Asia Pacific Guide to Lending and Taking Security - Vietnam

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# When considering whether to lend

## 1. Is it necessary or advisable for any lender, arranger, facility agent or security agent to be licensed, qualified or otherwise entitled to carry on business in this jurisdiction: (a) by reason only of its execution, delivery or performance of the finance documents; or (b) to enable it to enforce its rights under the finance documents?

No. However, we note that there are only regulations of the State Bank of Vietnam (SBV) on syndicated loans of credit institutions that allow the appointment of a foreign lender among the syndicated lenders to handle the roles of lender, arranger and security agent. It is unclear if a foreign lender can play these agency roles if it is not a lender in the lending transaction.

From a practical perspective, in relation to medium- and long-term offshore loans, since the identity of the facility agent and the security agent is described in the application for registration of the foreign loan with the SBV, it is arguable that if the foreign loan documentation has been examined and the foreign loan registration certificate recording the identity of the facility agent and the security agent has been issued by the SBV, the SBV is deemed to consent to the proposed foreign agency arrangement.

## 2. Will any lender, arranger, facility agent or security agent be deemed to be resident, domiciled, carrying on business or subject to tax by reason only of the execution, delivery, performance or enforcement of the finance documents?

No; however, there is a requirement for the borrower to deduct withholding tax (currently set at 5%) from the amount of interest and fees payable to the lender under the finance documents (see the answer to question 5 of the "When lending to borrowers" section).

## 3. Are there any regulatory reporting requirements that lenders must observe in connection with those transactions?

Foreign lenders are not required to report their transactions in Vietnam. However, credit institutions that provide account services for payments in relation to offshore loans are subject to a specific statistical reporting regime under the regulations of the SBV.

## 4. Is it necessary to establish a place of business in your jurisdiction in order to enforce any provision of the finance documents?

No.

## 5. Is a foreign bank/financial institution permitted to approach local entities for business?

Yes, if the approach is on a limited basis, i.e., made one-to-one and not to the public. This is because a general approach to potential customers in Vietnam for offering loans could be regarded as "advertising," which may only be provided by licensed advertising agencies in Vietnam.

# When lending to borrowers

## 1. Are there any restrictions in relation to the type of borrower who may borrow foreign currency or in relation to the term of foreign currency and/or the amount of foreign currency borrowed by local entities?

There are no restrictions on the type of borrower that may borrow foreign currency or on the terms of those loans, or generally on the amount of foreign currency loans. However, certain borrowers must satisfy certain conditions for borrowing offshore loans, including limitations on the amount of offshore loans that an enterprise may borrow. The form of the enterprise of the borrower and its investment/enterprise registration certificate determines whether those limitations apply to a particular borrower.

Under the foreign exchange regulations, in principle, individuals may obtain offshore loans in accordance with the government's regulations. However, the government has not yet issued any regulations in relation to the borrowing of offshore loans by individuals, and therefore, the SBV is likely to take the view that,  because there is no explicit permission, it is not permitted. Given the foregoing, in practice, offshore loans may not be granted to individuals.

## 2. Are there any restrictions on the rate of interest or default interest that may be charged?

Vietnamese laws do not restrict the rate of interest or default interest in relation to offshore loans. However, as a matter of practice, if the rate of interest is too high compared to the market standard, the SBV may challenge the registration of the loan (referred to in the answer to question 7 of this section) and the parties will need to explain the reason for the high rate of interest. The SBV may refuse to register a loan if it considers the interest rate to be too high. There is also a criminal penalty for usury in Vietnam but, in practice, it is unlikely that an offshore lender would be subject to a usury penalty.

The remittance bank in Vietnam may also challenge the payment of interest that is too high (at the bank's discretion) if there is concern in relation to a potential breach of Vietnam's anti-money laundering regulations.

Under applicable exchange control regulations, the governor of the SBV may determine the ceiling on borrowing costs for each interest period. However, we are not aware of the governor ever having imposed a ceiling on the borrowing costs for offshore loans.

## 3. Are there any restrictions on particular lenders or classes of lender entering into credit transactions with borrowers?

No. However, please note that there may be restrictions on the role that an offshore lender may take in relation to cross-border syndicated loans. Under Vietnamese laws, an offshore lender is not permitted to act as the paying agent in relation to a syndicated transaction.

## 4. Are there any exchange controls that will apply to payments to be made in foreign currencies or to foreign lenders?

No. However, for:

Medium- or long-term offshore loans with a term of more than one year;

Short-term loans whose principal payment period is extended so that the total term is over one year; and

Short-term loans without any renewal agreement whose term is over one year from the first utilization date unless the borrower fully completes its debt repayment obligation within 30 working days from the first anniversary of the first utilization date,

that, in each case, are not guaranteed by the government, drawdown of the loans and payment of debts (including the principal and interest) contemplated under the facility agreement can only be made after the registration of the loans with the SBV (except in the case of the drawdown and partial repayment in the first year of a short-term loan which is being extended to a medium- or long-term loan).

## 5. Is there any requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender (whether domestic or foreign)? If so, at what rate must tax be deducted and from what kinds of payment?

If the lender is an offshore entity, the borrower is required to deduct withholding tax (currently set at 5%) from the amount of interest and fees payable to the lender under the finance documents. The borrower must file and pay the tax it has withheld within 10 days after each payment of interest or fee.

The foregoing requirement does not apply to Vietnamese lenders.

