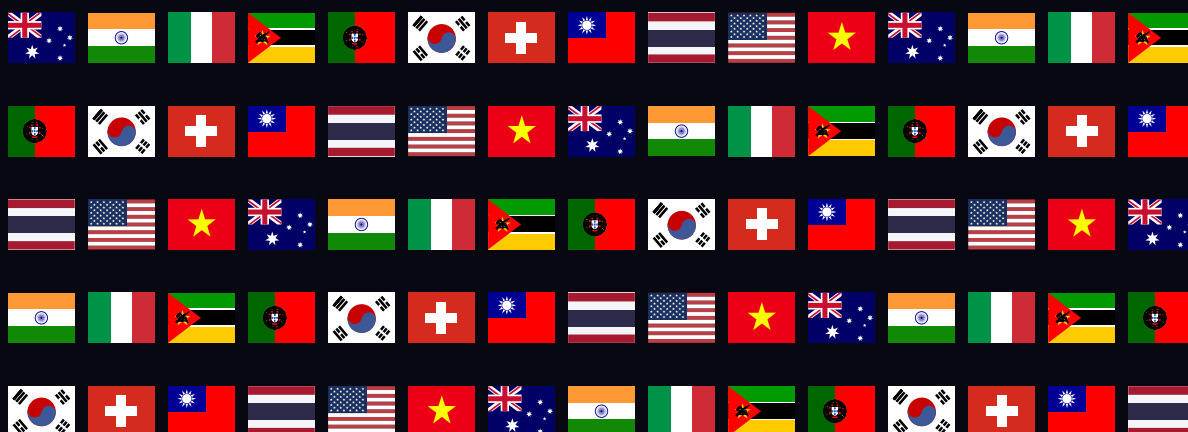


# Vietnam



# Project Finance

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Quick reference guide enabling side-by-side comparison of local insights into collateral and security packages; forex and withholding tax issues; remittances and repatriation of foreign earnings; foreign currency accounts; foreign investment issues, including investment, ownership, insurance, worker, equipment and nationalisation / expropriation restrictions and fiscal treatment; relevant government authorities; natural resource regulation; government approvals and filings; arbitration and governing law considerations; environmental, health and safety laws; project companies; public legislation, limitations and transactions; and recent trends.

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## CREATING COLLATERAL SECURITY PACKAGES

### Types of collateral

What types of collateral and security interests are available?

### Types of security available in Vietnam

The Civil Code 2015 sets out the types of security that may be created in Vietnam. Security may be created in the form of pledges, mortgages, security deposits, performance bonds, escrow deposits, title retention, guarantees, fidelity guarantees and property liens. Unlike in some other jurisdictions, assignments by way of security are not recognised under Vietnamese law as a security interest.

Mortgages, pledges, guarantees and security deposits in escrow accounts are the most common forms of security interests in Vietnam. In terms of the creation of security:

- security may be created over any property currently owned by the creator of the security, and also (unlike the case with legal mortgages in common law jurisdictions) that which will be owned in future, other than in the case of mortgages over land-use rights. While such property may be described generally in the security documentation, it must be identifiable;
- as in other jurisdictions, a mortgage does not require transfer of possession of the mortgaged property to the mortgagee;
- pledged property must be delivered to the pledgee to perfect a pledge; and
- the types of assets that may be deposited by way of security in an escrow account at a credit institution include sums of money, precious metals, gemstones and valuable papers deposited.

Onshore security packages for project financings in Vietnam typically include the creation of security over the assets of sponsors and project companies, briefly:

- a mortgage over the sponsors' equity interests in the project company. Transfer of equity interests of a sponsor can be subject to the first refusal right of other sponsors if the project company is established in the corporate form of a limited liability company. In that case, a written waiver of such rights of other sponsors is required;
- a mortgage over equipment and machinery of the project company;
- a mortgage over inventories;
- a mortgage over receivables and other claims under insurance policies and other contracts (enforcement of this mortgage will result in the transfer of ownership over the receivables or other claims to the mortgagee or other transferee. By law, a prior notice to the relevant counterparties (namely, payors or insurers) is required. In practice, lenders should require the project company to obtain a consent or acknowledgement from the relevant counterparties for the mortgage over the receivables and other claims);
- a mortgage over bank accounts and account balances standing to the credit of the bank account (both offshore and onshore bank accounts). Typically, in project financing, a project company will be required to open and maintain accounts with designated banks appointed by lenders. The lenders will typically have a contractual right to set off the credit balances in the project company's bank accounts against the company's debts. A mortgage is also created over such bank accounts to secure the priority of lenders against third parties;
- a mortgage over contractual rights is also common in Vietnam. However, contractual rights to be mortgaged must be rights measurable in money. Given that Vietnamese law has no concept of assignment by way of security, lenders should request the project company to obtain consents from counterparties to the underlying contracts on, among other things, step-in-rights enabling the lenders to replace the project company as a party to the relevant project agreements, or payments from the counterparties being made to the accounts designated by

the lenders;

- a mortgage over land-use rights and other immovable assets. While security may be created over movable assets in favour of foreign lenders, the Land Law 2013 permits organisational owners to create mortgages over immovable property at credit institutions licensed to operate in Vietnam only. Accordingly, foreign lenders cannot take security over land use rights and assets attached to land under Vietnam law. While an onshore security agent would not be able to take security in circumstances where the foreign lender could not, such a structure may be used in practice to hold such security on behalf of a foreign lender in important public-private partnership power projects with special approvals and confirmative opinions from the Prime Minister and relevant state authorities.

