in Vietnam.

Meanwhile, Vietnamese courts will consider recognition and enforcement of a foreign arbitral award where the award has been made in, or by arbitrators of, a country who 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.

6.4 A Foreign Lender’s Ability to Enforce Its Rights

Other specific issues relating to enforcement of equity interests:

- 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 such transfer. Transfer of shares held by a founding shareholder in a joint stock company during the first three years after incorporation to a party that is not a founding shareholder of the joint stock company is subject to the approval of the general meeting of shareholders of such joint stock company.
- 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. Assistance includes, among others, issuance of new certificates evidencing ownership of equity interests and recording the name of purchasers as owners of equity interests.

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

In respect of security of project licenses and permits, the enforcement of security is uncertain given that those rights are granted specifically to certain eligible investors and the transfer of such license rights is subject to strict conditions.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

Under Vietnamese law, the term “bankruptcy procedures” is used to describe the processes beginning from the filing of the petition with the Vietnamese court for a determination on whether the debtor is insolvent and for initiating “bankruptcy proceedings”, to either the “Recovery Procedures” or the “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 from the due date.

The “Liquidation Procedures” will be implemented in case the debtor is already declared “bankrupt” (in other jurisdictions, this is commonly referred to as “dissolution”). Accordingly, there are two main types of processes under the Bankruptcy Law: “Recovery Procedures” is for the recovery of the business operations and “Liquidation Procedures” is to liquidate the debtor’s assets and to write off its debts. After the commencement of the bankruptcy procedures, the judge then makes a decision on whether the debtor should be subject to the Recovery Procedures or the judge will declare the debtor bankrupt then the Liquidation Procedures will be implemented accordingly.

Within 30 days from the date on which the creditors’ meeting passes a resolution on application of the Recovery Procedures, the debtor must formulate a plan for recovery of business operations of the debtor (the “Rescue Plan”) and send it to the judge, 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 of the debtor 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 on approval of the Rescue Plan and will then send the decision to the debtor, creditors and the procuracy at the same level.

The Recovery Procedures will be implemented within the time period as approved by the creditors’ meeting. If the creditors’ meeting fails to approve the time period for implementation of the Recovery Procedures, the Recovery Procedures must be implemented no later than three years from the date of approval of the Rescue Plan by creditors.

The debtor will proceed with the Liquidation Procedures if the Rescue Plan is not approved, if the parties fail to implement the approved Rescue Plan, or if, upon the expiry of the Recovery Procedures, the debtor is still insolvent.

The creditors’ meeting will be held with a minimum of 51% of the total unsecured debts represented and the Rescue Plan is approved with a vote by the attending unsecured creditors who represent at least 65% of the total unsecured debts. Notably, the Rescue Plan which involves the use of secured assets must specify the period of use of such secured assets and plan for enforcement of such secured assets and be consented to by the creditors secured by such assets.

Any amendments of or additions to the Rescue Plan must be approved a vote by more than half of the attending unsecured creditors who represent at least 65% of the total unsecured debts.

7.2 Impact of Insolvency Processes

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

- within five business days from the date on which the court accepts jurisdiction over the bankruptcy matter, any competent authority or organisation may temporarily suspend enforcement of secured assets of the debtor by secured creditors.
- the business activities of a debtor continue to be operated and conducted as usual but is 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 related parties of the debtor are parties to the transaction) prior to 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 more 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 the following activities, among others, activities in connection with a borrowing or a pledge, mortgage, guarantee, purchase, sale, assignment, leasing out of assets; sale or conversion of shares; transfer of ownership rights in any asset; or stopping the performance of an effective contract. Therefore, a secured creditor can only foreclose the 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; and
- in case the secured assets are used for the Rescue Plan, the handling of the secured assets shall comply with the resolutions of the creditors’ meeting. In case the secured assets 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. As 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 are 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; and
- (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; 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.

7.3 The Order Creditors Are Paid on Insolvency

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

- the bankruptcy fees;
- the unpaid wages, severance allowance, social insurance and health insurance and other payables to the debtor's employees;
- the debts arising after commencement of the bankruptcy procedures to recover the debtor's business activities;
- financial obligations owed to the State, the unsecured debts, the secured debts if the value of secured assets is insufficient to pay all such secured debts; and
- the members of the company, owner 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.

7.4 Concept of Equitable Subordination

Under Vietnamese law, there is no concept of equitable subordination or similar.

7.5 Risk Areas for Lenders

Insufficiency of Secured Assets

In case the debtor is declared bankruptcy, 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 such order, the loan might not be repaid.

Enforcement of Secured Assets

Within five business days from the date on which the court accepts jurisdiction over the bankruptcy matter, any competent authority or organisation may temporarily suspend enforcement of 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 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 such uncertainty under the Law on Bankruptcy, the rights of creditors could be affected.

8. Project Finance

8.1 Introduction to Project Finance

For the last two decades, Vietnam has enjoyed strong economic growth. This growth has required significant resources to meet the increasing demand for investment. Heavy focus has been on investment in the energy and infrastructure sectors, which have traditionally been financed from the State budget of Vietnam and the Official Development Assistance ("ODA") from developed countries. However, these sources are 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 investments has emerged as new sources to meet this demand for financing energy and infrastructure projects, forming the project finance market in Vietnam.