## 6. Are there any “thin capitalization” or other rules that may limit the extent to which interest payments may be deducted for tax purposes?

There are no "thin capitalization" rules under the current regulations.

An interest payment may not be deductible if, among others:

It does not meet all of the following requirements:

The actual interest payment incurred is related to the enterprise's business operations.

There are sufficient and valid invoices in relation to the interest payments and proof of those interest payments can be shown as required by the tax regulations.

For each invoice for an interest payment of VND 20 million or above, there is proof of the corresponding non-cash payment.

The payment of interest or the related loan payment relates to the enterprise's late equity contribution.

## 7. Are there any registration, notarization, translation or reporting requirements in relation to the loan documents?

Yes. Under Vietnamese foreign exchange regulations, medium- or long-term offshore loans (i.e., offshore loans with a term of above one year, including short-term loans being extended to medium- or long-term loans) that are not guaranteed by the government are required to be registered with the SBV. The information to be provided on registration must include information about the offshore lender.

Loan documents can be made in any foreign language, with Vietnamese translations required for SBV registration purposes, with the accuracy to be certified by the borrower.

Vietnamese borrowers must also submit a written report on the status of the implementation of the offshore loan on a monthly basis or, in the case of unexpected or urgent events, on an extraordinary basis upon the request of the SBV.

## 8. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in relation to the loan documents? If yes, what are the amounts and when are they payable?

No, SBV registration for foreign loans is free of charge.

For stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in relation to security documents, see the answer to question 13 of the "If taking security" section below.

## 9. Does the law recognize the subordination of the debt that a debtor owes to one creditor to that which the debtor owes to another creditor? If yes, how is this usually effected?

Except for the case where credit institutions and foreign bank branches in Vietnam are permitted to issue subordinated debts pursuant to the regulations on prudential ratios and limits for operations of credit institutions and foreign bank branches of the SBV, Vietnamese law is silent on the subordination debt of enterprises. Vietnamese laws only provide that the order of priority for payment between the jointly secured parties may be changed if the jointly secured parties reach an agreement on changing the order of priority for payment between themselves. As a matter of practice, a creditor is entitled to contractually agree that its rights are subordinated to the rights of another creditor, subject to the fact that the rights of the parties may be limited by bankruptcy, insolvency, liquidation, reorganization and other laws of general application relating to or affecting the rights of creditors. The manner in which a subordination agreement is treated may be affected by how the Vietnamese courts exercise their inherent discretion.

If a bankruptcy process has been initiated in respect of the borrower, its indebtedness is paid in accordance with the hierarchy set out in the bankruptcy regulations (and therefore not necessarily as agreed between the lenders and borrowers). For the hierarchy of payments in relation to bankruptcy, see the answer to question 10 of this section.

## 10. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s other unsecured and unsubordinated creditors (e.g., the claims of employees and tax authorities or the claims of creditors under particular kinds of instrument)? If yes, what classes of creditors are preferred?

If a bankruptcy process has been initiated in respect of the borrower, the order of the distribution of its assets is prescribed by the bankruptcy regulations and claims are paid in the following descending order of priority:

Bankruptcy costs.

Employees' unpaid wages, severance allowances, social insurance and health insurance, and other benefits under labor contracts and collective labor agreements.

Debts arising after the commencement of bankruptcy proceedings that serve the purpose of business recovery of the enterprise or cooperative in accordance with the bankruptcy regulations.

Financial obligations to the state, unsecured debts payable to the creditors named in the list of creditors and secured debts not yet paid as the value of their secured assets is insufficient for the debt payment.

The members or shareholders of the enterprise (as the case may be).

If the value of the available assets is insufficient to pay all the creditors in any of the above categories, the debt due to each creditor in that category will be reduced on a pro rata basis.

## 11. Are there any consumer protection or similar laws that apply if credit is made available to individuals or other classes of debtor? If yes, what laws are applicable?

For onshore loans, the rights and obligations of creditors and debtors are subject to the SBV's regulations in relation to borrowing.

For offshore loans, creditors and debtors are free to agree upon their specific rights and obligations in the relevant offshore loan agreement.

However, although it is untested in practice, regulations in relation to consumer protection likely apply to parties to an offshore loan. Therefore, legal counsel should carefully review the loan agreement to ensure its provisions are enforceable.

## 12. Are there any prohibitions or limitations on the extent to which a company can give financial assistance for the purchase of: (a) its own shares or those of any affiliated company; or (b) assets owned by it or any affiliated company?

Technically, providing financial assistance may be deemed to constitute "lending," which requires a license from the SBV. Therefore, non-credit institutions in Vietnam may not provide loans to a third party for the purpose of purchasing shares or other assets.