*Law stated - 13 June 2022*

## **Collateral perfecting**

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? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

## **Perfection of security interests**

The requirements and procedures for the perfection of security interests differ depending on the type of asset:

- immovable property: an agreement creating security over immovable property must be notarised by a notary office to be effective. In addition, security over immovable property (including over land-use rights, assets attached to the land that are recorded in the certificate of the rights to use the land and ownership of houses and other property on the land) must be registered with the land registry of the Department of Natural Resources and Environment in the province where the land is located. A mortgage takes effect when the land registry records the registration of the mortgage in the registry book. Security over assets that will attach to the land in the future will typically also be registered with the land registry; however, such registration is not compulsory by law;
- ships and aircraft: pledges and mortgages may be created over aircraft and mortgages may be created over ships. Such security is required to be registered with the Civil Aviation Authority of Vietnam in the case of aircraft and the Vietnam Maritime Administration in the case of ships. There is no requirement to notarise security agreements over ships or aircraft; and
- movable assets other than ships and aircraft: there is no requirement to register security interests over movable assets generally to be effective. However, mortgages over such movable assets must be registered with the National Registration Agency for Secured Transactions (NRAST) to be effective against third parties. In the case of security created over the shares of public companies that are registered and deposited with the Vietnam Securities Depository and Clearing Corporation (VSDCC), the security should also be registered with the VSDCC. The VSDCC will block transactions involving the encumbered shares.

## **Priority**

In general, the ranking of security is determined by the order in which it was registered, and in the case of competing unregistered security that has no effect against third parties, the order in which it was created. Registered mortgages over movable assets (although such mortgage is not required by law to be registered), have priority over the unregistered mortgage, even if created after the unregistered mortgage.

## Fees and taxes

The fee for notarisation of agreements creating security over immovable assets will be determined based on the value of the assets or the value of the loan for which it is given, up to 70 million Vietnamese dong (approximately US\$3,000).

The fees for registration of security over aircraft will be determined based on the value of the transaction and will range from 1.8 million Vietnamese dong to 18 million Vietnamese dong (approximately US\$77.80 to US\$778).

The fees for registration of security over movable assets other than aircraft (including ships) and immovable assets are nominal (namely, less than US\$5).

## Security agent

The concept of a security agent is not explicitly recognised or tested under Vietnamese law. The Civil Code 2015 generally recognises the concept of an authorised representative, and parties to a syndicated loan may appoint a security agent (eg, a local credit institution that is participating as a lender) to act as an authorised representative or agent on behalf of all of the lenders, including offshore lenders participating in syndicated financings, to take, manage and enforce the security for the syndicated loan.

Currently, there is no specific licensing requirement for security agents to hold or enforce security. However, a security agent must be a credit institution participating in the financing.

The secured assets would not become the assets of the security agent as long as no enforcement event against the borrower occurs. If a security agent as a credit institution becomes bankrupt, the security agent's role and participation in the syndicated loan can also be terminated when the secured obligations of the borrower to the security agent is fully repaid. Accordingly, the lenders can authorise another credit institution to act as a new security agent to take, manage and enforce the security.

Security agent arrangements in favour of offshore lenders are generally permitted, except for security over immovable property. However, such security agent arrangements can be used where a foreign bank branch or a local bank can take mortgages over immovable property in favour of offshore lenders with the special approval and confirmative opinions of the Prime Minister and relevant state authorities. This security agent arrangement is not available to all types of project financing. In practice, only some large-scale public-private partnership projects power projects can get the approvals and confirmative opinions to use an onshore security agent to take mortgages over immovable property in favour of offshore lenders.

*Law stated - 13 June 2022*

## Assuring absence of liens

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

In addition, creditors can undertake searches of the applicable registries at which security is registrable to assure themselves of the absence of liens with priority to the creditor's lien as set out below:

- in the case of immovable property, creditors should request the security provider to submit a request to the land registry of the Department of Natural Resources and Environment in the province where the secured property is located for information regarding all securities created over such land and the assets attached to it;
- in the case of ships and aircraft, creditors should request the security provider to apply to the Vietnam Maritime Administration or Civil Aviation Authority of Vietnam (as applicable) for information regarding all securities



created over such assets; and

- in the case of movable property other than ships and aircraft, creditors should undertake a search of the online database of the NRAFT maintained by the Ministry of Justice. In addition, creditors may submit a request to NRAFT for an official search result regarding registered mortgages of a security provider. However, there is no requirement to register security over movable assets generally (namely, other than ships and aircraft), and the search conducted at NRAFT will not disclose prior unregistered security interests. Unregistered mortgages generally rank below registered mortgages.

Vietnamese law also recognises statutory liens, which are generally understood to have priority over registered forms of security, and as such, lenders should confirm the existence of any such liens.

*Law stated - 13 June 2022*

### **Enforcing collateral rights**

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?

In general, the enforcement process shall be mainly as follows:

- enforcement notice: prior to enforcing security, a secured party (or its authorised representative such as a security enforcement agent) must provide such period of notice as agreed in the security agreement, or the absence of agreement, reasonable notice, to the security provider and any other secured parties. Under Decree 21/2021/ND-CP, reasonable notice of enforcement means not less than 10 days in the case of movable property and not less than 15 days in the case of immovable property. Such notice may also be given by registering the enforcement notice with the relevant registry at which the security is registered (eg, the NRAFT in the case of movable property and the applicable land registry of the provincial Department of Natural Resources and Environment in the case of immovable property) and that registry will notify other secured parties of the enforcement notice;
- handover of secured assets: the secured party may inspect the secured assets to prevent the disposal of the secured assets and seek its handover to enforce the security interest, or seek the assistance of the courts if the party in possession of the secured assets does not handover the secured assets to the secured party for enforcement; and
- enforcement methods: depending on the nature of the secured assets and the parties' agreement in the security agreement, the security may be enforced by private sale of the secured assets, auction of the secured assets, by the secured party acquiring the ownership of the secured assets to set off against the secured obligations, and other agreed measures for enforcing the security. Such sale may be effected by the secured party (and not by judicial sale) without any involvement (or powers of attorney) from the security provider.

