Asia Pacific Guide to Lending and Taking Security - Vietnam

If taking security

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# 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.

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