Vietnamese foreign exchange regulations require borrowers to borrow offshore loans for a limited number of purposes, as follows:

If the borrower is a credit institution or foreign bank branch:

To supplement capital for credit extension activities according to the borrower's credit growth

To refinance the borrower's offshore loans

It would appear that if the borrower is a credit institution or foreign bank branch it is not allowed to use offshore loans for purchasing shares or other assets.
If the borrower is not a credit institution or foreign bank branch:

For mid- or long-term loans to:

Implement the borrower's investment project

Implement the production and business plan, or other projects of the borrower

Refinance the borrower's offshore loans

For short-term loans:

To refinance offshore loans

To repay short-term loans (in accordance with accounting law) payable in cash (excluding principals of onshore loans) of the borrower, which are incurred during the implementation of investment projects, production and business plans and other projects of the borrower

in cases where the borrower is subject to prudential ratios according to specialized laws, for the borrower's professional business activities, provided the loan term is no more than 12 months after the utilization date

Therefore, if offshore loans are used for purchasing shares or other assets, the specific utilization should be categorized within the scope of:

For mid- or long-term loan: the approved investment project/production and business plan/other projects of the borrower, which should be certified by the SBV. It is unlikely that the SBV will certify the offshore loans for the purposes of purchasing shares unless the borrower already has existing investment in the target company such that the purchase of shares would arguably be considered further investment by it in the target company.

For short-term loan: the borrower's professional business activities, e.g., securities investment activities conducted by professional securities investors.

# If taking security

## 1. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s secured creditors?

No. The claims of secured creditors have priority over the claims of unsecured creditors.

## 2. May security given by a company rank in a specified order so as to secure liabilities owed to different creditors of the company in that order and, if that is not possible, is it viable for parties to enter into a contractual arrangement for the purposes of moderating this order?

By law, the order of priority of the payment of secured transactions is determined by the order of the times when the secured transactions become enforceable against third person(s) (or, if none are enforceable against a third person, the order of their creation) and payments in relation to transactions that are enforceable against third persons will be made before payments in relation to transactions that are not enforceable against third persons.

Security will be enforceable against a third person from when the security is registered or when the secured party keeps or holds the secured assets. However, that order may be changed by agreement between the creditors in the circumstances set out in the following paragraph.

If one asset is used to secure debts due to more than one creditor, those creditors may agree on a specified order of payment that differs from the order provided by law. The party granted priority under an agreement of this type only has a right to a priority payment up to the scope (value) of the security to which the party granting the priority under that agreement is entitled.

## 3. Does this jurisdiction recognise the concept of floating security or similar equivalent (i.e., security over a changing pool of assets that the company giving the security is free to buy, sell and generally deal with)?

No. Floating security is not recognized under Vietnamese law. However, there are special regimes for the following:

A mortgage of circulating goods used in the manufacturing and trading process.

A mortgage of goods in storage.

Both of these regimes have features similar to the usual principles that apply to floating security. Notable features of these regimes are as follows:

For a mortgage of circulating goods used in the manufacturing and trading process, the mortgagor may sell or replace the mortgaged asset without the consent of the mortgagee. If there is a sale of goods, in substitution for the sold mortgaged assets, the mortgage will attach to the sale receivables, sale proceeds or to the assets purchased with the sale proceeds. If there is a replacement of goods, the replacement goods will become the mortgaged assets in substitution of the replaced goods.

For a mortgage of goods in storage, the mortgagor may replace the goods placed in storage without the consent of the mortgagee. However, the mortgagor must ensure that the value of the goods after the replacement is the same as before the replacement.

## 4. If so, are there any practical reasons why floating security is difficult to take, maintain or enforce?

This is not applicable, as floating security is not recognized under Vietnamese law. Nevertheless, there are practical issues in relation to taking and maintaining a mortgage of circulating goods used in the manufacturing and trading process and a mortgage of goods in storage, as described in the answer to question 3 of this section.

The mortgagee is typically concerned about how to ensure that the mortgagor honors its undertaking and that the value of the mortgaged assets does not fall below the initially agreed value when the mortgagor has the right to dispose of the mortgaged assets without the mortgagee's consent. The mortgagee will typically request the mortgagor to agree to the appointment of a supervisor  by the mortgagee who will supervise the mortgaged assets frequently to ensure that any disposal of the mortgaged assets complies with the mortgage terms.

## 5. May security be granted to a trustee to be held on trust for the lenders from time to time, in such a way that a change of lenders does not require new security to be taken?

No. Trusts are not recognized under Vietnamese law.

## 6. If not, are there any techniques that can be used to achieve substantially the same effect (e.g., parallel debt structures)?

In a syndicated loan transaction, one lender may act as the security agent for all of the lenders. The security agent may take security on behalf, and secure the debts, of all the lenders and may sign the security documents on behalf of all of them. The security agent can be an onshore or an offshore lender. However, offshore lenders are prohibited from taking security over land use rights and assets attached to land in Vietnam regardless of whether an onshore security agent is appointed to take the security over such land use rights and assets attached to land in Vietnam for and on behalf of offshore lenders. In this scenario, if the syndication only consists of offshore lenders, the lenders may engage a Vietnamese finance party providing a nominal facility amount or issuing a nominal standby letter of credit in favor of the foreign lenders to secure the obligations of the borrower to the foreign lenders to take security over land use rights and assets attached to land in Vietnam and the foreign lenders may take security over the surplus from the proceeds of an enforcement of the security over land use rights and assets attached to land in Vietnam (after deducting the amount payable to the Vietnamese finance party). The finance parties and the borrower will then agree on sharing all proceeds from the enforcement of the security over land use rights and assets attached to land in Vietnam. However, such mechanisms have not been tested before Vietnamese courts.

## 7. If an agent holds security for the lenders rather than a trustee, is it necessary to take new security on a change of lenders? If no, why not? If yes, are there ways to structure the transaction to avoid such a requirement?

No. A change of lenders does not require a change to the security documents and it does not require new security to be taken.

