

THE LENDING
AND SECURED
FINANCE REVIEW

FIFTH EDITION

Editor
Azadeh Nassiri

THE LAWREVIEWS

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CONTENTS

PREFACE.....	vii
<i>Azadeh Nassiri</i>	
Chapter 1 AUSTRIA.....	1
<i>Leopold Höber</i>	
Chapter 2 BELGIUM	12
<i>Yves Brosens and Britt Vanderschrick</i>	
Chapter 3 BRAZIL.....	22
<i>Bruno Balduccini and Roberto Panucci Filho</i>	
Chapter 4 CANADA.....	33
<i>Jean E Anderson, David Wiseman, David Nadler, Carrie B E Smit, Caroline Descours and Cathy Costa-Faria</i>	
Chapter 5 CHINA.....	50
<i>Gulong Ren</i>	
Chapter 6 ENGLAND AND WALES.....	61
<i>Azadeh Nassiri, Kathrine Meloni and Adam Burk</i>	
Chapter 7 FRANCE.....	78
<i>Karine Sultan, Yves Rutschmann, Charlotte Bonsch, Béna Mara, Gaël Rivière and Guillaume Wulfowicz</i>	
Chapter 8 GERMANY.....	93
<i>Christian Schmies, Nikolaus Vieten and Jens Wenzel</i>	
Chapter 9 HONG KONG	103
<i>Peter Lake</i>	

Contents

Chapter 10	INDIA	117
	<i>L Viswanathan and Dhananjay Kumar</i>	
Chapter 11	INDONESIA.....	133
	<i>Sri H Rahayu, Indra Prawira and Indriana Pramesti</i>	
Chapter 12	ITALY	147
	<i>Giuseppe Schiavello and Micol Mimun</i>	
Chapter 13	JAPAN	157
	<i>Hiroki Aoyama and Keigo Kubo</i>	
Chapter 14	LUXEMBOURG.....	165
	<i>Henri Wagner and François Guillaume de Liedekerke</i>	
Chapter 15	NETHERLANDS.....	183
	<i>Menno Stoffer and Pieter Hooghoudt</i>	
Chapter 16	NIGERIA.....	193
	<i>Kofo Dosekun, Oludare Senbore, Oritsemone Awala-Velly and Nafisa Adama</i>	
Chapter 17	NORWAY.....	204
	<i>Audun Nedrelid and Markus Nilssen</i>	
Chapter 18	PHILIPPINES	212
	<i>Vicente D Gerochi IV and Camille Angela M Espeleta</i>	
Chapter 19	SPAIN.....	221
	<i>Ángel Pérez López, Pedro Ravina Martín and Blanca Arlabán Gabeiras</i>	
Chapter 20	SWEDEN.....	234
	<i>Eric Halvarsson and Fredrik Gillgren</i>	
Chapter 21	SWITZERLAND	242
	<i>Patrick Hünerwadel, David Ledermann and Marcel Tranchet</i>	
Chapter 22	TAIWAN.....	251
	<i>Abe Sung and Mark Yu</i>	
Chapter 23	TURKEY.....	259
	<i>Sera Somay</i>	

Chapter 24	UNITED STATES	273
	<i>Monica K Thurmond</i>	
Chapter 25	VIETNAM.....	284
	<i>Duong Thu Ha, Vu Dieu Huyen and Pham Minh Thang</i>	
Appendix 1	ABOUT THE AUTHORS.....	297
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	315

PREFACE

This fifth edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 25 different countries, and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions, and on the challenges and opportunities facing market participants. I would also like to thank our publishers without whom this review would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri

Slaughter and May

London

June 2019

VIETNAM

Duong Thu Ha, Vu Dieu Huyen and Pham Minh Thang¹

I OVERVIEW

Vietnam's economy has achieved remarkable progress since the start of its transition from a centrally planned economy in the mid-1980s. However, since the 2008 global financial crisis, several segments of the economy had shown signs of poor performance and financial distress, which had affected the overall health of the banking system. From 2009 to 2011, interest rates rose dramatically due to high inflation, despite tightening monetary policies imposed by the State Bank of Vietnam (SBV). Access to credit was limited and the low overall liquidity in the banking system caused a race among banks to further increase deposit interest rates. In 2012, the burst of the real estate bubble triggered a crisis in the banking sector and resulted in a significant amount of non-performing loans (NPLs) in the system.