The sale of secured assets in Vietnam is subject to foreign exchange control regulations that require payment to be denominated and paid in Vietnamese dong.

*Law stated - 13 June 2022*

### **Enforcing collateral rights following bankruptcy**

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 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?

The Bankruptcy Law 2014 governs insolvencies in Vietnam. Under this law, a company, its shareholders, creditors and employees (or their union) may file a bankruptcy application. Bankruptcy proceedings apply to all types of enterprises established under the laws of Vietnam.

Vietnam does not have a concept of receiverships. However, as an alternative to petitioning the winding up of a company, a lender may sell secured assets to satisfy their debts under the Civil Code and in accordance with their security agreement.

### **Effect on enforcement**

Within five working days from acceptance of a bankruptcy application by a court, rights to enforce security will be subject to a temporary suspension and during such period of suspension, enforcement of security is possible only with the permission of the court (where there is a risk of the secured assets being damaged or significantly devalued). After the judge decides to open the bankruptcy proceedings, the judge will consider and decide how the suspension of enforcement of security will be handled in accordance with the following cases:

- if the unsecured creditors of the company approve for the company to be rehabilitated under a procedure called the restoration procedure, and secured assets are agreed to be used for the restoration of the company by the relevant secured creditors, the enforcement of security will be enforced in accordance with the resolution of the creditors' conference (including the time period and plan for using such assets); and
- if there is no restoration procedure or the secured assets are not necessary for the rehabilitation of the company, the security can be enforced in accordance with the applicable security agreement. If the security agreement has not become enforceable, the court shall suspend the security agreement and may permit enforcement of the security before declaring the company's bankruptcy.

### **Adjustments of prior transactions**

Under the Bankruptcy Law, the following transactions, among others, may be avoided if they occur within six months of the commencement of bankruptcy proceedings (or 18 months if they are with a related party of the bankrupt entity) by the order of the court:

- disposals of assets that are not at market price;
- set-off of debts that have not yet become due;
- grant of security in relation to existing unsecured debts; or
- transactions not for purposes of business activities of the company.

### **Priority of payments**

Under the Bankruptcy Law, the proceeds from the liquidation of a company will be distributed first to meet the costs of the bankruptcy proceedings, second to pay unpaid wages, allowances, compulsory insurance and other entitlements of employees, next to pay debts incurred after the commencement of the bankruptcy proceedings for the purpose of rescuing the business, and last to pay any debts owed to the Vietnam government and other unsecured creditors (including secured creditors whose security did not meet the secured obligations). The residue will be distributed among the shareholders and other equity holders.

*Law stated - 13 June 2022*

## FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

### Restrictions, controls, fees and taxes

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

Vietnam strictly controls foreign exchange (FX) activities within its territory or in relation to the residents in Vietnam. Some FX restrictions include:

- all payments and transactions conducted in Vietnam must be denominated and paid in Vietnamese dong except for certain limited cases as provided in the FX regulations;
- remittances of foreign currency overseas (including for payment of the principal or interest on loans) are strictly regulated. The remitting bank will verify the documents submitted by its customer to ensure that the remittance is in accordance with the FX regulations and reflect the transactions entered into by the customer;
- Vietnamese dong can only be converted into foreign currency if the conversion is for a permitted transaction and there is a supporting document for such transaction. Even if conversion is permitted, the State Bank of Vietnam (SBV) strictly controls the exchange rate between the US dollar and Vietnamese dong; and
- Vietnamese law allows an enterprise established in Vietnam to maintain and open foreign-currency offshore accounts with offshore banks. An enterprise may open and use a foreign-currency offshore account to, among others, borrow foreign loans from foreign lenders. The SBV's permit is required for opening and using offshore accounts, and that permit will record the details of the account as well as the purpose, and the inflows and outflows from that account. In practice, it would be difficult to obtain this permit except for large-scale projects or overseas investments by Vietnamese entities.

*Law stated - 13 June 2022*

### Investment returns

What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

A foreign-invested project company must open a direct investment capital account (DICA) at a licensed bank in Vietnam. Under applicable FX regulations certain transactions must be effected through the DICA, including relevantly:

- remittance of dividends overseas to foreign investors;
- remittance of divestment amounts overseas to foreign investors; and
- disbursement and repayment of medium-term or long-term offshore loans (including international bonds issued

in a foreign currency to offshore investors).

Interest or premiums on foreign loans or international bonds to corporate lenders or institutional bondholders is subject to a withholding tax of 5 per cent unless an applicable double taxation treaty with Vietnam provides otherwise.

*Law stated - 13 June 2022*

### **Foreign earnings**

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

Vietnamese law does not require investors to convert foreign earnings into Vietnamese dong. However, project companies must repatriate their foreign earnings (through their offshore investment capital account opened in a licensed bank in Vietnam) within six months from the date on which there is a tax finalisation report or an equivalent document under the laws of the country where the offshore investment is conducted. This period can be extended by up to 12 months, subject to notifying the Ministry of Planning and Investment (MPI) and the State Bank of Vietnam (SBV) that the project company cannot meet the six-month deadline for the repatriation of such earnings as described above. If a project company wants to retain its foreign earnings to reinvest overseas, the project company must obtain amendments to the offshore investment registration certificate or new offshore investment registration certificate issued by the MPI.