## 8. Under the laws of this jurisdiction, is there any class of asset over which it is difficult or impossible to grant effective and perfected security, or in relation to which any security granted will be of limited effect?

Land use rights and assets attached to land in Vietnam may only be mortgaged to, except for certain irrelevant cases, onshore credit institutions that are licensed to operate in Vietnam. Further, if an enterprise wishes to mortgage its land use rights, it must pay the land use right fees or rent in full and in a lump-sum payment for the entire lease term to the state authority. If an enterprise wishes to mortgage its land use rights and the relevant lands are located in the industrial zone, it is further required that the industrial zone developer must pay the fees or rent in full and in a lump-sum payment for the entire lease term to the state authority.

Specifically, if the industrial zone developer has leased a land use right in the industrial zone from the state and it has fully paid the rent in a lump-sum payment for the entire lease term, it can sublease that land use right to the sublessee with the rent to be paid as a lump-sum payment for the entire sublease term or with the rent to be paid annually. A land use right in an industrial zone subleased from the industrial zone developer can be mortgaged by the sublessee only if the sublessee has paid the rent to the developer in a lump-sum payment for the entire sublease term and the industrial zone developer has also paid the rent for that land use directly to the state in a lump-sum payment for the entire lease term.

In practice, if offshore lenders are involved, the structure described in the answer to question 6 of this section is advisable.

## 9. Under the laws of this jurisdiction, are there any restrictions on offshore lenders taking security over any class of asset?

The current laws bar offshore lenders from taking security interests over land use rights and assets attached to the land in Vietnam, as discussed in the answer to question 8 of this section.

## 10. Must a company receive a corporate benefit in return for giving a guarantee or security? In particular, are there restrictions on the grant of upstream and cross-stream guarantees and security? If yes, briefly what is the effect of these laws?

No. However, regarding upstream and cross-stream security, since the beginning of 2012, we have been aware of four precedents whereby four Vietnamese courts did not recognize a mortgage created over a third party's land use rights and immovable assets. We do not believe that it is a correct interpretation of applicable legal documents. The Ministry of Justice (MOJ), the SBV and the Vietnam Banks Association have sent official letters to the Supreme People's Court of Vietnam requesting that the Supreme People's Court of Vietnam give an interpretation of relevant legal documents with a view to recognizing the mortgage of land use rights created by a third party that is not concurrently an obligor. We are not aware of any precedents where Vietnamese courts did not recognize a mortgage created over a third party's movable assets. This issue has recently been resolved under the new government's decree on security arrangements.

## 11. What type of security interests does your jurisdiction recognise, e.g., pledge, charge, mortgage, hypothecation? In relation to each type of security interest, please state the formalities required to create and perfect that security.

Vietnam law provides the following types of security for performing civil obligations.

**Pledge of assets**

A pledge of assets is created by a pledgor delivering its own assets to a pledgee as security for the performance of an obligation.

**Mortgage of assets**

Mortgage is the most common form of security interest granted over assets in Vietnam. By definition, a "mortgage" is a transaction in which the mortgagor uses its own assets to secure the performance of an obligation to the mortgagee without giving possession of such assets to the mortgagee. The core feature of a mortgage is that the mortgagor retains the use and possession of the mortgaged assets. This feature distinguishes a mortgage from a pledge in which the pledgee takes possession of the assets.

**Performance bond**

One party delivers a sum of money, precious metals, gemstones or other valuable objects to another party for a period of time as security for entering into or the performance of a contract.

**Security deposit**

The lessee of a movable asset delivers a sum of money, precious metals, gemstones or other valuable objects to the lessor for a period of time as security for the return of the leased asset.

**Escrow deposit**

An obligor deposits a sum of money, precious metals, gemstones or other valuable papers into an escrow account at a credit institution as security for the performance of an obligation.

**Reserve of ownership (retention of title)**

Pursuant to a purchase and sale contract, the ownership right to assets may be reserved by the seller until the time when the obligation to make a payment has been fully discharged. The reserve of ownership right must be made in writing in a separate document or it must be stated in the purchase and sale contract.

**Guarantee**

A third person undertakes to perform an obligation on behalf of an obligor if the obligation falls due and the principal fails to perform or incorrectly performs the obligation.

**Fidelity guarantee**

A sociopolitical organization at the grassroots level may provide a fidelity guarantee in order that poor individuals and households are able to borrow sums from credit institutions for the purposes of production, business or consumption in accordance with the law. The loan guaranteed by a fidelity guarantee must be made in writing and it must be certified by the sociopolitical organization providing the fidelity guarantee in terms of the conditions and situation of the borrower. The agreement providing a fidelity guarantee must specify the loan amount, the purpose of the loan, the term of the loan, the interest rate, and the rights, obligations and responsibilities of the borrower, the lending credit institution and the sociopolitical organization that provides the fidelity guarantee.

**Retaining assets (lien)**

A retaining assets arrangement (or lien) means that the obligee (known as the retaining party) that lawfully holds the assets that are the subject matter of a bilateral contract is permitted to continue to retain the assets when the obligor fails to perform the obligation or incorrectly performs the obligation.

Please refer to the answer to question 12 of this section for formalities required to perfect the security.

## 12. Are there any registration, translation or notarization requirements in relation to security, guarantees, subordination or intercreditor documents?