The participation of 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 investment forms of Build-Operate-Transfer ("BOT"), Build-Transfer-Operate ("BTO") and Build-Transfer ("BT").

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, enterprises laws, tax regulations, foreign exchange control regulations and other legal regulations in specific industry (such as solar energy, construction, transport, etc). Large PPP projects have typically been implemented in the investment form of BOT as the BOT regulations are more developed than other investment forms.

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 2018, the Government issued Decree No. 63/2018/ND-CP providing the framework of the PPP investment activities (“Decree 63”) replacing Decree No. 15/2015/ND-CP from 2015. Decree 63 took effect on 19 June 2018 and 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 (the “Draft PPP Law”), which is expected to serve as a consolidated framework for the 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 be adopted in mid-2020.

8.2 Overview of Public-Private Partnership Transactions

PPP is an investment form based on contracts among the State authorities, investor, and the project company to build, operate and manage large projects in certain sectors. PPP investment activities are governed by various regulations such as the investment law, construction law, tendering law and 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 highlights of Decree 63 include:

- Investment is encouraged in a variety of sectors under PPP investment forms, such as power, transportation, commercial infrastructure, water treatment infrastructure and information technology, etc.
- 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 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 having sufficient financial capability can participate in PPP projects.

- 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 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.

8.3 Government Approvals, Taxes, Fees or Other Charges

To implement a project finance transaction, typical government approvals as set out below must be obtained.

- Approvals for investment:
 - (a) Establishment of new foreign invested enterprises: in order to set up a new company in Vietnam, a foreign investor must at least obtain investment approval-in-principle from the National Assembly, the Prime Minister or the relevant People’s Committee depending on the type and size of each project, investment registration certificate which records information relating to the investment project of the foreign investor, and enterprise registration certificate evidencing the incorporation of the project company.
 - (b) Acquisition of capital contribution/shares in existing company: acquisition of capital contribution or shares in an investee company is subject to approval of the local Department of Planning and Investment if the investee company operates in conditional business sectors or even if the investee company does not operate in conditional business sectors. 51% or more of charter capital of the investee company would be held by foreign investors post-acquisition. In addition, depending on whether the investee company is a limited liability company or a joint stock company,

the investee company must register any change of contents in its enterprise registration certificate if the acquisition results in such change.

- Administrative fees are subject to the type of application, but these are typically nominal amounts:
- Land matters: subject to need for land use, foreign investors, via the project company, submits application to obtain land use right certificate and pay land use fees for the land.
- Environment matters: by law, there are certain projects required to be conducted environment impact assessment or environment protection plan. Fees are subject to the type of procedure.
- Registration of foreign loans and security transactions: a medium/long term foreign loan (those with a maturity of more than 12 months) must be registered with the SBV and the registration is actually an approval process. A medium/long term foreign loans can only be disbursed after registration of such loan with the SBV. Short-term foreign loans (those with a maturity of 12 months or less) are not however subject to such registration requirement. However, security agreements are required to be notarised or registered, or both in certain circumstances (such as mortgage of land use rights and assets attached to land). Each type of application has different fees. The security registration fee is USD4 and the notarisation fee is USD3,000, at a maximum.

Generally, 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 power purchase agreements (the “PPA”) in particular sectors (eg, a solar or wind power) need to comply with a prescribed template and security agreements relating to land use rights. Assets attached to land are required to be notarised by competent notary office and registered with the Land Use Right Registration Office under the local Department of Natural Resources and Environment.

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. English law or New York law is typically selected. Nonetheless, certain transactions will have to apply Vietnamese laws, such as the PPA in solar or wind power projects, which is subject to a prescribed template, the incorporation and operation of project companies, a shareholder agreement among shareholders of the project company, contracts or agreements with respect to immovable assets located in Vietnam, and labour contracts.

8.4 The Responsible Government Body

Oil and Gas

Matters relating to oil and gas are mainly governed by the Law on Petroleum as amended by Law No. 19/2000/QH10, Law No. 10/2008/QH12 and Decree No. 95/2015/ND-CP.

The Ministry of Industry and Trade and provincial people’s committees are responsible for administration of petroleum operations.

Power

Matters relating to power are mainly governed by the Law on Electricity as amended by Law No. 24/2012/QH13 and Decree No. 137/2013/ND-CP. The Prime Minister, Ministry of Industry and Trade, and people’s committees at all levels are responsible to carry out uniform state administration of electricity activities and electricity use.

Mining Sectors

Matters relating to mining activities are mainly governed by the Law on Minerals 2010 and Decree No. 158/2016/ND-CP. The Government, Ministry of Natural Resources and Environment, and people’s committees at all levels are responsible for administration of minerals.