*Law stated - 13 June 2022*

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

A project company can establish and maintain foreign currency accounts in other jurisdictions for its offshore investments subject to obtaining the permit of the SBV. The project company must obtain the SBV's permit for opening and use of the offshore account that will record the details of the account as well as the purpose, and the inflows and outflows of such offshore account.

A project company can establish and maintain foreign currency accounts in Vietnam, including DICA, if, for example, the project company is established with foreign shareholding. It may maintain payment accounts in foreign currencies for the purpose of making payments in foreign currencies in Vietnam or overseas in accordance with the FX regulations in Vietnam.

*Law stated - 13 June 2022*

## **FOREIGN INVESTMENT ISSUES**

### **Investment 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?

A foreign investor must satisfy, among other conditions, the following conditions:

- the proposed investment project does not fall within the list of prohibited business lines (Prohibition List); and
- the foreign investor satisfies the market access conditions that are applicable if the investment falls within the list of business lines in relation to which foreign investors must satisfy market access conditions (FI Market Access List). The market access conditions will include, among other conditions, limitations on foreign ownership, investment form, the scope of investment activities and the capacity of investors.

Vietnam takes the negative list approach in which foreign investors are treated as domestic investors in terms of the market access conditions when investing in business lines that do not fall within the Prohibition List and the FI Market Access List.

Vietnam is a party to a number of bilateral and multilateral treaties that may provide preferential market access and investor protections to investors from treaty partners. Major treaties include:

- Vietnam's commitments to the World Trade Organisation (WTO), set out under WTO document number WT/ACC/VNM/48/Add;
- the Comprehensive and Progressive Agreement for Trans-Pacific Partnership;
- the ASEAN Framework Agreement on Services and ASEAN Comprehensive Investment Agreement; and
- the Japan–Vietnam Economic Partnership Agreement signed between Japan and Vietnam;

The restrictions on investment and conducting business in Vietnam are also applicable to foreign investors or creditors in event of the foreclosure on the project and related companies, or the enforcement of security (eg, enforcement of security over the shares in a project company that is undertaking a business for which foreign investors are permitted conditional market access only must be in accordance with the applicable restrictions on such investments).

*Law stated - 13 June 2022*

## **Insurance restrictions**

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?

A foreign insurance company can provide insurance services (other than life insurance and health insurance) in Vietnam provided that:

- the foreign insurance company is headquartered in a country that is a party to an applicable international treaty in which Vietnam has made a commitment to permit the cross-border supply of insurance services; and
- only foreigners working in Vietnam and project companies with foreign ownership greater than 49 per cent of the charter capital may purchase an insurance policy from a foreign insurance company.

Insurance policies obtained from Vietnamese insurers may be reinsured under the Law on Insurance Business.

*Law stated - 13 June 2022*

## **Worker restrictions**

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

Under Vietnamese laws, employers (including both project companies and contractors) are only permitted to recruit foreigners to work in positions such as managers, operators, experts and technicians, and only if Vietnamese workers are not yet able to satisfy the production and business requirements. Employers must report and explain their need to employ the foreign worker to the labour department of the People's Committee of the central province or city where the person will work and obtain written consent before recruiting the foreign worker.

Generally, foreign workers in Vietnam must obtain a work permit.

*Law stated - 13 June 2022*

## **Equipment restrictions**

What restrictions exist on the importation of project equipment?

In general, project equipment may be imported into Vietnam subject to payment of applicable import duties and the obtainment of import licences (if applicable).

*Law stated - 13 June 2022*

## **Nationalisation laws**

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

The state recognises and protects the ownership of assets, investment capital and income and other lawful rights and interests of investors. The government may expropriate an asset due to national defence and security, where it is in the national interest, in emergency circumstances or to prevent or combat a natural disaster, subject to compensating the investor in accordance with the law.

Foreign investors from a country that is a party to an investment treaty with Vietnam may also be entitled to protections from expropriation under those treaties.

*Law stated - 13 June 2022*

## **FISCAL TREATMENT OF FOREIGN INVESTMENT**

### **Incentives**

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?

Foreign-invested companies and domestic companies are treated equally in terms of investment incentives, including tax incentives, reduction or exemption of land use fees or land rental and application of accelerated depreciation. Subject to satisfaction of conditions on the location, sector and size of the investment project with business lines that are entitled to investment incentives or project locations that fall into the areas with difficulties in socio-economic

conditions, investment projects can be entitled to the following main investment incentives:

- exemption from corporate income tax (CIT) for up to four years, and a 50 per cent reduction in the CIT rate for a further four to nine years;
- reduced CIT rate of 10 per cent for the whole term of operation, or 10 per cent for the first 15 years, or 17 per cent for the first 10 years of the project (the normal CIT rate is 20 per cent or 22 per cent except for certain mining projects that are subject to a higher CIT rate of 32 to 50 per cent);
- exemption of import tax for the importation of equipment and machinery for the projects; and
- exemption of the land rental for the whole term of the land lease, or for the construction period of the investment project, or for some periods.

There is no stamp duty levied on foreign loans, mortgages, or other security documents. The payment of interests or premiums on foreign loans or international bonds paid to corporate lenders or institutional bondholders is subject to a withholding tax of 5 per cent on the interest or premiums unless an applicable double taxation treaty provides otherwise.

*Law stated - 13 June 2022*

## GOVERNMENT AUTHORITIES

### Relevant authorities

16 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?

Key government agencies or departments include:

- the Ministry of Industry and Trade, which is responsible for power, oil and gas and mineral extraction and processing projects;
- the Ministry of Transportation, which is in charge of infrastructure projects; and
- the Ministry of Information and Communications, which is in charge of telecommunication projects.

