



ICLG

The International Comparative Legal Guide to:

Project Finance 2014

3rd Edition

A practical cross-border insight into project finance

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Vietnam

Hoang Phong Anh



Akemi Kishimoto



DFDL

1 Overview

1.1 What are the main trends/significant developments in the project finance market in Vietnam?

In order to encourage the construction and improvement of infrastructure facilities by the private sector in Vietnam, in 1993 the Vietnamese Government introduced, under the general investment legislation, a succession of regulations to develop the regulatory framework specifically governing relevant forms of investments and related contracts. The latest milestones in the process of development of the relevant framework are Decree № 108/2009/ND-CP on investment on the basis of BOT, BTO and BT contracts, and Decision № 71/2010/QĐ-TTĐ of the Prime Minister on investment under a PPP structure.

Phu My 2-2 and Phu My 3 power projects are known as the first projects that are successfully implemented in Vietnam.

1.2 What are the most significant project financings that have taken place in Vietnam in recent years?

Recent significant project financings in Vietnam include:

- Nghi Son Refinery & Petroleum (with investment of USD 9 billion).
- Mong Duong II (a BOT power plant project – with a capacity of about 1,200MW and an investment of USD 2 billion).
- Phan Thiet-Dau Giay expressway (USD 750 million).
- Vinh Tan 3 (1,980MW coal-fired plant).
- Vung Ang 2 (a BOT thermoelectric plant project – with a capacity of about 1,200MW and an investment of more than USD 2.5 billion).
- Hai Duong (a BOT thermal power plant project – with a capacity of about 1,200MW and an investment of USD 2.25 billion).
- Vinh Tan 1 (a BOT thermal power plant project – with a capacity of about 1,200MW and an investment of USD 2 billion).

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Vietnamese law does not prohibit a “general security agreement”.

However, it will not work practically, due to different requirements on the perfection and enforcement of each kind of secured asset. It is advisable that each asset type should be covered by a respective security agreement.

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 be 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 (please note that future assets may not include land use rights).

A secured transaction needs to be established in writing and needs to be notarised or certified as agreed by the parties or as required by law. It is usually recommended that the secured transaction be notarised. Those involving real property such as mortgage- or guarantee-based land use rights 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, against a third party, secured transactions will be effective from the date of registration.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Real property:

There is no private ownership of land in Vietnam. Land is owned by the people and administered exclusively by the state. Land use rights and properties attached to the land cannot, in principle, be mortgaged in favour of a foreign lender. In certain cases for large infrastructure-related projects, the properties attached to the land can be mortgaged in favour of a foreign lender through an onshore

security agent, subject to special approval of the prime minister.

Machinery and equipment:

Security can be taken over these moveable assets. However, the pipeline could be considered as “property attached to the land” and cannot be mortgaged in favour of a foreign lender.

See question 2.1 for procedures.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

The Borrower may pledge its rights under contracts in favour of a (foreign or domestic) lender including the right to reclaim a debt to be formed in the future without requiring consent from the party obliged to pay the debt. Vietnamese law requires that such rights can be valued in terms of money and may be transferred in civil transactions.

The lender is obliged to provide information about the right to reclaim the debt upon request of the party obliged to pay such debt.

See question 2.1 for procedures.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

The onshore account owner may pledge all monies standing to the credit of its account in favour of a (foreign or domestic) lender.

In the case of an escrow account at a commercial bank taken as security for the performance of a civil obligation, the escrow deposit property and the lodging of a deposit at the bank shall be as agreed by the parties or as stipulated by law.

In the case of a pledge of a savings deposit card, the pledgee will have the right to demand that the organisation that is the recipient of the savings deposit freeze the savings deposit account of the pledger.

See question 2.1 for procedures.

2.5 Can security be taken over shares in companies incorporated in Vietnam? Are the shares in certificated form? Briefly, what is the procedure?

A lender can take security over shares in a Vietnamese company. A (foreign or domestic) shareholder may pledge any shares it holds in favour of a foreign lender. However, as there are limits on foreign ownership of Vietnamese companies (which varies depending upon the sector in which the Vietnamese company in question operates), foreign lenders could only transfer shares to their ownership up to the applicable maximum foreign ownership cap and would need to sell the remainder to Vietnamese purchasers (see also question 6).