The crisis in 2012 led to a series of interventions and bank restructuring reforms by the government, which have shown results in recent years. Bank profits and asset quality are improving in most large banks. A strong economy and higher real estate prices facilitated the disposal of collateral and the restructuring of bad debts, raised profits and boosted capital. Interest rates decreased in general owing to high liquidity in the market. The government aimed to cut down lending interest rates by 0.5 to 1 per cent and increase loans for agriculture, hi-tech and supporting industries by more than 20 per cent. In 2018, the SBV wanted to further lower interest rates to incentivise economy sectors. However, there is not much room for this reduction given the current cost of financing. In the first quarter of 2019, deposit interest rates ranged from 0.5 to 1 per cent per annum for indefinite terms and 6.6 to 7.3 per cent per annum for a term of 12 months or more, and lending interest rates ranged from 6 to 9 per cent per annum for short-term loans and 9 to 11 per cent per annum for middle and long-term loans.²

Credit growth in Vietnam is the highest in the region, rising to 18.7 per cent in 2016, 18.17 per cent in 2017 and 14 per cent in 2018,³ owing to a more consumer-oriented economy and a low interest rate environment. This trend is expected to continue until 2020. To control credit growth, the SBV has been imposing limits on the credit growth of each bank. Banks that meet the Basel II standards earlier than the 1 January 2020 deadline would be allocated a higher credit growth limit. By September 2018, most banks had reached the credit growth limits imposed by the SBV and only a few banks had been able to obtain an adjustment to these limits. The SBV also limits lending in the real estate sector by increasing the risk weight of real estate loans from 200 to 250 per cent and reducing the proportion of

1 Duong Thu Ha is a partner, and Vu Dieu Huyen and Pham Minh Thang are counsel at YKVN LLC.

2 www.sbv.gov.vn.

3 *ibid.*

short-term capital to be used for medium and long-term lending by banks from 50 per cent in 2017, 45 per cent in 2018 to 40 per cent in 2019. The SBV expects that both of these measures will reduce lending in the real estate sector because loans in this sector tend to be on a medium or long-term basis.

Partially due to the limit imposed on domestic credit growth, access to domestic bank loans has been difficult and foreign borrowing has increased sharply in recent years, at 44.8 per cent in 2016, 48.9 per cent in 2017 and 49.7 per cent in 2018 of GDP.⁴

Despite the positive trends in both domestic and foreign borrowing growth, the corporate lending market in Vietnam is premature. Most foreign syndication loans use the Asia Pacific Loan Market Association (APLMA) form. Certain provisions of the APLMA form have been adopted and used in Vietnam by banks and law firms; however, there is no standard form for domestic transactions. Lenders in Vietnam are mostly traditional banks and credit institutions licensed by the SBV to conduct banking business. There is also no established market for transferring loan participations.

II LEGAL AND REGULATORY DEVELOPMENTS

i New lending regulations

On 30 December 2016, the SBV issued one of its most anticipated lending regulations, Circular No. 39/2016/TT-NHNN (Circular 39), to replace the old Decision No. 1627/2001/QĐ-NHNN, which was issued in 2001. Circular 39 provides for the principles, conditions, borrowing dossiers and interest rates of loans by commercial banks, credit institutions and foreign bank branches operating in Vietnam (banks) for business and consumption purposes. Below are the most significant changes introduced by Circular 39.

Eligible borrowers

Under the new lending regulations, non-legal entities (i.e., households, cooperative groups, and other organisations without a legal entity status) are no longer eligible to borrow from banks. In the case of borrowing for business and other activities, individual borrowers can borrow to meet their own capital needs and those of non-legal entity organisations.

Restricted borrowing purposes

Under the new lending regulations, refinancing loans are restricted. Circular 39 provides for a list of restricted loan purposes:

- a* carrying out business investment activities in industries and trades that are prohibited by law;
- b* paying the costs and meeting the financial needs of transactions and acts prohibited by law;
- c* purchasing and using goods and services that are prohibited by law;
- d* purchasing gold bars;
- e* repaying a loan at the same lending credit institution; or
- f* repaying debts at other credit institutions and repaying foreign loans.

⁴ *The Banks Times*, www.thoibaonganhang.vn.