Generally, these agencies will play three key roles:

- they are involved in the appraisal of projects;
- they are authorised to issue permits or licences required for projects; and
- they are authorised to sign project contracts with investors in public-private partnership projects.

In addition, the Prime Minister is in charge of approving the national industry master plans prepared by the competent authorities for each sector. The national industry master plan is used to appraise the conformity of proposed investment projects in the relevant sectors.

Vietnam has opened its markets to foreign investors and narrowed the state's monopoly in certain sectors. In the power sector, before 1 March 2022, the state held a monopoly over the power transmission network (besides the load dispatch of power systems and construction and operation of large-scale power plants), which were especially important to the economy and national defence and security of Vietnam. From 1 March 2022, private parties are

entitled to invest in and construct transmission networks and operate the transmission networks they invest in and construct.

In the oil and gas sector, Vietnam Oil and Gas Group (PVN), a state-owned enterprise, is entitled to conduct oil and gas activities, including searching, exploring, developing a mine and exploiting oil and gas, and activities directly serving these oil and gas activities. PVN is entitled to sign oil and gas contracts with contractors. Foreign parties may sign oil and gas contracts with PVN to conduct oil and gas activities in Vietnam.

*Law stated - 13 June 2022*

## REGULATION OF NATURAL RESOURCES

### Titles

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?

Land, water, minerals, oil and gas and other natural resources belong to all Vietnamese people and the state manages such resources on behalf of the Vietnamese people. Private parties are granted rights to explore, exploit and use such natural resources and other rights under Vietnamese law.

In general, land may be owned through allocation or lease of land from the state or transfer or sublease of such rights from a private landholder (such as an industrial zone developer or other private parties). Private land users own land-use rights, which are recognised as property rights. Foreign entities (other than those with diplomatic functions) cannot directly own land-use rights. However, foreign-invested companies can use land for permitted purposes and own the land use rights.

Investors may obtain an exploration licence and an exploitation licence to prospect for and exploit mineral deposits. A foreign branch or representative office in Vietnam may qualify for an exploration licence, however, foreign investors must establish a company in Vietnam to obtain an exploitation licence.

The state-owned enterprise, Vietnam Oil and Gas Group (PVN) is entitled to conduct oil and gas activities, including searching, exploring and developing mines and exploiting oil and gas, and activities directly serving these oil and gas activities. PVN is entitled to sign oil and gas contracts with contractors, including foreign parties.

*Law stated - 13 June 2022*

### Royalties and taxes

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

There is no distinction between the natural resource taxes payable by domestic companies and foreign-invested companies (or foreign parties, where permissible). The natural resource taxes are levied on projects for the exploitation of Vietnam's natural resources including minerals, crude oil, natural gas, coal gas, natural forest products (other than animals), natural aquatic products (including marine animals and plants), water (including surface water and groundwater), swallow's nests, and other resources, as regulated by the Standing Committee of National Assembly. The natural resource taxes are determined based on the natural resource output, specified taxable price and tax rates.

The tax rates vary depending on the group and type of natural resources, ranging from 1 to 40 per cent. Crude oil, natural gas and cold gas are taxed at progressive rates on the daily average exploitation output.

*Law stated - 13 June 2022*



## Export restrictions

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

Regulations on the export of natural resources vary depending on the type of natural resources. The natural resources to be exported must have legitimate origins and fall within the list of natural resources with specific quality standards issued by the Ministry of Industry and Trade. Export of some minerals or in particular cases is subject to an export licence or special approval issued by the competent authority, such as the Ministry of Science and Technology or the Prime Minister. Regarding oil and gas, other than the mandatory amount required to be sold domestically by the government of Vietnam, in certain limited cases provided for in the Law on Oil and Gas, private contractors are entitled to export oil and gas in accordance with the oil and gas contracts signed with PVN.

The export rates levied on natural resources vary depending on the type of natural resources and timing of export, ranging from 1 to 30 per cent.

*Law stated - 13 June 2022*

## GENERAL LEGAL ISSUES

### Government permission

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

### Investment

Infrastructure projects such as power, transportation or telecommunication sector projects must be included in the relevant industrial master plan prepared by the competent authority for each sector.

For certain projects, an investment in-principle approval issued by the National Assembly, the Prime Minister or the provincial-level People's Committee will be required, depending on the type and size of the project.

To establish a project company to implement an investment project in Vietnam, an investment registration certificate (IRC) recording the information of the investment project issued by the provincial Department of Planning and Investment (DPI), management board of an industrial zone, processing zone, high-tech or economic zone and an enterprise registration certificate (ERC) recording the information of the project company issued by the provincial DPI must also be obtained.

To make a capital contribution or acquire shares in a project company, foreign investors must obtain the approval (mergers and acquisitions approval) of the provincial DPI.

The fee for issuance of the ERC is nominal (being 50,000 Vietnamese dong, or approximately US\$ 2.20).

### Loans

Foreign medium and long-term loans must be registered with the State Bank of Vietnam (SBV). Confirmation of foreign loan registration issued by the SBV is required before the borrower can make any drawdown or repayment of the loan.

A licence issued by the SBV is also required for a project company to open and maintain an offshore foreign currency account.

In general, the total outstanding amount of all medium and long-term loans of a borrower must not exceed the difference between the total investment capital and the amount of capital contribution recorded in the project's IRC, or

if no IRC has been issued, the demand for borrowing approved in the business plan or investment plan.

## Land

A project company must obtain a land-use right certificate issued by the provincial People's Committee for the project land and construction works built on the land, and pay the applicable rent.