Share certificates are issued to the shares in companies incorporated in Vietnam.

See question 2.1 for procedures.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

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 (namely, USD 4 for registering one secured transaction).

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally speaking, the registration process would not involve a significant amount of expense. According to the law, the registration office shall process registrations of security transactions on the receipt date of valid files. If a file is received after 15:00 hours, registration shall be completed on the following working day. If it is necessary to prolong the time limit for processing a registration file, the prolonged time limit must not exceed three working days.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

See question 2.2 for certain restrictions and regulatory requirements in relation to the security over land, land use rights and properties attached to the land. Otherwise, there are no regulatory consents required.

3 Security Trustee

3.1 Regardless of whether Vietnam recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Under the current law Vietnam does not recognise the concept of a security trustee but 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 the case of bankruptcy.

3.2 If a security trust is not recognised in Vietnam, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See question 3.1 above.

The parallel debt clause concept is not recognised in Vietnam.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

The method of collateral enforcement is provided in the security agreement. Before the enforcement of collateral, if a single

property is used to secure the performance of several obligations, the realisor must provide written notices 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).

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.

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. In the case of a court order being requested and subsequently enforced, timing is difficult to assess and realisation may take many months, if not years.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Foreign lenders cannot seize or buy immoveable secured property. See also questions 2.2, 2.5 and section 6.

5 Bankruptcy and Restructuring Proceedings

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

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 that have been established before the petition for bankruptcy proceedings and 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.

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

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.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

To our knowledge, there exists no type of entity that is excluded from bankruptcy proceedings.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

There are no other processes except court proceedings that are available to seize the assets of a business.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

There is no other legal process for the restructuring of debts and/or cramdown of dissenting creditors.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in Vietnam.

Vietnamese law does not specifically provide for such liabilities. However, if such continuation of trade is considered as the breach of directors' duties under corporate law ("Law on Enterprises" in Vietnam) or company's by-laws, they may be liable to compensate the company for the damage.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

In principle, Vietnam has committed to maintaining 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 the sectors in which the foreign investor will operate. 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.

No fees or taxes will be imposed on foreign ownership of a project company.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

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.

6.3 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 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 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 sets out similar provisions with respect to the assets and invested capital of an enterprise, and the BOT Decree also sets out similar provisions with respect to the property of the investors.

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

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project 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 mineral extraction; and water treatment would be under the management of the provincial people committee.

7.2 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 State Bank of Vietnam (“SBV”) in order to be legal (see question 7.5 on foreign exchange).

Certain secured transactions need to be notarised or certified and registered (see question 2.1). 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. Any document registered or filed with a government authority must be in the Vietnamese language or include a Vietnamese translation.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

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., through relevant licences in accordance with applicable Vietnamese laws. Foreign investors may also acquire such rights subject to relevant regulations.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

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 35%, depending on the kind of resource. 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 seven to 29% depending on the rate of production, and for natural gas they vary from one to 10% depending on the rate of production. There is no distinction between the royalties on extraction payable by domestic and foreign parties.

Export duties are imposed on the export of natural resources such as minerals, forest products and scrap metal, with a range of applicable rates from zero to 40%.

7.5 Are there any restrictions, controls, fees and/or taxes 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 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 dividends or investment return. There is no fee, tax or other charges on foreign currency exchange imposed by the government except where income is deemed to arise from foreign exchange gains. The income tax rate of 22% applies.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Vietnam does not impose tax on dividends paid to corporations, but imposes 5% income tax if paid to individuals. Withholding foreign contractor tax generally applies to remittances of interest (5%), royalties (10%), service fees (5% income tax and 5% value added

tax). Capital assignment tax at 22% applies to transfers of shares in a Vietnamese entity or capital assets.

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.

Regarding repatriation, 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.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

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 prior approval from the SBV is obtained. 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.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Vietnam or abroad?

The payment of dividends from a project company to its onshore or offshore parent company is possible provided that the remittance of dividends complies with applicable laws; notably foreign currency regulations and tax obligations and conditions for distribution of profits under corporate law.

