



Project Finance

in 45 jurisdictions worldwide

Contributing editors: E Waide Warner Jr and Gavin R Skene

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Contributing editors: E Waide Warner Jr and Gavin R Skene, Davis Polk & Wardwell LLP

Business development manager
Joseph Samuel

Marketing managers

Alan Lee
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Robyn Hetherington
Dan White
Sarah Walsh
Ellie Notley

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Alice Hazard

Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

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Senior subeditor

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Production editor

John Harris

Subeditors

Chloe Harries
Sara Davies

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

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Vietnam

Hoang Phong Anh

DFDL Mekong

1 Collateral

What types of collateral are available?

In principle, all types of collateral allowed to be provided as security in Vietnam are available for securing project finance transactions. Pursuant to Vietnamese laws, more specifically the Civil Code and the Decree on Secured Transactions, collateral can comprise objects, money, valuables papers and property rights.

Generally, collateral used within project financing includes immovable property (land use rights, properties attached to the land), moveable assets, contractual rights, onshore and offshore bank accounts and conditional assignment of equity. The collateral can also be property that arises in the future, for example a construction or agreement to be signed.

It must be noted that there is no private ownership of land in Vietnam. Land is owned by the people and administered exclusively by the state. Land use rights cannot in principle be mortgaged in favour of a foreign lender.

2 Perfection and priority

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

A secured transaction needs to be established in writing and needs to be notarised or certified as agreed by the parties or if the law requires. It is usually recommended that the secured transaction be notarised, especially secured transactions involving real property such as mortgage of or guarantee by land use right must be notarised or certified by the local people's committee as the case may be.

Secured transactions become effective from the signing date except:

- if otherwise agreed by the parties;
- a pledge shall be effective from the time of transfer of assets being pledged;
- the mortgage of land use rights, forest use rights and ownership, aircraft and sea-going vessels shall be effective from the time of registration of the mortgage; or
- secured transactions shall take effect from the time of notarisation or certification if so required by law.

However, secured transactions will be effective against a third party from the date of registration.

Vietnamese laws require that the following secured transactions must be registered:

- mortgage of land use rights, forest land use rights, of ownership of planted forest land for production, of aircraft and ships, and of ownership registered assets;

- of a single item of property as security for performance of several obligations; and
- pledge of asset.

Other secured transactions can be registered if agreed by the contracting parties.

Priority is established by order of registration. If none of the secured transactions is registered, priority will be determined by order of establishment of the security transaction. The applicant must pay a fixed fee for notarisation or certification of security agreements and for registration of each secured transaction. In general, this fixed fee is a nominal amount (ie, US\$4 for registering one secured transaction).

It is possible for a corporate entity, such as an agent or trustee, to hold collateral on behalf of the project lenders as the secured party. There is no precedent of a bankruptcy of the collateral agent or trustee in Vietnam. However, the collateral is not an asset of the collateral agent or trustee. Therefore, this collateral shall be excluded from the estate of such collateral agent or trustee in case of bankruptcy. The parallel debt clause concept is not recognised in Vietnam.

3 Existing liens

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

It is common practice to perform lien searches. Such searches may be duly conducted with respect to secured transactions requiring registration. However, in the case of secured transactions not requiring registration, it could be more difficult for the creditor to get assurance as to the absence of liens because the creditor must rely heavily on information provided by the debtor.

With respect to the land use rights, the creditor can obtain mortgage information from the provincial agency for the registration of land and house. As regards to other assets, the creditor can search for security information at an office for the registration of secured transaction. There are three offices, located in Hanoi, Ho Chi Minh City and Da Nang City.

4 Enforcement of collateral

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

The method of collateral enforcement is provided for in the security agreement. Before the enforcement of collateral, the realisor must provide written notice of realisation of the security property to other jointly secured parties at the addresses recorded at the security transactions registration office or must register the notice of realisation of the property in accordance with the law on registration of security transactions. If the parties have not agreed otherwise, in the case of moveable property, land use rights and property attached to land,

collateral (security property) shall be sold by auction (except where the value of the security property may be clearly determined on the market, the property may be sold at the market price without conducting an auction sale, subject to a notification to the securing party and the jointly secured parties, if any). If a single property is used to secure the performance of several obligations, notice of realisation of the secured property must be sent to jointly secured parties.