## Environment

Depending on the scale, capacity and nature of the business activities, an environmental impact assessment report (EIAR) may need to be submitted to the Ministry of Natural Resources and Environment or the provincial People's Committee for approval. An environmental licence is also required for projects discharging waste into the environment, managing waste or importing scrap from overseas as raw material for production. The fee ranges from 6 Vietnamese dong to 96 million Vietnamese dong (approximately US\$259 to US\$4,142) for the assessment and approval of an EIAR, and ranges from 45 million Vietnamese dong (approximately US\$1,941) for the assessment and issuance of the environmental licence.

## Construction

Depending on the type and scale of the project, authorisations must be obtained for construction works such as approvals of feasibility study reports and construction design, and a construction permit. In addition, there are several authorisations related to fire fighting and extinguishment such as a certificate of appraisal of design for fire-fighting and extinguishment, acceptance of fire prevention and extinguishment and approval of fire extinguishment plan, which must be obtained.

*Law stated - 13 June 2022*

## Registration of financing

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?

Security agreement over land-use rights and assets attached to lands must be notarised by a notary office to be effective.

Security interests created over certain types of assets (namely, land-use rights, assets attached to land recorded in a certificate of rights to use land, ownership of house and property on land, ships and aircraft) are also subject to registration. Although not strictly required under Vietnamese law, security created over movable assets should also be registered to be enforceable against third parties and to establish priority over unregistered security interests.

Loan agreements with foreign lenders must be registered with the SBV if:

- it is a medium- and long-term loan with a loan term above 12 months;
- it is a short-term loan but its term has been extended so that the total term is above 12 months; or
- it is a short-term loan that has not been extended, but the borrower has not completed the repayment of the loan within 10 days after the first anniversary of the initial capital drawdown.

Security agreements are not required to be submitted to the SBV, but the security interests created for an offshore loan

need to be listed in the application to the SBV to register the offshore loan, and will be set out in the SBV's confirmation of registration of the offshore loan. In practice, the SBV may ask for security agreements to be submitted to it.

*Law stated - 13 June 2022*

## Arbitration awards

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?

Vietnam is a party to the New York Convention. It has made three declarations to the Convention, being that the Convention would:

- apply only to awards made in the territory of another contracting state to the Convention;
- apply only to differences arising out of legal relationships that are considered as commercial under the laws of Vietnam; and
- the interpretation of the Convention would be in accordance with the Constitution and laws of Vietnam.

Foreign arbitral awards will only be enforced in Vietnam if they are recognised and held enforceable by a competent Vietnamese court. A party seeking to enforce a foreign arbitral award in Vietnam must file an application with a competent Vietnamese court within three years from the effective date of the award (this time period may be extended where there are applicable force majeure events or other exceptional circumstances).

Vietnamese courts will generally recognise and enforce foreign arbitral awards made in a country that is a party to an international treaty (such as the New York Convention) on recognition and enforcement of arbitral awards to which Vietnam is also a party, or if a treaty does not apply, on the basis of the reciprocity principle.

A foreign arbitral award may be set aside if, among others:

- the dispute could not be resolved by arbitration proceedings in accordance with Vietnamese law; and
- the case where the recognition and permission for enforcement of the award of foreign arbitrators in Vietnam is contrary to fundamental principles of Vietnamese law.

It is not yet established what the fundamental principles of Vietnamese law are, as this concept is not clearly defined in Vietnamese law (although there is a limited set of fundamental principles in the Civil Code 2015, the Commercial Law 2005 and the Law on Commercial Arbitration 2010).

Vietnam is not a party to the ICSID Convention.

Except for disputes where Vietnamese courts have exclusive jurisdiction such as disputes over immovable property situated in Vietnam, commercial disputes may be subject to arbitration, including:

- disputes arising from commercial activities;
- disputes in which at least one party is engaged in commercial activities; and
- other disputes that are stipulated as arbitrable under the law.

Disputes between foreign investors and a state authority relating to investment activities within the territory of Vietnam will be subject to domestic courts or domestic arbitration unless otherwise agreed in a contract or prescribed under a treaty to which Vietnam is a party.

Vietnamese law has no regulation on automatic domestic arbitration. Settlement of a dispute through arbitration must be based on a valid arbitration agreement of the parties. Absent such arbitration agreement, Vietnamese courts will have jurisdiction to hear the case.

*Law stated - 13 June 2022*

### **Law governing agreements**

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

Generally, in international project financing, offshore lenders prefer to select a foreign law such as English law to govern financing agreements and certain project agreements. The Civil Code 2015 generally allows the parties to select a foreign law to govern a contract if there is a foreign element such as the participation of a foreign entity in the contract, provided that the consequence of the application of the foreign law is not contrary to the fundamental principles of Vietnamese law.

Notwithstanding a contrary choice of law, the law where the immovable property is located (namely, Vietnamese law in the case of property in Vietnam) will govern the transfer of ownership rights and other rights in relation to the immovable property, the lease of and the security created over immovable property. In addition, any minimum guaranteed rights of employees or consumers under Vietnamese law will be mandatorily preferred. Project contracts of public-private partnership projects entered into between the Vietnamese state authorities and the sponsors and project company must also be governed by Vietnamese law.

*Law stated - 13 June 2022*

### **Submission to foreign jurisdiction**

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Except for certain cases being subject to the exclusive jurisdiction of Vietnamese courts such as disputes over immovable property situated in Vietnam, submission to a foreign jurisdiction will be effective. Judgments of foreign courts will only be enforced in Vietnam if the foreign courts' judgments are recognised and held enforceable in Vietnam. Similar to foreign arbitral awards, foreign judgments will be enforced by Vietnamese courts if made by the courts of a country with which Vietnam has agreed a treaty to recognise judgments, or on a reciprocal basis. In practice, Vietnam has entered into very few such treaties, however, there are several precedents of foreign courts' judgments being recognised and enforced in Vietnam, which are generally considered to be based on the reciprocity principle.