Under these provisions, refinancing loans is no longer permitted, unless the loans meet the following conditions set out in Circular 39:

- a* the loan is to repay a loan at the same lending credit institution as payment of the interest arising during the process of construction works where the interest costs were included in the total investment amount for construction approved by the competent authority; or
- b* the loan is to repay debts at another credit institution or repay foreign loans, in which case three conditions must be met:
 - it is a loan to serve business activities;
 - the term of the new loan does not exceed the residual term of the previous loan; and
 - the term of the previous loan has not been restructured.

Interest and fees

Prior to Circular 39, it was unclear whether bank loans were subject to the cap of 20 per cent per year imposed by the Civil Code 2015 on all civil transactions. This cap had impacted the consumer loan market because the lending rates in this sector tend to be much higher than 20 per cent per year. Lending rates for corporate and non-consumer loans were generally lower than this cap.

Circular 39 confirmed that bank loans are not subject to this 20 per cent cap. Banks and borrowers are free to agree on the lending interest rates, except for short-term Vietnamese dong-denominated loans in certain sectors. These include loans for the purposes of developing agriculture and rural areas, exporting, and supporting small and medium-sized companies, industries and high-tech businesses. This exception aims to incentivise the enlisted sectors, and interest rates in these loans are capped at the maximum lending rate announced on occasion by the governor of the SBV.

Though most banks welcomed the much-needed clarification on the 20 per cent interest rates, they also raised concerns on the cap imposed for loans in the incentivised sectors. This cap can potentially be counterproductive because instead of channelling more loans to the incentivised sectors, it could make lending in these sectors less attractive for banks, especially if the interest rates are lower than the banks' cost of funds.

In addition, Circular 39 also imposes caps on overdue interests: 150 per cent of the regular interest rate with respect to the overdue principal amount (this is not a new change because it was also provided in the predecessor of Circular 39) and 10 per cent per year with respect to the overdue interest amount. These caps on overdue interest rates are viewed by many banks as too low, especially the fixed 10 per cent per year cap on overdue interest.

Lending method

Revolving and rollover loans were not formally permitted in Vietnam. Circular 39 now permits borrowers with financing needs for business cycles not exceeding one month to obtain revolving loans from banks with a term of up to three months. Rollover loans will also be possible provided that the borrower does not have any NPLs, and the total tenor of the rolled over loan does not exceed 12 months following the initial disbursement and does not exceed one business cycle of the borrower.

Loan currency

Circular 39 specifies that banks and borrowers may agree on the currency of the loans (if the loan is in a foreign currency, regulations on foreign currency lending will apply); however, Circular 39 requires that the loan must be repaid in the same currency it was borrowed in. Loans in foreign currencies by credit institutions are limited to certain circumstances enumerated by the SBV (e.g., short-, mid- and long-term loans for certain qualified import payments, short-term loans for manufacturing, and exports and loans for overseas investments that have been approved by the National Assembly or the Prime Minister of Vietnam). The SBV is expected to further restrict mid- and long-term foreign currency loans in the coming years.

Language

Under Circular 39, loan agreements will be prepared in Vietnamese, or in both Vietnamese and a foreign language. Therefore, the Vietnamese language is mandatory.

The order of debt recovery

Under Circular 39, banks and borrowers can agree on the order of debt recovery; however, if the loan is overdue, Circular 39 requires that the banks must first recover outstanding principal, and thereafter outstanding interest on the loan.

ii Basel II

For Vietnam's banking system, Basel II standards have become an important requirement in the risk management and safety of the system. However, the application of Basel II in Vietnam remains slow.

In 2014, the SBV announced the trial application of the capital and risk management method in accordance with Basel II standards. According to this programme, 10 banks were selected to apply Basel II by the beginning of 2020. These banks are Vietcombank, VietinBank, the Joint Stock Commercial Bank for Investment and Development of Vietnam, the Military Commercial Joint Stock Bank (MB), Sacombank, Techcombank, Asia Commercial Bank, VPBank, Vietnam International Bank (VIB) and Maritime Bank. Basel II is implemented by Circular No. 41/2016/TT-NHNN (Circular 41) of the SBV. Under Circular 41, the deadline for these banks to meet Basel II standards is 1 January 2020.

Circular 41 implements the three pillars of Basel II:

- a* capacity adequacy ratio (CAR): the required CAR is at least 8 per cent. Under Circular 41, for the purposes of calculating CAR, equity includes Tier 1 and Tier 2 after deductions. Asset classifications are based on credit risk ratios; for example, zero per cent for gold, zero per cent for receivables from international financial institutions, and 90 per cent for receivables from small and medium-sized companies;
- b* supervisory review: banks must implement a comprehensive review of their capital adequacy and have a strategy to maintain their capital adequacy level; and
- c* market discipline: banks are required to disclose important factors of their business operations, risks and risks management. This is aimed to allow the market to gauge the capital adequacy of a bank.