**Registration**

**Mandatory registration**

To be valid and enforceable, registration of the following security arrangements is mandatory:

Registration with the district or provincial land use right registration office under the provincial Department of Natural Resources and Environment (DONRE) of the district, province or city where the asset is located:

Mortgage over land use rights

Mortgage over houses, assets attached to the land with ownership certificate

Mortgage over investment projects using land for which the mortgagor pays the fees or rents in full and in a lump-sum payment for the entire lease term to the state authority

Registration with the municipal division of the Vietnam Maritime Administration of the province or city where the vessel is registered: mortgage or retention of title over vessel

**Voluntary registration**

Registration of the following security arrangements is recommended to secure the priority of payment, even though registration is not required for the secured transaction to be valid:

Registration with DONRE:

Mortgage over houses, assets attached to and to be formed in the future

Mortgage over established assets attached to the land other than houses, which are not required by law to be registered, and the ownership rights of which have not been registered upon request

Transition of registration of mortgage over property rights arising from a sale and purchase of houses or other assets attached to the land to registration of mortgage over such houses or other assets attached to land

Registration with the Vietnam Securities Depository and Clearing Corporation (VSDCC): security over securities centrally registered at VSDCC

Registration with the National Registration Agency for Security Transactions (NRAST) under the MOJ:

Mortgage, retention of title, pledge, deposit, security collateral or escrow over movable assets (other than aircraft and vessel)

Security over securities, dividends, and property rights arising from securities that have not been centrally registered at VSDCC

Security over assets attached to land being annual plants, temporary works

Registration with the Civil Aviation Authority of Vietnam (CAAV): mortgage, pledge or retention of title over aircraft. We note that registration of security over aircraft was explicitly stipulated as a mandatory registration. However, the language indicating that such registration is mandatory was removed as of 15 January 2023 in light of the enactment of the new legal document. The said security arrangements may also be registered with the International Registrar under the Convention on International Interests in Mobile Equipment (also known as the Cape Town Convention) to which Vietnam is a contracting state.

**Notarization**

A mortgage of land use rights and assets attached to land must be notarized by the public notary in the province or city where the asset is located before registration is permitted.

**Translation**

For registration purposes, foreign language documents must be:

Translated into Vietnamese; and

Notarized or certified the translator's signature

## 13. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in respect of security, guarantees, subordination or intercreditor documents? If yes, what are the amounts and when are they payable?

There is a fee for notarization. The amount of the notarization fee depends on the value of the secured transaction. The fee will not exceed VND 70 million. Notarization fees are due at the time of notarizing the relevant document.

Registration fees are as follows:

For each registration with NRAST and the municipal division of the Vietnam Maritime Administration: VND 64,000

For each registration with the district or provincial land use right registration office under the provincial DONRE: subject to the decision of the competent provincial People's Council, depending on the application dossier for registration, the number of land use rights certificates, the number of land parcels and assets attached to land that are recorded on a certificate in the application dossier for registration or other registration cases

For each registration with the Civil Aviation Authority of Vietnam: from VND 1.4 million to VND 14.4 million, depending on the value of the secured transaction

For each registration with the VSDCC: VND 80,000

Registration fees are due at the time of registration.

Other than these registration and notarization fees, there are no stamp, documentary, registration or other taxes, duties or fees chargeable in respect of security documents under Vietnam law.

# If things go wrong

## 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

In Vietnam, an enterprise is considered insolvent when it fails to perform its obligation to repay a debt within three months from the maturity date and an insolvent enterprise is bankrupt when it is so declared by the court.

A lender's main rights on the insolvency of an enterprise are as follows:

File a petition for the commencement of bankruptcy proceedings on the expiration of the period of three months from the maturity date of a debt in respect of which the debtor fails to perform its obligation to repay (except that a fully secured creditor does not have this right).

As the petitioner for the bankruptcy procedure, nominate the asset management officer (an individual responsible for managing and liquidating assets during a bankruptcy procedure) or the asset management and liquidation enterprise (an enterprise established by one or more asset management officers with the same function as an asset management officer) to the court before the commencement of bankruptcy proceedings.

Request individuals, bodies or organizations keeping and managing the documents and/or evidence relating to the lenders' legitimate rights and interests to provide those documents and/or evidence for submission to the court.

Request the judge, asset management officer or asset management and liquidation enterprise to verify and/or collect documents and/or evidence that the lender is unable to do or seek an examination, valuation and/or appraisal of the value of the assets.

Request that the judge audit the insolvent enterprise and summon witnesses.

Access, take notes and/or make copies of the documents and/or evidence presented by other participants in the bankruptcy proceedings or collected by the judge.

Request the application, change or cancellation of interim injunctive relief.

Receive valid notices for the lender to exercise their rights and obligations.

Protect or ask another person to protect their legitimate rights and interests.

Attend the creditors' meetings.

Request a replacement of the asset management officer or asset management and liquidation enterprise in accordance with the law.

Request the asset management officer or asset management and liquidation enterprise to add creditors to the list of creditors and/or debtors to the list of debtors.

Make a recommendation to the asset management officer or asset management and liquidation enterprise on the recovery of the debtors' money and assets.

Participate in the asset management and liquidation as requested by the judge, the civil judicial enforcement office and/or the asset management officer or asset management and liquidation enterprise.

Request a review of the court's decisions in accordance with the law.

A lender's main duties on the insolvency of an enterprise are as follows:

As the petitioner for the bankruptcy procedure, pay the bankruptcy fee and make an advance payment of bankruptcy costs.