The project company may distribute profits only when it generates profits from its business and has fulfilled its tax obligations and other financial obligations in accordance with law and, at the same time, must ensure that debts and other property obligations are able to be paid in full after distribution of profits.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

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.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

Generally speaking, procurement by project companies is governed by the agreement between the parties and relevant provisions of civil law. Only in limited cases (projects which are financed by state or state-owned enterprises with 30% or more, or more than

VND500 billion in total invested capital of the project), specific legal frameworks (e.g. Law on Bidding) may apply.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Only insurance companies duly licensed in Vietnam may provide insurance policies over project assets of a local project company (without a foreign sponsor). However, a foreign invested project company (having a foreign participation with an interest higher than 49%) may enter into insurance policies with local or foreign insurance companies. It is of note that these foreign insurance companies must have headquarters in a country with which Vietnam has signed an international trade treaty, which includes an agreement on provision of cross-border insurance services in Vietnam.

There are generally no taxes imposed on insurance policies.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes, the insurance policies over project assets are payable to foreign (secured) creditors.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

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 notably include technical skills, qualifications and professional experience. Please note that in order to work in Vietnam, foreign employees must obtain a work permit beforehand.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

In general, there is no restriction applicable to the importation of project equipment as long as it is not among the list of prohibited goods of importation. However, the importation of project equipment must comply with provisions relating to the protection of the environment.

Customs controls and import duty is in principle applicable to importation of the equipment and generally assessed on an *ad valorem* (on value) basis.

A 10% value added tax is imposed on the importation of goods. An additional special consumption tax may apply to import of certain non-essential or luxury items.

10.2 If so, what import duties are payable and are exceptions available?

Exemption from import duties may be granted for equipment and materials (which cannot be produced in Vietnam) used to form its fixed assets. See also questions 10.1 and 17.2.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Force majeure exclusions can be stipulated in agreements and are enforceable in Vietnam.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Anti-Corruption Law as well as Penal Code criminalise attempted corruption, passive and active bribery, extortion, bribing of foreign officials, abuse of office, and money laundering.

Civil penalties (e.g. confiscation or recovery of corruption-related properties, disciplinary action, etc.) and/or criminal penalties (e.g. imprisonment; capital punishment) are applicable, depending on the nature and seriousness of the offence.

13 Applicable Law

13.1 What law typically governs project agreements?

The BOT Decree confirms 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 of foreign law is not contrary to the basic principles of the laws of Vietnam.

In practice, the establishment and the operations of the project company will be governed by Vietnamese law. In the case of disputes relating to the application or interpretation of the project agreements, foreign law can be applied.

13.2 What law typically governs financing agreements?

Either English or Singaporean law is often chosen to govern financing agreements, except for onshore security agreements, which are governed by Vietnamese law (see question 13.3 below).

13.3 What matters are typically governed by domestic law?

As explained in question 13.2 above, onshore security agreements should be governed by Vietnamese law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding 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.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

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”; and the second was that of reciprocity: Vietnam would recognise enforcement of foreign arbitral awards in Vietnam from countries not party 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.

15.2 Is Vietnam a contracting state to the New York Convention or other prominent dispute resolution conventions?

Vietnam is a contracting state to the New York Convention as mentioned above and also to the ASEAN Comprehensive Investment Agreement.

15.3 Are any types of disputes not arbitrable under local law?

Non-commercial disputes are not arbitrable.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

The Investment Law provides that any dispute in connection with foreign investors or a foreign-owned company relating to investment activities in the territory of Vietnam shall be resolved at a Vietnamese court or (domestic, foreign, international or *ad hoc*) arbitration body. Any dispute between a foreign investor and a state administration body of Vietnam relating to investment activities in the territory of Vietnam shall be resolved at a Vietnamese court or arbitration body (except otherwise stipulated in an agreement (if any) between such foreign investor and state administration body of Vietnam, or in a treaty under which Vietnam is a signatory or member).

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

As to the change of law, the 2005 Investment Law provides that if a law or policy contains greater benefits and incentives than those to which an investor was previously entitled, the investor shall be entitled to the benefits and incentives in accordance with the new provisions as from the date of effectiveness of the new law or policy. On the other hand, if a new law or policy affects adversely the lawful benefits enjoyed by an investor prior to the date of effectiveness of such law or policy, the investor shall be guaranteed to enjoy the same incentives provided for in the investment certificate, or the appropriate arrangements shall be made.