A lender can seize or sell secured property itself, or petition a court to permit it to do so in the case of disputes. When seizing a property, a lender must not apply any measures in breach of law or public order during the process of seizure.

Foreign lenders cannot seize or buy immoveable secured property.

A security property shall be realised within a time limit agreed by the parties; if there is no such agreement then the realisor shall have the right to make a decision on the time for realisation which shall not be earlier than seven days in respect of moveable property and 15 days in respect of immoveable property, calculated from the date of notice of realisation of the security property.

The sale could be for foreign currency if the purchaser is a non-resident in Vietnam as determined by the regulations on foreign exchange (eg, organisation under foreign laws, individual residing in Vietnam for less than 12 months or residing overseas, etc).

5 Bankruptcy proceeding

How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

In principle, a bankruptcy proceeding in respect of the project company has no major impact on secured lenders: debts secured by pledged or mortgaged assets which have been established before the petition for bankruptcy proceedings has been accepted by the court shall be given priority in payment by such assets. Where the value of the pledged or mortgaged property is insufficient to pay the debts, the remaining debts shall be paid during the asset liquidation of the project company. Where the value of the pledged or mortgaged property is greater than the debt, the difference in value shall be included in the value of the remaining assets of the bankrupt project company. The period for clawback rights is three months before a petition for bankruptcy proceedings is processed by the court. Other preferential creditors' rights with respect to the collateral are not related to the collateral.

To our knowledge, there exists no type of entity that is excluded from bankruptcy proceedings. There are also no other processes except court proceedings that are available to seize the assets of a business. To our knowledge, claims should be treated in the same way regardless of whether they emanate from foreign or local creditors.

6 Foreign exchange

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

The Vietnamese currency (dong) is not freely convertible into other currencies. From a Vietnamese law perspective, some foreign exchange transactions, such as opening offshore accounts and offshore direct payments, will need to be approved by the State Bank of Vietnam (SBV).

Also, all foreign loans of over 12 months have to be registered with the SBV. In this regard, foreign loans can be provided if such loans are within the quota of foreign loans that was approved by the relevant authorities for a specific project.

Transfer of foreign currency overseas is possible provided that such transfer complies with the purposes permitted by the foreign currency regulations, for example repayment of debt, payment in relation to offshore agreements, remittance of dividend or investment return. There is no fee, tax or other charges on foreign currency exchange imposed by the government.

7 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or loan payments to parties in other jurisdictions?

In general, payments of interests and charges by the project company to offshore lenders, including loans obtained from parents company, are subject to withholding tax of 10 per cent (although some bilateral taxation treaties may provide otherwise). Remittance of investment return is currently not subject to any restriction, specific tax or fee.

The project company is entitled to buy foreign currencies with its local bank to make lawful remittances. However, only in certain cases for large infrastructure-related projects, project companies may be granted a guarantee on the availability of foreign currency.

8 Repatriation

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

Project companies are required to repatriate foreign earnings as long as they relate to the operations of the project. Such foreign earnings must not be converted to local currency. Nevertheless, these foreign earnings can be kept abroad in an offshore account of the project company if the project company was granted a proper authorisation from the SBV. The use of foreign currency including foreign earnings must comply with foreign currency exchange regulations in Vietnam.

9 Offshore and foreign currency accounts

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

The project company may establish and maintain foreign currency accounts locally at duly authorised banks. However, the opening of foreign currency accounts in other jurisdictions is only possible when it is expressly required by the lender and a prior approval from the SBV is required. Please note that such bank accounts may only be used for the receiving and paying of foreign loans or other purposes strictly authorised by the SBV.

10 Foreign investment and ownership restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

In principle, Vietnam has committed to maintain a policy of national treatment for foreign direct investment, subject to several restrictions applicable to sensitive sectors. Restrictions in terms of foreign ownership vary depending on which sectors the foreign investor will operate in. For instance, with regard to project finance transactions, foreign investors may invest without any restriction on ownership in the production of electricity. In contrast, foreign ownership is restricted with respect to the establishing of telecommunication network infrastructure, which requires state participation, and investing in the oil and gas sector in Vietnam.

To our knowledge, there are no provisions in any bilateral

investment treaties with key nation states or in other international treaties that may afford relief from such restrictions. Registration with governmental authorities is required at the start of any project.