Satisfy requests from the judge, the asset management officer or asset management and liquidation enterprise, and/or the civil judicial enforcement office in accordance with the law.

Provide documents and/or evidence relating to the bankruptcy resolution.

Present itself as requested by the asset management officer or asset management and liquidation enterprise, or as summoned in writing by the court, and compliantly implement the court's decisions in relation to a bankruptcy resolution.

## 2. Is it possible to obtain a moratorium before insolvency?

**Moratorium**

There is a process in Vietnam known as the "recovery of business operations." It is a process by which an insolvent enterprise is intended to be returned to a state of solvency. A moratorium (together with other measures for the recovery of business operations (if any) and the conditions, time limit and plan for the payment of debts) must be included in the plan for the recovery of business operations of the insolvent enterprise. This is prepared by the insolvent enterprise (if the meeting of creditors passes a resolution for the application of the procedures for the recovery of business operations), reviewed by the creditors, the asset management officer or asset management and liquidation enterprise, and the judge and it is submitted to the meeting of creditors for consideration and approval. The judge will issue a decision to acknowledge the approval of the plan for recovery of the insolvent enterprise's business operations by  meeting  creditors.

**Time Limit**

The time limit for the implementation of the plan for the recovery of the insolvent enterprise's business operations is subject to the creditors' approval in a meeting of creditors. If the meeting of creditors fails to specify the time limit, the applicable time limit is three years or less from the date the plan is approved.

**Conditions**

The conditions for the validity of a meeting of creditors approving the plan for the recovery of the insolvent enterprise's business operations are as follows:

The number of creditors attending the meeting must represent at least 51% (in value) of the total unsecured debts. Any creditor that did not attend the meeting of creditors but sent its written approval or disapproval of the plan to the judge before the date of the meeting is deemed to have attended the meeting.

The asset management officer or asset management and liquidation enterprise assigned to resolve the petition for the commencement of bankruptcy proceedings must attend the meeting of creditors.

**Approval of the plan at the creditors' meeting**

A resolution of the meeting of creditors is passed when the plan is approved by at least 51% of the total number of unsecured creditors attending the meeting and representing at least 65% (in value) of the total unsecured debts. If a plan for recovery of the insolvent enterprise's business operations involves the use of assets that are subject to a security granted by the enterprise in favor of secured creditors, the resolution must be approved by the creditors whose obligations are secured by the collateral, specify the period that those assets are permitted to be used and include a plan for the enforcement of the security.

**Recognition of decision**

The judge recognizes a resolution approving the plan for the recovery of the insolvent enterprise's business operations passed at the meeting and it is binding on all participants in the bankruptcy proceedings. As from the effective date of the resolution approving the plan for the recovery of the insolvent enterprise's business operations, the insolvent enterprise is no longer subject to prohibitions on and the supervision of its business operations.

The court will send the judge's decision recognizing the resolution of the meeting to the insolvent enterprise,  all creditors and the Supreme People's Procuracy of Vietnam that corresponds with the relevant court within seven working days from the date of issue of the decision.

**No meeting or no resolution**

If no meeting of creditors is held or if the meeting is held but it fails to pass a resolution as set out above, the court will declare the insolvent enterprise bankrupt.

## 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

**Transactions that are deemed invalid**

A transaction carried out by the insolvent enterprise within six months (or within 18 months if the transaction is conducted with a related person) before the date on which the court issues a decision to commence bankruptcy proceedings is deemed invalid if it falls into one of the following categories:

A transaction related to a transfer of assets that is not at market value.

The conversion of an unsecured debt into a debt that is fully or partially secured by the insolvent enterprise's assets.

A payment or set-off that benefits a creditor in respect of a debt that has not yet become due or with a sum that is bigger than a debt that has become due.

A donation of assets.

A transaction outside the purpose of the business operations of the insolvent enterprise.

A transaction for the purpose of disposing of the insolvent enterprise's assets.

In addition, the following transactions of an insolvent enterprise that are carried out after a decision to commence bankruptcy proceedings are prohibited and deemed invalid:

A concealment, disposal or donation of any assets of the insolvent enterprise.

A payment of any unsecured debts (except for unsecured debts arising after the commencement of bankruptcy proceedings and the payment of wages to employees as stipulated by law).

The abandonment of any right to claim a debt.

The conversion of unsecured debts into debts secured wholly or partly by the insolvent enterprise's assets.

**Termination or temporary suspension of the performance of effective contracts**

The insolvent enterprise or a creditor may request the court to issue a decision to temporarily suspend the performance of a contract (except for the settlement of secured debts in accordance with the law) if it finds that the performance of the contract (which has come into effect and is either being performed or has not yet been performed) may result in a disadvantage to the insolvent enterprise. This type of request must be made within five working days from the date on which the court accepts jurisdiction over a petition for the commencement of bankruptcy proceedings.

Within five working days from the date on which the court issues a decision to commence bankruptcy proceedings, it must review any temporarily suspended contract to decide on one of the following options:

Continuing the performance of the contract if it is currently effective and being performed or if the performance will cause no disadvantage to the insolvent enterprise.

Terminating the performance of the contract.

If the court decides not to commence bankruptcy proceedings, it must annul any decision for temporary suspension.

## 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

**Enforcement timeline**

Upon the occurrence of an enforcement event, the lender or its security agent shall deliver an enforcement notice to the securing party and other registered secured parties, if any.

