

VIETNAM - KEY LEGAL ISSUES FOR FOREIGN LENDERS



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Foreign loan capital (including lending and corporate bonds issuance) remains an important source of funding for the Vietnamese economy. According to a report published by the Ministry of Finance in early 2023, the total foreign debt owed by Vietnamese companies (i.e., commercial debt other than public debt) in the first half of 2022 was nearly US\$100 billion, accounting for about 70 per cent of total foreign debt.

The demand by Vietnamese borrowers for foreign loans is expected to increase significantly due to stricter scrutiny by the State Bank of Vietnam (SBV) on lending by local banks to certain fast-growing but high-risk sectors including real estate and securities. Government investigations into the bond and real estate markets that have been ongoing since 2021 have also impacted the availability of local bond financing, which had previously been the principal source of funding for the real estate sector.

In this article, we discuss key legal and practical challenges in cross-border financing in Vietnam together with Vietnam’s insolvency and bankruptcy regime.

Conditions and restrictions applicable to cross-border loans

Foreign loans are regulated in two categories: (1) short-term loans with a term of up to one year; and (2) medium-to-long-term loans with a longer term. By law, a medium-to-long-term foreign loan must be registered with the SBV.

On 30 June 2023, the SBV issued the long-awaited Circular 08/2023/TT-NHNN (Circular 08) providing the conditions applicable to cross-border loans. Circular 08 will be effective as of 15 August 2023, replacing formerly effective Circular 12 that has been in effect since 2014. The final version of Circular 08 no longer includes stringent restrictions that were present in earlier drafts such as an 8 per cent per annum cap on interest and fees and a blanket prohibition on using short-term loans to finance securities or real estate acquisitions.

However, Circular 08 also sets out various conditions and restrictions applicable to cross-border financing to Vietnamese borrowers that are not credit institutions. Accordingly, a short-term foreign loan will only be permitted for: (1) restructuring other foreign loans of the

borrower, or (2) financing short-term payment liabilities of the borrower (as defined under the accounting standards). A medium-to-long-term loan is permitted for (i) financing an investment project, (ii) implementing business plans or other projects; or (iii) refinancing other foreign debts.

The principal amount (excluding interest and fees) of a medium-to-long-term loan for financing an investment project and the total outstanding amount (including principal, interest and fees) of a medium-to-long-term loan for financing the business plans of the borrower must not exceed the borrowing limit set out in the approvals of the competent authorities for the relevant investment projects or business plans respectively.

With regard to refinancing, Vietnamese borrowers continue to be prevented from taking foreign loans to refinance domestic debts. However, Circular 08 has eliminated the prohibition on using a foreign refinancing loan with higher finance costs than the original loans, giving more room for restructuring in a global environment of rising interest rates. To avoid double counting of the total foreign debt of a borrower, borrowers must use the proceeds from the refinancing loan to repay the refinanced loan within five business days from the disbursement date.

Taking and enforcing security interests

Foreign lenders can generally take security over all assets and rights of Vietnamese borrowers/obligors with two key exceptions: (1) foreign lenders are not permitted to take security over land and real estate assets in Vietnam; and (2) a Vietnamese guarantor cannot guarantee the obligations of a foreign borrower without the approval of the Prime Minister of Vietnam.

Secured transactions are effective from the time they are entered into by the parties or as otherwise agreed in the security agreement, except for security over certain assets, which must be registered in order to take effect. Security over land use rights must be registered with the Land Registration Office under the Department of Natural Resources and Environment. Security over maritime vessels must be registered with the Vietnam National Maritime Bureau, and security over aircraft must be registered with the Civil Aviation Authority of Vietnam.

Security over most types of assets is registrable with the National Registration Agency for Security Transactions (NRAST). Whilst NRAST registration is not required to establish the validity of the security interests, registration will determine the priority of the enforcement of the security vis-à-vis third-party creditors.