As at April 2019, only six banks are recognised by the SBV as having successfully applied Basel II standards: Vietcombank, MB, VPBank, VIB, Orient Commercial Bank (OCB) and TPBank (OCB and TPBank are not among the initial 10 selected banks). It remains to be seen whether the remaining six of the 10 initially selected banks could meet the 2020 deadline.

iii Sanctions and anti-corruption

Anti-money laundering and counter-terrorism law

Vietnam became a member of the Asia/Pacific Group on Money Laundering (APG) in May 2007. To strengthen its anti-money laundering (AML) system, Vietnam enacted an AML law and an implementing decree, and the SBV established a Financial Intelligence Unit. Vietnam underwent an APG Mutual Evaluation in November 2008 for the first time and is preparing for its second APG Mutual Evaluation in 2019.

Under the AML laws and regulations, depending on the types of transactions and the factors relating to the customers or their transactions, a reporting person will have to comply with different types of AML and counter-terrorist financing obligations. These obligations include as follows:

- a* create and maintain internal regulations on AML;
- b* perform and collect know-your-customer information;
- c* report and disclose information to the SBV and other competent authorities; and
- d* impose temporary measures at the request of the competent authorities.

Notably, the threshold for the value of transactions to be reported is relatively low, approximately 300 million Vietnamese dong.

New Penal Code

In 2015, the National Assembly adopted a new Penal Code, which took effect from 1 January 2018. The most significant changes among those introduced by the new Penal Code are the expansion of corruption-related offences related to the private sector and the introduction of corporate criminal liability. Under the new Penal Code, individuals of any nationality working in the private sector can now be criminally liable for the offences of embezzlement, and the giving, receiving and brokerage of bribes, which were previously applicable to the public sector only. Together with this change, the definition of bribes was also broadened to include both tangible and intangible interests. The new Penal Code also provides, for the first time, for corporate criminal liabilities applicable to commercial legal entities. Accordingly, commercial legal entities can now be liable for offences of smuggling, tax evasion, securities and insurance-related offences, money laundering and terrorism financing.

Sanctions

Banks in Vietnam have been instructed by the SBV not to facilitate or engage in Iran-related transactions. Details of these instructions are unclear because they are 'classified'. The SBV is concerned about potential penalties that may be imposed by the Office of Foreign Assets Control at the US Department of the Treasury if any Vietnamese bank were found to engage in or facilitate prohibited Iranian transactions. These penalties could include prohibitions against US financial institutions maintaining correspondent accounts in Vietnamese banks, which would effectively freeze any Vietnamese bank that is the subject of these penalties out of the global banking market. The main focus and concern of the SBV instructions is

probably to protect the Vietnamese banking system, which has become very integrated into the global banking system, rather than any policy aimed at supporting the United States or, for that matter, the EU sanctions regime applicable to Iran.

In addition to the SBV instructions, Vietnamese banks are also tracking US, UN and EU sanctions because most Vietnamese banks now have international presence and their businesses are integrated into the international bank network and settlement systems.

III TAX CONSIDERATIONS

i Withholding tax

A withholding tax of 5 per cent corporate income tax applies to interest paid on loans from foreign entities. Offshore loans provided by certain government or semi-government institutions may obtain an exemption from withholding tax where a relevant double taxation agreement or intergovernmental agreement applies.

ii Value added tax

Interest and other incomes of lenders relating to loans are not subject to value added tax. There is also no stamp duty or documentary tax applicable to loan agreements.

iii FATCA

On 1 April 2016, Vietnam and the United States signed an intergovernmental agreement (Model IGA 1B) on the Foreign Account Tax Compliance Act (FATCA), effective from 7 July 2016. Pursuant to Model IGA 1B, financial institutions in Vietnam will submit FATCA reports to the SBV, then the SBV will transfer the reported information to the US Internal Revenue Service (IRS).