11 Documentation formalities

Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Loan agreements of over 12 months must be registered with the SBV in order to be legal (see question 6 on foreign exchange).

Certain secured transactions need to be notarised or certified and registered (see question 2). Although registration is not compulsory for all secured transactions, it is advisable to proceed with registration formalities because priority will be established by order of registration (see also question 2). Any document registered or filed with a government authority must be in Vietnamese language or include a Vietnamese translation.

12 Government approvals

What government approvals are required for typical project finance transactions? What fees and other charges apply?

In an infrastructure project transaction, several permits and approvals will be required. The main permits and approvals are as follows:

- special approvals from the government, such as an approval of award and formal notification of winning bidder (often applicable to build-operate-transfer (BOT) projects in the electricity sector), approval of project agreements, etc;
- investment approvals such as an investment certificate issued by the Ministry of Planning and Investment;
- SBV's approval or certificate for offshore bank accounts (if any) and for registration of foreign loan;
- approval of an environment impact assessment report; and
- one or more operating licences or approvals depending on sectors in which the investor will be operating, for example electricity permit, construction permit, mining permit, jetty permit.

Fixed and nominal fees are applicable for these licences, approvals and permits.

13 Foreign insurance

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

According to the regulations applicable to the insurance business, only insurance companies duly licensed in Vietnam may provide insurance policies over project assets. A common arrangement in a project finance transaction is that the local insurance company provides insurance policies over the project assets and such local insurance company would then enter into a reinsurance arrangement with an onshore specialised reinsurance company. The specialised reinsurance company may make a retrocession with an offshore insurance company, provided that such reinsurer reinsures a part of the liability for which insurance has been accepted with the local insurance company. These policies may be directly payable to foreign secured creditors.

14 Foreign employee restrictions

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

There is no particular restriction on bringing in foreign workers, technicians and executives to work on a project (foreign employees)

provided that such foreign employees satisfy conditions applicable to the recruitment of foreign employees.

These conditions include notably technical skills, qualifications and professional experience. Please note that in order to work in Vietnam, foreign employees that will work for more than three months must obtain a work permit beforehand.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

In general, there is no restriction applicable to the importation of project equipment. However, the importation of project equipment must comply with provisions relating to the protection of the environment. The project company may enjoy custom duty exemption for equipment and materials used to form its fixed assets. No particular restriction exists on the importation of project equipment, except the importation of used equipment.

16 Nationalisation and expropriation

What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Several laws govern the issue of nationalisation or expropriation of foreign investments, as follows.

The 2005 Investment Law

The 2005 Investment Law stipulates that lawful assets and invested capital of investors shall not be nationalised or confiscated by administrative measures. In a case of real necessity for the purposes of national defence and security and in the national interest, if the state compulsorily acquires or requisites an asset of an investor, such investor shall be compensated or paid damages at the market prices at the time of that such compulsory acquisition or requisition is announced. Payment of compensation or damages must respect the lawful interests of investors and must be made on a non-discriminatory basis between investors. Any compensation or damages payable in relation to assets to foreign investors shall be made in a freely convertible currency and shall be permitted to be remitted overseas.

The 2005 Law on Enterprises

The 2005 Law on Enterprises provides that the lawful assets and invested capital of an enterprise and its owner shall not be nationalised or expropriated by administrative measures. In cases of extreme necessity where the state compulsorily acquires or requisites the assets of an enterprise for reasons of national defence or security and in the national interest, the enterprise shall be paid or compensated at the market price at the time the compulsory acquisition or requisition is announced. The payment or compensation must ensure the interests of the enterprise without discrimination as between types of enterprise.

The BOT Decree

The BOT Decree provides that investment capital and legitimate property of the investors shall not be nationalised or expropriated by administrative action. In necessary cases where acquisition and requisition of the state's property are required in accordance with the provisions the Law on Investment, the state must assure payment or compensation for property and capital of the investors at market prices or by other methods as agreed.

The procedures and conditions in relation to the expropriation are stipulated by the Law on Compulsory Purchase and Requisition.