In general, the merits of a foreign judgment will not be re-examined by Vietnamese courts for the purpose of recognition and enforcement. However, Vietnamese courts may refuse to recognise and enforce foreign judgments if certain applicable grounds in the Civil Proceeding Code 2015 are met, including where the foreign judgment violates the fundamental principles of Vietnamese law. It is not yet established what the fundamental principles of Vietnamese law are, as this concept is not clearly defined in Vietnamese law.

The Civil Code 2015 suggests that a waiver of immunity could be effective and enforceable. It provides that the state of Vietnam, central and provincial state authorities will be liable for their civil obligations to foreign legal entities and foreign individuals in the following cases:

- an international treaty to which Vietnam is a signatory provides for a waiver of immunity;
- the parties are in a civil relationship and agree to waive immunity; or
- the state of Vietnam, central or local state authorities waive immunity.

*Law stated - 13 June 2022*

### **Anti-money laundering rules**

Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

The Law on Prevention and Anti-money Laundering imposes obligations on licensed financial institutions and entities operating in certain sectors such as real estate businesses regarding money laundering, such as an obligation to conduct know-your-client procedures and report suspicious transactions. It would be advisable for investors to undertake an anti-money laundering compliance check as part of their due diligence prior to undertaking a transaction in Vietnam.

*Law stated - 13 June 2022*

## **ENVIRONMENTAL, SOCIAL AND GOVERNANCE**

### **Relevant ESG issues**

What environmental, social and governance (ESG) issues are relevant in typical project sectors? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations?

The Law on Environment Protection 2020 classifies investment projects into four groups based on, among other factors:

- size, capacity and type of production;
- business and service;
- area of land;
- land with the water surface and sea used;
- the scale of extraction of natural resources; and
- sensitive environmental factors.

Large-scale projects in the first group and some types of projects in the second group must undertake an Environment Impact Assessment Report (EIAR).

In addition to an EIAR, a project company must obtain an environmental licence if the project is in any of the first three groups and will generate wastewater, dust and emissions into the environment that must be treated or generate hazardous waste that must be managed in accordance with regulations on waste management before officially being put into operation.

*Law stated - 13 June 2022*

## PROJECT COMPANIES

### Principal business structures

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

Typically, a special purpose company will be established to implement a project, to segregate it from an investor's other businesses and invite participation from other investors. The principal sources of financing include equity capital of investors, shareholder loans, bank loans and through the issuance of debt securities in Vietnam or offshore.

*Law stated - 13 June 2022*

## PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

### Applicable legislation

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

The Law on Investment in Form of Public-Private Partnership (the PPP Law) was adopted by the National Assembly in 2020 and took effect on 1 January 2021. The government of Vietnam also issued Decree No. 35/2021/ND-CP providing detailed guidance on the PPP Law and Decree No. 28/2021/ND-CP providing guidance on the financial control mechanisms of PPP projects. Previously, PPP projects were governed by Decrees of the government and did not have an overarching legislative framework. The PPP Law is the first law in Vietnam on PPP projects and represents a significant change in Vietnam's approach to PPP projects.

The PPP Law covers PPP projects in the following six sectors with a prescribed minimum investment (except for PPP projects in the form of operation and maintenance PPP projects to be implemented in areas with difficult socio-economic conditions):

- transportation, including projects in road, railway, inland waterways, maritime and air transport with a total minimum investment of 1,500 billion Vietnamese dong (approximately US\$65 million);
- power grid and power plant projects with a total minimum investment for renewable energy projects of 500 billion Vietnamese dong (approximately US\$21.65 million) and a total minimum investment for non-renewable energy projects (such as coal or gas or liquid natural gas-fired power projects) of 1,500 billion Vietnamese dong (approximately US\$65 million);
- irrigation, clean water supply, water drainage and wastewater and waste treatment with a total minimum investment of 200 billion Vietnamese dong (approximately US\$8.7 million);
- healthcare, including medical examination and treatment facilities, preventive healthcare and testing, with a total minimum investment of 100 billion Vietnamese dong (approximately US\$4.3 million);
- education and training, including educational infrastructure, facilities and equipment, with a total minimum investment of 100 billion Vietnamese dong (approximately US\$4.3 million); and
- information technology (IT) infrastructure including projects in, among others, digital information and economic infrastructure, application and development of IT and databases, shared national platforms, applications and services, network security and information and communication technology infrastructure for smart cities, with a total minimum investment of 200 billion Vietnamese dong (approximately US\$8.7 million).

Types of PPP structures recognised under the PPP Law include:

- build-operate-transfer;
- build-transfer-operate;
- build-own-operate;
- operate-manage;
- build-transfer-lease;
- build-lease-transfer; and
- combinations of these.

Build-transfer (BT) is no longer considered a form of PPP under the PPP Law. BT projects where the in-principle investment approvals had not been obtained by 15 August 2020 will be terminated under the PPP Law.

*Law stated - 13 June 2022*

## PPP – LIMITATIONS

### Legal limitations

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

A PPP project can be initiated by either a competent state authority or a private investor. However, the selection of PPP investors must be conducted by an open bidding process for all PPP projects including those proposed by private investors, except for certain limited cases where competitive negotiation or direct appointment is available. In practice, it could take several years to initiate and select investors for a PPP project.