On 7 August 2017, the SBV issued Official Letter No. 6226/TTGSNH (Letter 6226) guiding the implementation of FATCA in Vietnam in accordance with Model IGA 1B. Letter 6226 incorporates the entire contents of the FATCA guiding documents previously issued by the SBV in response to the requirements of the IRS, and follows the contents of Model IGA 1B. Letter 6226 is applicable to FATCA reports from 2016 onwards. Under letter 6226, the deadline for banks to submit their FATCA reports with the SBV is 15 August. The reporting format and data must follow the relevant requirements of the IRS. Banks must submit their FATCA reports in electronic format to the AML Department of the SBV.

IV CREDIT SUPPORT AND SUBORDINATION

i Security

Methods of security

Mortgage

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

taken with regard to not only immovable property but also intangible property, which is physically undeliverable, and movable property if the lenders do not wish to take possession of the movable property. Mortgage will also be taken with regard to movable property if the possession of the movable property by the lenders will cause material consequences to the business and operation of the borrower (e.g., material machinery and equipment of the borrower).

Pledge

In a pledge, the pledgee will take possession of the property. Given this possession feature, a pledge is typically taken with regard to movable property only, and the law imposes on the pledgee an obligation to take care of and preserve the pledged property. If the pledgee loses, mislays or damages the pledged property, the pledgee must compensate the pledgor for the losses and damage.

Mortgages and pledges are forms of security transactions rather than forms of transfers of title to assets. Indeed, the transfer of title to the assets from the mortgagor or pledgor to the mortgagee or pledgee only occurs upon completion of enforcement of the mortgage or pledge.

Other forms of securities

The law also provides for other forms of security interests, including, among others, guarantees, securities by way of deposit, security collateral, escrow accounts, retention of title, pledges of trust and liens.

Assignments by way of security, even though generally accepted in many jurisdictions, are not recognised under Vietnamese law as a security transaction. Since an assignment by way of security is not among the forms of securities recognised by Vietnamese law, the creation of security over contractual rights, bank accounts and equity interests is generally achieved by way of a mortgage.

Assets available for security

Available secured assets

Under Vietnamese law, assets are defined to include objects, money, valuable papers (e.g., shares or bonds) and property rights valuable in money. Property rights are in turn defined to include, among others, rights to receive payment under contracts, rights to dividend and other equity interests, intellectual property rights and other rights arising from assets.

Assets are categorised in two ways: immovable or movable assets. Immovable assets include the following:

- a* land;
- b* houses and construction structures attached to land (e.g., buildings, plants);
- c* other assets attached to land, houses and construction structures; and
- d* other assets as provided by law.

Movable assets are assets that are not immovable assets (e.g., equipment, inventory, bank accounts and securities).

Secured assets can be an existing asset at the time of the creation of the security or an asset to be created in the future (a future asset). Secured assets must be under the ownership of the securing party and be identifiable.

An economic organisation, subject to the land lease or allocation type, is entitled to mortgage the land use right and assets attached to the land to credit institutions authorised to operate in Vietnam. Although foreign bank branches, joint venture banks and wholly foreign-owned banks operating in Vietnam are also allowed to take mortgage of the land use right and assets attached to the land, the current laws do not, as yet, go so far as to permit foreign lenders to take such security interests, either directly or through a security agent established in Vietnam.

To conclude, foreign entities are only permitted to take a security interest over movable assets and property rights, including shares and rights relating to equity capital (other than property rights relating to immovable assets such as a land use right).

Rights under licences and regulatory approvals are sometimes used as secured assets even though the validity and enforceability of these securities are questionable because licences and approvals are generally issued to specific persons and are not assignable.

The most common secured assets are described below.

Shares

A pledge or mortgage over the shares held by shareholders of the borrower is allowed and can be perfected under the law of Vietnam. A mortgage is typically applied with respect to the security over non-listed shares, whereas a pledge is used for the security over listed shares because of the nature of blockading pledged shares at the Vietnam Securities Depository (VSD). The company issuing the shares is normally notified of the pledge or mortgage, and will acknowledge and consent to the pledge or mortgage.

Movable and immovable assets

As discussed above, current Vietnamese law does not permit foreign lenders to take a mortgage over land use rights or immovable assets located on land; it is, however, permissible for foreign lenders to take a mortgage or pledge over movable assets.

Contractual rights

A mortgage of contract rights (including rights under insurance contracts) is generally permissible and can be perfected under the law of Vietnam.