17 Fiscal treatment of foreign investment

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

Tax incentives are usually related to corporate income tax and import duty. Under Vietnam tax and investment law, the level of tax incentives depends on both the sector of the investment and its geographical location. Foreign investors in infrastructure projects in the form of BOT, BTO and BT contracts will enjoy special investment incentives status, which include a concessionary 10 per cent tax rate for the duration of the project, a four-year tax exemption period plus nine years of a 50 per cent reduction in tax rate. In addition, these foreign investors are entitled to benefit an exemption on rental on land use rights. See question 15 in relation to the exemption of import duty.

In several special locations, a reduction of personal income tax can be also granted to persons working within the project company.

Finally, in certain special cases for large infrastructure-related projects, project companies could be granted a guarantee on the availability of foreign currency.

18 Government authorities

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

For a typical project sector, authorisations would be required from both central level (government, line ministries) and local level (people committees of the city or province where the project is located and department of line ministries).

For example, the Ministry of Industry and Trade is mainly in charge of projects in the oil, gas, electricity and petrochemicals sectors; the Ministry of Natural Resources and Environment is in charge of investment in natural resources such as minerals extraction; water treatment would be under the management of the provincial people committee.

See also question 12.

19 International arbitration

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

In 1995, Vietnam acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), with two reservations. The first permitted Vietnam to restrict the enforcement of international arbitral awards only to such awards involving a 'commercial dispute'; the second was that of reciprocity: Vietnam would recognise enforcement of foreign arbitral awards in Vietnam from countries not parties to the New York Convention only if those countries similarly recognised enforcement of arbitral awards from Vietnam.

Furthermore, according to the new Code for Civil Procedure, a decision of a competent court in Vietnam is required in order to enforce a foreign arbitral award in Vietnam provided that such arbitral award is not contrary to the basic principles of the laws of Vietnam. Vietnam is not yet a member of the ICSID Convention.

The dispute resolution mechanism provided under the 2005 Investment Law provides that any dispute to which one party is a foreign investor or an enterprise with foreign-owned capital or any dispute between foreign investors shall be resolved by one of the following bodies and organisations: a Vietnamese court; a Vietnamese

arbitration body; a foreign arbitration body; an international arbitration body; or an arbitration tribunal established in accordance with the agreement of the disputing parties (ad hoc arbitration).

The Investment Law also provides that any dispute between domestic investors or between a domestic investor and a state administrative body of Vietnam relating to investment activities in the territory of Vietnam shall be resolved at a Vietnamese court or arbitration body.

Non-commercial disputes are not arbitrable.

20 Applicable law

Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

The BOT Decree confirms the possible application of a foreign law as the governing law of project agreements which are guaranteed by the competent state authority, provided that the application is not contrary to the basic principles of the laws of Vietnam.

In practice, project agreements are often governed by Vietnamese law (notably the establishment and the operations of the project company), except that several issues (ie, interpretation, performance, breach, damages and settlement of disputes) can be governed by a foreign law. Either English or Singaporean law is often chosen to govern financing agreements, except for onshore security agreements, which are governed by Vietnamese law.

21 Jurisdiction and waiver of immunity

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

Under the 2005 Investment Law, any dispute to which one party is a foreign investor or an enterprise with foreign-owned capital or any dispute between foreign investors shall be resolved by one of the following bodies and organisations: a Vietnamese court; a Vietnamese arbitration body; a foreign arbitration body; an international arbitration body; or an arbitration tribunal established in accordance with the agreement of the disputing parties (ad hoc arbitration). A foreign court judgment would, in principle, not be recognised by a Vietnamese court, without looking at the merits of the case.

There is no clear legal basis for the sovereign immunity waived de jure by a sovereign entity in connection with a commercial relationship and through contractual arrangements. This issue should be confirmed by a legal opinion from the ministry of justice.

22 Title to natural resources

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

In principle, natural resources including oil and gas, minerals, water and other natural resources located in the land, islands, internal waters, sea territory, exclusive economic zones and continental shelf of Vietnam are owned by the entire people and are uniformly managed by the state.

Private parties cannot 'own' these resources, but may acquire rights to conduct exploration, exploitation, mining, processing etc in accordance with applicable Vietnamese laws. Foreign investors may also acquire such rights subject to relevant regulations.

According to the Mineral Law, organisations and individuals permitted to mine or process minerals shall be responsible for combining the requirements of mineral mining or processing activities with the infrastructure construction, protection and rehabilitation of the local environment, ecology and land in accordance with approved feasibility studies. They shall also give priority to local people in the recruitment of labour for mineral activities and related services.