8.5 The Main Issues When Structuring Deals

Main issues that need to be considered when structuring a deal include the following:

- 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 security interest in land and other immovable assets. Foreign entities are only permitted to take security interest in movable assets and property rights (other than property rights relating to immovable assets such as land use rights). Land and other immovable assets can only be mortgaged to credit institutions licensed to operate in Vietnam and cannot be mortgaged to Vietnamese entities other than these credit institutions. The mortgage right of the project company being the land user is subject to the form of payment of land rental. Generally, the land user who pays a lump-sum payment for the entire land use term is entitled to mortgage both its land use right and assets attached to the land, meanwhile the land user who pays land rental on an annual basis is entitled to mortgage the assets attached to the land only.
- Foreign Investment Restrictions: 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 of Vietnam and domestic laws. Vietnam’s WTO commitments are the most important and comprehensive international treaty provisions in relation to foreign investment. They provide for Vietnam’s commitments to give foreign investors market access (and limitation 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, Law on Investment and other specialised laws regulating specific business sectors. Foreign investment restrictions exist primarily in the form of prohibition of foreign investment, foreign ownership limit, requirement to joint venture with local partners, regulatory approval for foreign investment, or a combination thereof.

- **Fund Flows:** there exist uncertainties relating to how payment of the acquisition consideration would flow, especially in secondary transactions. Since the regulations are not clear, banks where foreign investors open their accounts have broad discretion on how the funds flow. In practice, account banks should be consulted to clarify fund flow issues.
- **Currency:** under Vietnamese foreign exchange regulations, all transactions in Vietnam require VND denomination except for certain exceptions prescribed by the SBV, such as foreign investors being permitted to make deposit or escrow in USD in the context of a privatisation/divestment of State assets only. Before 2014, market practice was that payments were made in VND in transactions involving foreign investors and these were indexed to or calculated on the basis of USD values. However, from 2014 onwards the most prudent practice is to agree on VND amounts in contracts and for these VND amounts to not be indexed to or calculated on the basis of USD values. Therefore, the foreign investor should take into account the FX risk when making investment.
- **Limitation on Loan:** the outstanding medium or long-term loan must not exceed the difference between total investment capital and the equity capital of the project as recorded in the Investment Registration Certificate. Foreign medium or long-term loan is required to be registered with the SBV.

A foreign invested enterprise can be set up in one of the following forms of companies, namely limited liability company (LLC), joint stock company (JSC), partnership and private enterprise. However, in practice, the two forms that the foreign investors often use are LLC and JSC. Depending on the investment structure and the foreign ownership limitation, the project company can either be a 100% foreign invested company or a joint venture between foreign and domestic investors.

8.6 Typical Financing Sources and Structures for Project Financings

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, which 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 fields of power, infrastructure, and aircraft. The first ECA-supported facility extended to a private sector company is 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 fund on a larger scale or to restructure former debts.

8.7 The Acquisition and Export of Natural Resources

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 by way of entering into contractual agreements (such as production sharing contracts in exploring and producing oil and gas) or obtaining relevant licences and approvals (such as licence to explore or extract mineral resources).

Royalty tax applies to the extraction of natural resources which is revenue-based. The royalty rates range between 1% and 35% depending on the kind of resources. Crude oil, natural gas and coal seam gas are taxed at progressive tax rates depending on the daily average production output, with applicable rates ranging from 7% to 29% for crude oil, and 1% to 10% for natural gas. Also, an environmental protection fee shall be paid. For example, the environmental protection fee is VND100,000 per ton (for crude oil) or VND50 per cubic metre (for natural gas) or VND35 per cubic metre (for associated gas).

Minerals that are legally exploited and processed by licensed entities are domestically tradeable, except for toxic minerals. For export activities, in general, minerals to be exported must be in the permitted list, satisfy certain quality standards prescribed by laws, and have lawful origin. The Prime Minister has set out a general objective up to 2025 that crude ores, gold and copper concentrates are prohibited from export. The export tax rate ranges from 0% to 40% subject to each type of minerals.

8.8 Environmental, Health and Safety Laws

In respect of environmental laws applicable to projects in Vietnam, the Law on Environment Protection would be the primary legislation. Regarding health and safety issues, several laws are adopted, namely, Labour Code, Law on Social

Insurance, Law on Occupational Safety and Hygiene, etc. Such laws govern the requirements for a project and the obligations of a project company.

Depending on the specific industry, projects may also be subject to other environmental, health and safety regulations specific to that industry, such as Law on Petroleum, Law on Chemicals, Law on Minerals, Law on Construction, etc.

The main regulatory body at the national level is the National Assembly. The Government, Ministry of Natural Resources and Environment, Ministry of Health, Ministry of Labour - Invalids and Social Affairs, and local authorities are also responsible for overseeing environmental, health and safety in Vietnam.

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9. Islamic Finance

9.1 The Development of Islamic Finance

Islamic finance is not relevant to the financing market in Vietnam.

9.2 Regulatory and Tax Framework

See 9.1 The Development of Islamic Finance.

9.3 Main Shari'a-compliant Products

See 9.1 The Development of Islamic Finance.

9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

See 9.1 The Development of Islamic Finance.

9.5 Recent Notable Cases

See 9.1 The Development of Islamic Finance.