Lenders should consider requiring consent from the borrower's counterparties for any mortgage of the underlying contracts. Counterparties should be required to give acknowledgment and consent providing for, among other things, (1) step-in rights enabling the lenders to replace the borrower as a party under the relevant project agreements, or (2) the requirement that any payment from the counterparties be made to the account designated by the lenders, or both. However, state-owned enterprises being counterparties may be reluctant to give such acknowledgment and consent.

Receivables

Vietnamese law specifically recognises a mortgage over receivables, which can be perfected under the law of Vietnam. Enforcement of receivables requires assistance from the relevant counterparties. Therefore, similar to the contractual rights, the borrower should be required to obtain consent from its counterparties for a mortgage over receivables.

Bank accounts

A mortgage of bank accounts and the balance standing to the credit of the bank account is allowed and can be perfected under the law of Vietnam.

Conceptually, lenders and borrowers may have a contractual agreement on set-off of the loan obligation when due against the credit balances in the accounts of the borrowers opened with the lenders. In addition, the lender and the borrower may also agree that the lender is entitled to the credit balances in the accounts of the borrower opened with other banks for the payment of the loan obligation when due. In this case, authorisation by the borrower to, and undertaking to the lender by, the other banks should be procured.

Aircraft and vessels

Security over aircraft may be created by way of a mortgage or pledge, but security over vessels may only be created by way of a mortgage.

Creation and perfection of security

A security transaction is created by an agreement between the securing and the secured parties. There is no restriction under Vietnamese law on taking security over all or substantially all of the assets of a company. However, the security interests should not be documented in a single security agreement given that the security arrangement will be registered with the different registrars depending on the types and locations of the secured assets.

The security agreement will be effective as of the execution date, unless otherwise agreed by the parties or provided by law (e.g., a land use right mortgage agreement will be effective as of the time of registration in the cadastral register). The security agreement over the land use right or the security agreement over the land use right and assets attached to the land must be notarised or authenticated, except for where parties or a party to the security agreement are enterprises operating in real estate business; the notarisation must be implemented at a notary office and the authentication must be implemented at the commune people's committees.

Generally, security interest created over property in Vietnam will be enforceable against third parties as of the time when, inter alia, the security is registered, or the secured party keeps or holds the secured. Security over movable assets (other than aircraft and vessels), property rights and shares will be registered with the Centre for Registration of Transactions and Assets of the National Registration Agency for Secured Transactions (NRAST) under the Ministry of Justice of Vietnam. In addition to registration with the NRAST, the shares of public companies deposited with the VSD will be blocked by it upon creation of a security over such shares. The Civil Aviation Authority of Vietnam under the Ministry of Transport will register security assets being aircraft, whereas the Vietnam Maritime Administration, or maritime bureaus and port authorities as delegated by the Vietnam Maritime Administration, under the Ministry of Transport, will register security assets being vessels. Security over land use rights and assets attached to land will be registered in land registration offices under the Ministry of Natural Resources and Environment.

There are certain administrative fees related to the security transaction registration. The registration fee at the NRAST is 80,000 Vietnamese dong per application. For registration at a land registration office, the registration fee will be occasionally decided by the provincial people's council. For registration at the Civil Aviation Authority of Vietnam, the fee will be determined by the value of each security transaction, ranging from 1.8 million to 18 million Vietnamese dong. The registration fee at the Vietnam Maritime Administration

is 80,000 Vietnamese dong per application. For voluntary securities blockade services at the VSD, service fees are determined based on the number of securities offered for the blockade, ranging from 5 million to 150 million Vietnamese dong.

ii Guarantees and other forms of credit support

Guarantees

The use of guarantees is common in the Vietnamese corporate lending market. A guarantee is an undertaking made by the guarantor to the beneficiary to perform an obligation on behalf of the guaranteed party when the obligation falls due and the guaranteed party fails to perform such obligation. The guarantor and the beneficiary may agree to use a security interest created over property such as a mortgage or pledge as security for the performance of the guaranteed obligation.

The beneficiary may not demand the guarantor to perform an obligation on behalf of the guaranteed party until the obligation falls due, and where the beneficiary is able to offset the obligation with the guaranteed party, the guarantor does not have to perform the guaranteed obligation.