23 Royalties on the extraction of natural resources

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The extraction of natural resources (excluding oil and gas which have a specific regime) is subject to royalties in Vietnam. The rate of royalty varies, from zero to 40 per cent, depending on the kind of resources. The basis for the calculation of royalties shall be the quantity of commercial resources actually exploited, the taxable value and the royalty rate.

Royalties applicable to crude oil vary from 6 to 40 per cent depending on the rate of production, and to natural gas they vary from 1 to 30 per cent depending on the rate of production. There is no distinction between the royalties on extraction payable by domestic and foreign parties.

24 Export of natural resources

What restrictions, fees or taxes exist on the export of natural resources?

Export of goods, including export of natural resources, shall generally be subject to export duties which basis and rate for each item are specified in the Export Tariff.

Export controls on natural resources are imposed to protect domestic supply and national security and, in practice, such control may be introduced by a specific export licence.

In the case of oil and gas, the investor may export its product share in petroleum in accordance with the petroleum contract without applying for an export permit, except in cases where the investor is required to sell in the Vietnamese market at the request of the government:

- natural gas owned by it, on the basis of agreements in projects for the development and production of gas; and
- a portion of its share of crude oil at an internationally competitive price.

Export of minerals is generally administered by the Ministry of Industry and Trade.

25 Environmental, health and safety laws

What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

For all projects, the Law on Environment would apply regarding environmental issues and the Labour Code would apply regarding health and safety issues. The Ministry of Natural Resources and Environment and the Ministry of Labour, War Invalids and Social Affairs, respectively, are the regulatory bodies administering those laws.

Update and trends

Vietnamese law provides only a general legal framework for project financings. However, many matters need to be clarified by future legal documents, notably the following issues:

- a detailed mechanism and formal guidance to provide sponsors and lenders with confidence that step-in rights will be enforced for inclusion in project documents; and
- a guarantee in relation to the availability of foreign currency.

A PPP decree to be issued in 2010 may create a clear legal basis and more incentives for investors in infrastructure projects in Vietnam.

More specifically, for each project sector, the laws and regulations relating to each sector shall be applied. For example, in the oil and gas sector, the Petroleum Law would apply and for power generation and transmission, the Electricity Law would apply. For both these laws, the Ministry of Industry and Trade is the regulatory body. For the telecommunications sector, the Post and Telecommunications Laws would apply under the regulatory authority of the Ministry of Information and Communication. With respect to the transport sector, the applicable laws and regulations depend on the type of transport involved. In cases involving aviation, the relevant law is the Law on Aviation. The regulatory body administering this law is the Ministry of Transport.

26 Project companies

What are the principal business structures of project companies?

What are the principal sources of financing available to project companies?

The Law on Enterprises of 2005 provides for five forms of corporate structure, namely:

- one-member limited liability company;
- limited liability company with two or more members;
- shareholding company or joint-stock company;
- partnership; and
- private enterprise.

For projects involving infrastructure projects in Vietnam, a limited liability company is the commonly chosen corporate form.

Principal sources of financing available to project companies are onshore or offshore bank lending and local financial leasing companies.



Hoang Phong Anh

phonganh.hoang@dfdlmekong.com

9th floor, Melia Hanoi Office Building
44B Ly Thuong Kiet Street
Hanoi
Vietnam

Tel: +84 4 3936 6411/3936 6412
Fax: +84 4 3936 6413
www.dfdlmekong.com
vietnam@dfdlmekong.com

27 Public-private partnership legislation

Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Except for the specific decree on investment under BOT, BTO, and BT structures, no specific PPP-enabling legislation has been enacted in Vietnam. A specific decree on PPP being prepared the ministry of planning and investment will be issued in 2010.

See also question 25.

28 PPP – limitations

What, if any, are the practical and legal limitations on PPP transactions?

See questions 17, 22, 23, 24, 25 and 27.

29 PPP – transactions

What have been the most significant PPP transactions completed to date in your jurisdiction?

On the assumption that BOT projects are classified as PPP transactions, the most significant PPP transactions completed to date are two BOT power plant projects (Phu My 2-2 and Phu My 3, the capacity of each project is more than 700MW with an investment of more than US\$400 million) and the Phu My bridge project.



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