A lender can only enforce its security after the expiry of the waiting period as from the date of the enforcement notice. The waiting period can be either:

The period as agreed between the parties; or

A reasonable period as decided by the lender in the absence of a mutually agreed period, but no less than 10 days for moveable assets or 15 days for immovable assets

However, if the secured asset is in danger of damage resulting in it diminishing in value or the loss of its entire value, the lender can enforce immediately and concurrently deliver the enforcement notice.

**Enforceability**

Security can be enforced out of court following an event of default or another contractual trigger event. However, the lender may need to rely on the cooperation of the securing party to a certain extent for an efficient enforcement process. If the securing party is not cooperative and repossession of the collateral is necessary for enforcement purposes, the secured party will, in most cases, have to resort to the agreed dispute resolution forum, which could cost significant time and expense.

**Restriction on enforceability**

Within five working days from the date the court accepts jurisdiction of a bankruptcy matter, the enforcement of security given by the insolvent enterprise to secured creditors will be temporarily suspended by the competent authorities.

After the commencement of bankruptcy proceedings, the asset management officer or asset management and liquidation enterprise must make a recommendation to the judge on the settlement of secured debts where the payment has been temporarily suspended.

If secured assets that are subject to a security granted by the enterprise in favor of secured creditors are used for the recovery of the insolvent enterprise's business, the enforcement of the secured assets will be decided in the resolution of the creditors' meeting referred to in the answer to question 2 of this section.

If the recovery of the insolvent enterprise's business is not approved or the secured asset is not required for carrying out the recovery of the insolvent enterprise's business, the settlement of secured debts that have become due is permitted to be satisfied in accordance with the timing specified in the relevant agreement. In the case of secured debts that have not become due, before declaring the insolvent enterprise bankrupt, the court must terminate the contract and settle the secured debts. Secured debts established before the court's acceptance of the jurisdiction of the petition for the commencement of bankruptcy proceedings are repaid out of the secured asset. If the value of the secured asset is not enough to repay the debt, the unpaid part of the debt is repaid in the course of the liquidation of the assets of the bankrupt enterprise. If the value of the secured asset exceeds the amount of the debt, the difference is included in the value of the assets of the insolvent enterprise.

After the court accepts the jurisdiction of a bankruptcy matter or the commencement of bankruptcy proceedings, if the secured asset is at risk of destruction or a considerable decrease in value, the asset management officer or asset management and liquidation enterprise must recommend that the judge permit the immediate realization of the secured asset. The enforcement of the secured asset must be in accordance with the above principles. However, the issue of whether a secured loan with first ranking security interests over a secured asset will have the priority of repayment by such secured asset over other loans with lower ranking security interests in the bankruptcy procedures has not been tested before Vietnamese courts.

## 5. Do any limitation periods apply in relation to bringing an action to enforce security?

By law, the limitation period for initiating civil lawsuits is three years, starting from the date the claimants knew or should have known that their lawful rights and interests had been infringed. Commercial disputes are subject to a two-year limitation period from the date when the lawful rights and interests of the claimant(s) are breached. Although it is not entirely clear, such limitation periods may be applicable in relation to bringing an action before the dispute resolution authorities to enforce security. Under the regulations on the settlement of secured debts (as discussed in the answer to question 4 of this section), the settlement of debts in bankruptcy proceedings may be effected only after the commencement of bankruptcy proceedings or when the secured asset is at risk of destruction or a considerable decrease in value.

## 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

No.

## 7. Are there any particular legal or practical difficulties or delays in enforcing security?

In practice, the enforcement of security requires the cooperation of the securing party, especially in respect of the repossession of secured assets by the secured party. If the securing party is not cooperative and the repossession of the secured assets is necessary for the purpose of enforcement, in most cases, the secured party will have to bring the dispute to the agreed dispute resolution forum to enforce it, which could cost significant time and expense.

## 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

In the case of equity enforcement, a foreign lender may be subject to certain foreign ownership limitations and regulatory approvals imposed by Vietnamese law if the foreign lender takes an assignment of the secured assets in satisfaction of the prompt and complete payment and performance in full of the secured obligations. However, the foreign lender can also sell or assign the secured assets by way of a public sale, private sale or otherwise to avoid such circumstance.

Further, security enforcement proceeds arising from Vietnam must be carried out through a bank or branch of a foreign bank incorporated and operating in Vietnam ("**Security Supporting Bank**") before remitting to the foreign lender/security agent. Details of the Security Supporting Bank must be registered with the SBV in the application for foreign loan registration. For foreign loans that are already registered with the SBV before 15 November 2022, although Vietnamese law does not require the registration to be updated with the details of the Security Supporting Bank, considering that the enforcement proceeds must be carried out through a Security Supporting Bank, lenders should consider registering the Security Supporting Bank with the SBV for those registered loans.

## 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

A decision or judgment by any court other than a Vietnamese court is unlikely to be recognized and enforced in Vietnam, as Vietnam is not a member of the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. However, a Vietnamese court may consider recognizing and enforcing a civil judgment or decision made by a foreign court where the foreign country is a party to a judicial assistance agreement with Vietnam or it is a participant or signatory to a relevant international treaty to which Vietnam is also a participant or signatory, or such judgment is permitted to be recognized and enforced under Vietnamese law or on a reciprocal basis.