Standby letters of credit

Vietnamese law is silent on the concept of a standby letter of credit as a security measure. However, a standby letter of credit is commonly used by Vietnamese credit institutions as a security measure. Generally, Vietnamese credit institutions describe a standby letter of credit as a guarantee of payment by a bank on behalf of its clients, in which the bank fulfils payment obligations if the client fails to fulfil a contractual commitment with a third party. Given the above, the standby letter of credit seems to fall within the scope of a guarantee under the law of Vietnam. By law, the guarantee arrangement (in the form of the standby letter of credit) to secure the payment obligations of the borrower with respect to the foreign loans should be included in the application for registration of the foreign loan to be submitted to the SBV for its approval of the foreign loan.

Negative pledge undertakings

Negative pledge undertakings are usually provided in facility agreements. These provisions may mitigate risk to lenders with respect of certain assets of the borrower or any obligor by not permitting the borrower or obligor to create security or quasi-security over any assets.

iii Priorities and subordination

Priorities

Payment priority is provided under Vietnamese law as follows:

- a* where all securities are registered, the payment priority will be determined according to the order in which the securities are registered;
- b* where there are both registered and not registered, the obligation for which the security is registered will be paid first; and
- c* where all securities are not registered, the payment priority will be determined according to the order in which the securities were created.

Subordination

Vietnamese law is silent on subordinated debt of enterprises (except for subordinated debts issued by credit institutions subject to the SBV's regulations on prudential ratios and limits for operations of credit institutions). Subordination is generally left to be agreed by the parties. Vietnamese law provides 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 as 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 by an intercreditor or subordination agreement, subject to the rights of the parties possibly being limited by bankruptcy, insolvency, liquidation, reorganisation, or other laws of general application relating to or affecting the rights of creditors.

Security sharing

An asset may be used by the borrower as security for its performance of several obligations if, at the creation of the security transaction, the value of the asset is higher than the total aggregate value of the secured obligations of the borrower, unless otherwise agreed or provided by law. In addition, if the asset is enforced to fulfil an obligation that has become due, other undue obligations of the borrower shall also be deemed as due and all secured parties shall be entitled to take part in enforcement of the asset. If the parties wish to continue the performance of the undue obligations, it may be agreed by the parties that the borrower shall use other assets as security for its performance of the undue obligations, which may arguably be interpreted that the former asset is enforced to fulfil the due obligation only.

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

i Legal reservations

There are certain limitations on the validity and enforceability of lending and security arrangements under Vietnamese law. Therefore, a legal opinion is normally qualified by reservations. Below are the most common reservations in legal opinions in Vietnam.

Insolvency

Rights of the parties may be limited by bankruptcy, insolvency, liquidation, reorganisation, and other laws of general application relating to or affecting the rights of creditors.

Registration of a foreign loan

SBV registration must be obtained for long- or medium-term foreign loans, renewed short-term loans having a loan term exceeding one year or non-renewed short-term loans having outstanding principal on the first anniversary date of the first disbursement (unless the loan is fully repaid within 10 days of the anniversary date). For the purpose of this registration, finance documents, such as a loan agreement, and security documents must be submitted to the SBV.

Agency arrangement

'Agency arrangement' is not a well-developed concept in Vietnam and is vaguely provided under Vietnamese law, which does not govern agency activities of a foreign entity. From a practical perspective, since the identity of the facility agent or the security agent, or both, is

described in the application for registration of the foreign loan with the SBV, it can be argued that if the foreign loan documentation has been examined and the foreign loan registration has been approved by the SBV, the SBV is deemed to consent to the foreign agency arrangement related to the foreign loan as set forth in the credit agreement.

Choice of foreign law

The choice of law rules for a civil contract involving a foreign element are provided in the Civil Code of Vietnam. A civil relation involving a foreign element is defined as follows:

- a* at least one of the parties is a foreign individual or legal entity;
- b* the parties are Vietnamese individuals or legal entities but the establishment, alteration, execution or termination of the relation arises in a foreign country; or
- c* the parties are Vietnamese individuals or legal entities but the subjects involved in the relation are located in a foreign country.

The foreign law, notwithstanding being referred to, shall not apply in any of the following circumstances: the consequences of its application are inconsistent with the fundamental principles of Vietnamese law or the contents of the foreign law are not identifiable regardless of the application of necessary measures prescribed by procedural law.