Although the legal framework of Vietnam for creation and perfection of security interests is relatively well-developed, establishing a robust contracting mechanism is recommended to protect the rights of lenders/secured parties upon enforcement. This is often accomplished through a combination of the following options:

Share pledge. Enforcement of security over shares is challenging as it requires cooperation from the company and the shareholders to complete the share transfer. Foreign ownership limitations also apply in certain sectors limiting the rights of foreign lenders to take ownership of the shares or designate another foreign party to take over the shareholding. Ways around this include taking security over shares in an offshore holding company; pre-agreed form share transfer agreements at the onshore level; and obtaining extensive undertakings of obligors and the company in financing documents to be used upon enforcement.

Where shares or other securities to be pledged are registered and deposited at the Vietnamese Securities Depository (VSD), the VSD and depository banks/securities companies may be reluctant to block pledged shares registered and deposited at VSD in favour of an organisation which is not a Vietnamese credit institution. The parties should liaise with VSD and any depository bank or security company involved in the transaction at an early stage to determine which forms will be required for the transfer of shares in an enforcement scenario.

Security over bank accounts. It is onerous and uncommon for a Vietnamese borrower to open an offshore debt service account, which will be subject to SBV approval. Taking security over an onshore bank account will confer the lenders with the right to seize the outstanding amount in the account at enforcement but does not allow the lenders to control the cash flow through the account. To facilitate enforcement, there should be prior agreement with the bank holding the account on certain restrictions on the use of the mortgaged accounts and enforcement actions.

Security over contractual rights. There is no concept of assignment by security under Vietnamese law but lenders can take security over contractual rights of the securing party. Enforcement by way of assignment of the contractual rights to the lenders may be subject to consent by the counterparties to the underlying contracts and other restrictions set out therein. The prior consent of counterparties should be obtained.

Floating charge uncertainty. Vietnamese law does not recognise the concept of a floating charge. Decree 21/2021/ND-CP effective on 15 May 2021 seems to allow the owner of an investment project to use all of its assets in its investment project as collateral to secure its obligations

to another party. However, there is no guidance on how this would be undertaken in practice nor is it well-tested by the market. In practice, lenders should enter into specific security agreements regarding security over specific assets.

Untested insolvency and bankruptcy regime

The currently effective bankruptcy regime of Vietnam was enacted in the 2014 Bankruptcy Law, which took effect in 2015 but until now has been largely untested. From 2015 until March 2020, Vietnamese courts accepted fewer than 600 bankruptcy requests, of which the courts only granted over 100 bankruptcy orders. Since March 2020, no further data has been published by the government. Bankruptcy proceedings in Vietnam are time consuming and inefficient due to ambiguity in the legislation and inefficiency of the courts and enforcement authorities in practice.

An unsecured creditor, partly secured creditor, or the company may file an application to commence a bankruptcy proceeding. A fully secured creditor cannot initiate a bankruptcy proceeding and should instead dispose of the charged collateral to recover the debt.

The commencement of a bankruptcy proceeding triggers a moratorium on civil actions by unsecured creditors. Creditors must submit notices requesting payment of debts to the receiver within 30 days from the commencement of the bankruptcy proceedings. The receiver will prepare a list of creditors that can attend the creditors' meeting.

The judge must convene a creditors' meeting by (1) 20 days from the completion of the assets inventory or (2) finalisation of the creditors list, whichever is later. During the meeting, the receiver and company will propose a restructuring plan and a business recovery plan for the approval of creditors. The restructuring plan is approved if a majority of the unsecured creditors representing at least 65 per cent in value of the unsecured debts present at the meeting vote in favour. The court will then issue a decision acknowledging the creditors' approval of the business recovery plan.

The following transactions may be held invalid by the court if made within 6 months (or 18 months in the case of related party transactions) prior to the date of acceptance by the court of the insolvency petition: (a) transfer of property at non-market price; (b) conversion of unsecured debt into secured / partly secured debt on assets of the company; (c) making payments, or setting off obligations in favour of creditors, where the debt is not yet due or in relation to a sum that is larger than the debt that is becoming due; (d) donation of assets; (e) conducting transactions outside the purpose of the business operations; and (f) other transactions for the purpose of disposing of assets.

Due to the challenges in the enforcement of the bankruptcy regime, the most common restructuring tool in Vietnam remains for the debtor company to negotiate terms on an ad hoc basis with individual creditors on the restructuring of each debt outside of any formal court proceedings.