Vietnam is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; therefore, an arbitral award given by an arbitration center of another New York Convention member country will be recognized and enforced in Vietnam by a competent court of Vietnam, unless the court deems that the said award is contrary to "fundamental principles of Vietnamese laws." However, as the "fundamental principles of Vietnamese laws" have not been explicitly and completely provided in any legal documents, except for the fundamental principles of civil law and commercial law, the recognition and enforcement of a foreign arbitral award will be subject to the court's discretionary interpretation of the "fundamental principles of Vietnamese laws".

Vietnamese law also anticipates parties constructing a hybrid arbitration-litigation clause in a contract, as further discussed in the answer to question 10 of this section.

## 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

To our knowledge, this question has not been tested in Vietnam. However, Vietnamese law recognizes agreements whereby the parties agree to use either arbitration or the court to resolve the dispute (except for certain cases where the dispute will fall under the jurisdiction of the court regardless of the agreement of the parties) in accordance with the following:

Where the claimant submits the dispute to arbitration before requesting the court to resolve the dispute or submits the dispute to arbitration when the court has not yet accepted jurisdiction over the dispute, the court will reject jurisdiction to resolve the dispute. If the court has already accepted jurisdiction over the dispute, the court will suspend the resolution of the dispute as not being subject to the court's jurisdiction and it will return the statement of claim and accompanying documents.

Where the claimant requests that the court resolve a dispute, after receiving the statement of claim, the court must immediately determine whether one of the parties has submitted the dispute to arbitration. If the respondent or the claimant has not submitted the dispute to arbitration, the court will consider accepting jurisdiction over the dispute for resolution. Where the court discovers that the dispute was submitted to arbitration before it accepted jurisdiction over the dispute, the court will issue a decision suspending the resolution of the dispute as not being subject to the court's jurisdiction and it will return the statement of claim and accompanying documents.

# Working digitally

## 1. Is it possible for documents to be executed electronically (whether by the manual insertion of a digital signature or the use of an e-signing platform) under the laws of this jurisdiction? If so, is this limited to only particular types of finance documents?

Loan agreements can be made in the form of electronic data messages (i.e., in the form of electronic data exchange, electronic documents, electronic mail, telegram, telegraph, fax or other similar forms). Vietnamese law also provides certain legal frameworks for the parties to execute transactions electronically, for example, via the internet and, signing documents with electronic signatures (e-signatures) in lieu of prevalent wet-ink signatures.

An e-signature is: (a) created in the form of words, letters, numbers, symbols, sounds or other forms by electronic means; (b) logically associated or incorporated with electronic contracts (e.g., in the form of common PDF or Word files); and (c) capable of certifying the signatory and their approval of the content of the signed electronic contract. There are three common forms of e-signature:

Scanned signature: a signatory of each party signs a hard copy of a document in wet ink; then, the document with the signatures is converted into electronic form by scanning and is sent to the counterparty by email.

Image signature: a signatory inserts an image of their signature into the signature box of an electronic file of a document; then, the file including the image signature is sent to the counterparty by email.

Digital signature: parties use a specialized platform and device provided by a digital signature authentication service provider to create digital signatures; then, such digital signature is attached to an electronic file of a document to be signed.

Not all e-signatures have equal legal validity to pen-and-paper signatures. Equal validity for an e-signature is only legally recognized if the e-signature in question satisfies the following requirements:

The method of creating the e-signature allows for the identification of the signatory and indicates their consent to the contents of the contract/agreement.

Such method is sufficiently reliable and appropriate for the purpose for which the contract/agreement was originated and sent.

However, there has been no further official implementation guidance or clarifications of these requirements. A digital signature is officially recognized as a type of e-signature. Documents signed by digital signature do not require stamps and do not give rise to the validity issue. In practice, due to the higher level of security it offers in comparison to other forms of e-signatures, a digital signature that has been certified by a licensed certificate authority in Vietnam is legally considered a secured e-signature and it is more likely to be recognized by Vietnamese competent authorities and courts. However, although there have been a tremendous number of documents signed with signatures created through foreign digital signature services such as DocuSign or Adobe Sign, it is not certain whether such documents and signatures will be recognized as legally valid by the courts in the event of disputes.

In practice, for finance documents pertinent to loan or security interests that need to be registered with the competent authorities (e.g., long-term offshore facility/loan agreements), the authorities usually require such finance documents to be signed with wet-ink signatures and delivered in hard copies.

## 2. Where the witnessing of a signing is contemplated, is it possible for the witness to verify the signature over a live video call?

Depending on the types of documents, the physical presence of the signatory that executed the document will be required (e.g., real estate-related agreements such as mortgage agreements over assets attached to land). Except for limited cases where the entity is able to register its specimen signature at the notarial practice organization, the contract can be signed beforehand. However, a notary will compare the signature in the contract with the specimen signature before notarization.

According to the law, notarization requesters, witnesses and interpreters must sign the contracts in the presence of the notary. The law does not specifically say whether such presence can be virtual. Thus, it would likely be permissible for the notary to witness the execution by videoconference. However, parties should understand that the burden of proof falls on them when the execution is witnessed virtually.

## 3. Is it possible to register/perfect security electronically without wet ink signatures?

The competent authorities often require the applicant for security registration/enforcement to submit and present documents stamped and signed with wet-ink signatures.

## 4. Are there any other legal restrictions that may prevent the parties from executing a finance transaction electronically?

No.

# Contributors

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