Enforcement of foreign judgments and awards

Vietnamese courts will consider recognising and enforcing foreign arbitral awards where the awards have been made in, or by arbitrators of, a country that is a party to a relevant international treaty of which Vietnam is a participant or a signatory, for example, the New York Convention. Courts may also consider recognising and enforcing foreign arbitral awards on a reciprocal basis without the condition that Vietnam and the relevant country are signatories or participants of a relevant international treaty. A foreign arbitral award may be enforced only after the decision of the Vietnamese court recognising and permitting enforcement of the award has taken legal effect. Under Vietnamese law, a foreign arbitral award will not be recognised or enforced where, among others, the court in which the recognition and enforcement are requested determines that the recognition and enforcement of the award is contrary to the fundamental principles of Vietnamese law. In addition, courts will not recognise or enforce a foreign arbitral award in certain circumstances specified by laws.

A court will consider recognising and enforcing a judgment rendered by a foreign court where the judgment has been made in, or by the court of a country that is a party to a relevant international treaty of which Vietnam is a participant or a signatory, where the judgment is permitted to be recognised and enforced under Vietnamese law, or on a reciprocal basis without the condition that Vietnam and the relevant country are signatories or participants of a relevant international treaty. A foreign court judgment may be enforced only after the decision of the Vietnamese court recognising and permitting enforcement of the judgment has taken legal effect. Vietnam has only signed bilateral treaties on reciprocal enforcement of court judgments with a very limited number of countries (predominantly former communist countries) and is not a signatory to any multilateral international conventions with commitments on the reciprocal enforcement of judgments. Further, under Vietnamese law, judgments rendered by foreign courts will not be recognised or enforced where, among others, the Vietnamese courts determine that the recognition and enforcement of such judgments are contrary to the fundamental principles of Vietnamese law. In addition, the judgments must also satisfy all conditions for recognition and enforcement set forth in the relevant judicial assistance treaty to the extent that the judgments are recognisable and enforceable in reliance on the treaty.

Issues not covered by legal opinions

Normally, a legal opinion will not cover the tax, financial, accounting, commercial or technical matters, except for high-level tax advice. For example, the withholding tax of 5 per cent is imposed on interests and fees to be made by the borrower to the lender under the credit agreement in accordance with Article 13.2(a) of Circular No. 103/2014/TT-BTC (Ministry of Finance, 6 August 2014), guiding the performance of tax obligations of foreign individuals and organisations doing business in Vietnam or having profits in Vietnam.

ii Legal opinion practice

The practice of delivering legal opinions is well developed in cross-border transactions in the lending market in Vietnam. However, delivering a legal opinion in a domestic transaction is uncommon. Legal opinions usually cover the capacity and authority of the borrower or other obligors, or both, and the validity and enforceability of the finance documents. Therefore, legal opinions are typically issued with the assumption about the correctness of all factual statements and representations as to matters of fact contained in each of the finance documents at the date when given and at the date of the opinion, and the assumption that the signatures of the signatories on behalf of the borrower or other obligors, or both, to the credit agreement are true and authentic.

The counsel to the lender will deliver a legal opinion. In some cases, the counsel to the borrower or obligor, or both, will give a legal opinion. Legal opinions are normally addressed to the lender in the case of bilateral loans and to the agent and the lenders in the case of syndicated loans. The provision of copies of legal opinions in some cases is permitted in respect of affiliates and professional advisors of the addresses on a non-reliance basis.

VI LOAN TRADING

Even though trading of bilateral loans or syndication loan participations are permitted and regulated by several legal documents of the government and the SBV, there is no established market for loan trading in Vietnam. Loans are typically transferred by assignment of the right to collect debt between the loan seller and loan buyer (pursuant to the definition of 'loan sale and purchase' under Circular 09/2015/TT-NHNN of the SBV on loan sale and purchase by credit institutions and foreign bank branches, and under Decree No. 69/2016/ND-CP of the government on conditions for loan trading business). Novation is not recognised under Vietnamese law. For an assignment of loan, a notice to the borrowers of the assignment is required.

VII OUTLOOK AND CONCLUSIONS

In 2019, the SBV released the credit growth target for the whole economy of only about 14 per cent, lower than 16 per cent in 2018. Banks will expect a slowdown in credit growth. However, economic growth in Vietnam will remain robust, and the banks' asset quality will improve, helping to strengthen their profitability. Strong economic growth will also translate into improvements in borrower repayment capabilities and enable banks to accelerate the write-offs of legacy problem assets. Moody's Investors Service, a credit rating agency, has recently changed its outlook for Vietnam's banking system from stable to positive for the next 12 to 18 months,⁵ reflecting a positive outlook for the Vietnamese economy and its banking sector.

⁵ www.moody.com.

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