In practice, political risk protection can be provided for in a “specific agreement” between the investor and the Government (i.e. the BOT Contract).

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

- (a) In general, a 5% withholding tax is due on interest on loans paid to non-residents.
- (b) Under local law, loan interest subject to Withholding Tax includes all charges that the Vietnamese party must pay under the contract, including:
 - Income from transfer of securities.
 - Fines and compensations collected from the partner that breaches the contract.
 - Other income as prescribed by law.

17.2 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 that may be available to foreign investors are usually related to corporate income tax and import duty. Under Vietnamese 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, or in PPP projects, will enjoy special investment incentives status, which include a concessionary 10% tax rate for the duration of the project, a four-year tax exemption period, plus nine years of a 50% reduction in tax rate.

There are no incentives pertaining to foreign creditors.

Vietnam does not impose tax or stamp duties on documents like investments, loans or mortgages. Instead, “registration fees” are charged on required registrations of transfers of ownership of certain properties, including buildings/land, ships and land vehicles and guns. Rates vary from 0.5% in the case of lands and buildings up to 1-20% in the case of automobiles.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Vietnam?

Corporate structure:

In general, the main forms of corporate structure under corporate law in Vietnam include limited liability company (one-member or with two or more members), joint-stock company (i.e. shareholding company), partnership, etc. For projects involving infrastructure in Vietnam, a limited liability company is the commonly chosen corporate form.

Existing liens:

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 that are not required to be registered, it could be more difficult for the creditor to get outside assurance as to the absence of liens. Instead, the creditor must rely on information provided by the debtor.

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

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

There are no special regulations applicable to project companies. Common legal requirements (see below) would apply.

As to the legal and regulatory requirements for the issuance of capital market instruments, in the case of the public offering, before a company may list on stock exchanges, it must first obtain the approval of the State Securities Commission (“SSC”) for a public offering of securities (defined as an offer to 100 or more non-institutional investors). The SSC approval is separate from the listing on a stock exchange.

Public offerings of securities must be denominated in Dong.

In addition, companies will be subject to strict requirements such as minimum paid-up charter capital (VND 10 billion for shares and bonds and VND 50 billion for fund certificates), profitability in the preceding year, plan for issuance and utilisation of the proceeds being passed by its general meeting of shareholders, undertaking by issuing company to discharge obligations to bond investors, submission of a prospectus in its application, etc.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in Vietnam.

The use of such Islamic financing structures does not appear to be expressly prohibited by Vietnamese law.

There are currently some “very small” projects under the Islamic financing structure. The authors are, however, not aware of any

significant Islamic financing transactions having been undertaken/completed in the Vietnamese market, and, as such, it seems that such structures remain untested.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

Vietnamese laws do not make a distinction between *Shari'ah* law and other foreign laws. In case Vietnamese laws are not the mandatory law, the contractual parties may select the foreign law (including *Shari'ah* law) as the governing law; please also see section 13 above.



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Hoang Phong Anh is a qualified Vietnamese lawyer who, prior to joining DFDL in 2007, worked for a large international law firm in Vietnam for 12 years. He has an excellent knowledge of corporate, commercial and investment law, having provided legal expertise on several foreign investment projects in Vietnam as well as working on donor-funded technical assistance projects, including projects for the review and analysis of draft Vietnamese legislation. Mr. Hoang provided legal advice and assistance for BOT power plant projects for both the sponsor side and the Government side. He is the lawyer for the Vietnamese Government in an international arbitration in connection to an investment dispute between an overseas Vietnamese investor and the Vietnamese Government. Mr. Hoang also provided technical assistance to several banking reform projects which were financed by the World Bank and Asian Development Bank in Vietnam. He speaks Vietnamese, English and French.

We are unaware of any Vietnamese litigation that has considered or applied *Shari'ah* law.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in Vietnam? If so, what steps could be taken to mitigate this risk?

Vietnamese laws do not clearly prohibit the addition of interest to principal. However, the compounding of interest (or the addition of interest to principal) in relation to a loan does not work practically in Vietnam, especially an offshore loan. Of note, under the foreign exchange laws, the borrower can only repay the true loan amount. In addition, the offshore interest will be subject to the withholding tax.



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