The PPP Law provides certain limitations that would affect the bankability of PPP projects. Notably:

- foreign currency convertibility: in Vietnam, foreign exchange activities are strictly regulated. Foreign currency availability and convertibility are material risks to international investors and lenders. Previously, by law, there were no caps on the government's guarantee on foreign currency convertibility. In practice, in some large-scale build-operate-transfer (BOT) power projects financed by international lenders, the government guaranteed to deliver sufficient US dollars for the BOT company to convert all of its Vietnamese dong revenue (excluding local expenses) to fulfil its payment obligations to offshore lenders and sponsors. However, under the PPP Law, the government's guarantee on foreign currency convertibility is capped at 30 per cent of the project revenue minus the expenditures in Vietnamese dong. Moreover, a government guarantee on foreign currency convertibility is only available to important and large-scale projects that are subject to the authority of the National Assembly or the Prime Minister to decide investment policies;
- the time limit for financial close: under the PPP Law, financial close is required to be achieved within 12 months after the signing of the project contract, or 18 months in the case of projects subject to approval by the National Assembly or the Prime Minister. Given the recent PPP practice in Vietnam, this time limitation is a significant constraint, especially for projects with international project financing;
- government guarantee: the government previously provided guarantees to secure the performance and payment obligations of Vietnamese counterparties in several PPP power projects. The PPP Law and the Law on Investment 2020 no longer contemplate the provision of such guarantees. However, the Law on Investment 2020 and Decree No. 31 guiding the implementation of the Law on Investment 2020 still allow the Prime Minister to decide other forms of guarantee for important projects that are subject to the authority of the National Assembly or the Prime Minister; and
- governing law for project contracts: the Civil Code 2015 allows the parties to choose a foreign governing law if there are foreign elements such as the participation of foreign parties. In the past, contracting parties in PPP projects could select a foreign law to govern project contracts and other contracts in accordance with the Civil

Code. However, the PPP Law requires contracts and other relevant documents entered into between Vietnamese state authorities with sponsors and project companies to be governed by Vietnamese law. International lenders typically require project documents to be governed by a foreign law (typically, English law). This requirement for a choice of Vietnamese governing law may affect the bankability of PPP projects.

*Law stated - 13 June 2022*

## PPP – TRANSACTIONS

### Significant transactions

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

No PPP project has achieved financial close since 1 January 2021, the date the PPP Law entered into force. A number of PPP projects that were initiated prior to this time have also not achieved financial close yet. Most significant PPP projects have been carried out in the thermal power sector in the form of BOTs. These projects have successfully obtained international project financing. Some high-profile examples include the following:

Coal-fired power plants with total investment capital per project ranging from US\$2.2 billion to US\$2.8 billion that achieved financial close from 2011 to 2021:

- Vung Ang 2 coal-fired BOT power project with a capacity of 1,200 megawatt (MW);
- Van Phong 1 coal-fired BOT power project with a capacity of 1,320MW;
- Nghi Son 2 coal-fired BOT power project with a capacity of 1,200MW;
- Duyen Hai 2 coal-fired BOT power project with a capacity of 1,200MW;
- Hai Duong coal-fired BOT power project with a capacity of 1,200MW;
- Vinh Tan 1 coal-fired BOT power project with a capacity of 1,200MW; and
- Mong Duong 2 coal-fired BOT power project with a capacity of 1,200MW.

Gas-fired power plants:

- Phu My 2.2 gas-fired BOT power project with total investment capital of US\$480 million and a capacity of 715MW, which achieved financial close in 2002; and
- Phu My 3 gas-fired BOT power projects with total investment capital of US\$450 million and a capacity of 716.8MW, which achieved financial close in 2003.

*Law stated - 13 June 2022*

## UPDATE AND TRENDS

### Key developments of the past year

In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

The focus on the power industry in Vietnam has recently shifted from coal-fired thermal power plant projects to liquid natural gas (LNG)-to-power and renewable energy projects. A pilot programme on the direct power purchase agreement is currently being considered, as an initial step to the implementation of a competitive electricity retail market. The programme was proposed to cover grid-connected wind and solar power projects, with a combined total capacity below 1,000 megawatts. The contractual structure for the sale and purchase of power by a consumer from a power



generator was expected to be through three contractual arrangements:

- the sale by the power generator of electricity to the state-owned Vietnam Electricity (EVN) or the power corporations affiliated with EVN at the spot price;
- the purchase by customers of electricity from EVN at the spot price (plus applicable fees); and
- a contract between the power generator and consumer providing for the consumer to pay the power generator an amount equal to the difference between the agreed price agreed between them for the supply of power and the spot price.












The finalisation of this pilot programme remains pending.

A number of large-scale LNG-to-power projects have been registered recently. However, no foreign-invested LNG-to-power projects have publicly announced financial close to date. The bankability of these projects is unclear and investors remain in discussion with the MOIT, EVN and other authorities to improve the bankability of these projects. It is expected that these negotiations will take further time and potentially require a reconsideration of current policy settings.

The State Bank of Vietnam is also currently drafting new guidance on offshore loans that is expected to introduce a number of new requirements such as a cap on borrowing expenses and mandatory use of derivatives to hedge foreign exchange risks. If these new requirements are adopted, they may significantly affect offshore financing arrangements.

*Law stated - 13 June 2022*

## Jurisdictions

	<b>Australia</b>	Allens
	<b>India</b>	Cyril Amarchand Mangaldas
	<b>Italy</b>	Legance - Avvocati Associati
	<b>Mozambique</b>	VdA
	<b>Portugal</b>	VdA
	<b>South Korea</b>	Shin & Kim
	<b>Switzerland</b>	Walder Wyss Ltd
	<b>Taiwan</b>	Lee and Li Attorneys at Law
	<b>Thailand</b>	Chandler MHM Limited
	<b>USA</b>	Morgan, Lewis & Bockius LLP
	<b>Vietnam</b>	Chandler MHM Limited