



Vietnam cross-border lending guide

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Vietnam continues to be an attractive destination for foreign investors. As well as equity investment, both Vietnamese and foreign-invested enterprises constantly require debt capital from overseas lenders to establish and grow their businesses. In recent years, the demand for cross-border financing has also been boosted by a growing number of investments in real estate and renewable projects.

In this guide, we set out an overview of the basic principles of cross-border lending into Vietnam and address some issues frequently encountered by foreign lenders and domestic borrowers in their transactions.

Overview of cross-border lending

FOREIGN LENDERS

Any non-resident lender may lend to a Vietnamese borrower (a **foreign loan**) without having to be a licensed credit institution in its home jurisdiction or obtain any banking license from the Vietnamese authority.

DOMESTIC BORROWERS

Any Vietnamese organisation may borrow a foreign loan, subject to the prohibitions or conditions in its charter and any applicable borrowing limits. Although the law allows a Vietnamese individual to obtain foreign loans, such loans are uncommon and unenforceable in practice due to the lack of relevant implementing regulations.



KEY FEATURES OF A FOREIGN LOAN

Loan term

A foreign loan can be made for a term of 12 months or less (**short-term loan**) or more than 12 months (**medium- or long-term loan**), starting from the date of first drawdown to repayment of all outstanding amounts.

A short-term loan is not required to be registered with the State Bank of Vietnam (**SBV**) for the purposes of disbursement and repayment. In contrast, a medium- or long-term loan must be registered with SBV before it can be disbursed or repaid.

Loan currency

A foreign loan can be made in any foreign currency.

Foreign loans can also be made in Vietnamese Dong (**VND**) but in very limited circumstances (eg if the borrower is a micro-finance institution, or if the borrower is borrowing a shareholder loan derived from the shareholder's profits distributed in VND). Otherwise, special approval is required from SBV, though such approval is not commonly granted in practice.

Lending forms

Most foreign loans are made in the form of a straight loan agreement. Other less common forms include entrustment lending, finance leasing, accounts receivable¹ or issuance of debt instruments such as international bonds.

¹ Since 15 April 2016, accounts receivable arising from services/products importation agreement with deferred payment period of more than 12 months are no longer required to be registered with the SBV.

Bilateral loan vs syndicated loan

A foreign loan can be provided by one lender (**bilateral loan**) or two or more lenders (**syndicated loan**)².

A syndicated loan is subject to certain conditions prescribed by law, including:

- an onshore credit institution must be appointed as payment coordinating agent to process payments under the loan;
- the syndicated loan agreement must contain the statutory content provided by law; and
- syndicated lenders are only permitted to charge certain types of fees, including prepayment fees, fees for a standby credit line, arrangement fees, and commitment fees. Other common fees in the market such as cancellation fees and front-end fees cannot be charged.

In practice, syndicated loans provided by both foreign lenders and domestic lenders are rare, whereas syndicated loans made by a group of solely foreign or domestic lenders are relatively common.

² Circular 42/2011/TT-NHNN (**Circular 42**) on co-financing/syndicated loans (as amended). It is not entirely clear under Circular 42 whether a syndicated loan provided by only foreign lenders is considered 'co-financing' captured by Circular 42 (though our reading of this circular is that a loan should be considered a syndicated loan under Circular 42 only if at least one Vietnamese credit institution lender participates in the syndicate).

Limitations

LIMITATION ON USE OF FOREIGN LOANS

Use of foreign loans is subject to the following limitations:

- borrowers must not enter into a short-term loan (eg for working capital) for a medium- or long-term purpose (eg construction of buildings, capital investment etc.); and
- borrowers can only borrow foreign loans for two purposes being: (1) restructuring/ refinancing its other existing foreign loans; and (2) implementing business plans and investment projects of the borrower.

REFINANCING

Foreign loans can be refinanced or used to refinance existing loans of borrowers in different scenarios, subject to certain conditions and restrictions:

REFINANCING SCENARIOS	CONDITIONS/RESTRICTIONS
Borrow a new foreign loan to refinance an existing domestic loan	Not permitted.
Borrow a new domestic loan to refinance an existing foreign loan	<ul style="list-style-type: none">• the refinanced loan was to serve business activities;• the term of the refinancing loan does not exceed the residual term of the refinanced loan; and• the repayment term of the refinanced loan has not yet been restructured (eg has not been extended).
Borrow a new foreign loan to refinance an existing foreign loan.	<ul style="list-style-type: none">• the borrowing costs of the refinancing loan cannot be higher than that of the refinanced loan. The borrowing costs include interest and all costs and fees the borrower must pay for the loan transaction.

BORROWING LIMITS

Overall limit

The total amount of all foreign loans in Vietnam is subject to an annual limit approved by the Prime Minister (approx. USD5,500 million/year), with separate limits applying to government-guaranteed and non-government-guaranteed foreign loans.

In practice, the overall limit does not raise practical issues for private borrowers, except for large-scale loans drawn in the last months of the years when the limit may have been reached.

Loan headroom limit

A borrower that is issued an 'investment registration certificate' (**IRC**) for its investment project (eg a foreign invested enterprise (**FIE**)) may only borrow money to implement such project up to an amount that is the difference between the borrower's contributed capital in the project (eg charter capital) and the total investment capital specified in its IRC. All existing onshore and offshore long-term loans of the borrower will be counted towards this borrowing limit).

Any borrower without an IRC is allowed to borrow foreign loans to the limit approved by its relevant decision-making body (eg board of management), subject to its charter.

Vietnamese credit institution borrowers

A borrower that is a Vietnamese credit institution is subject to separate prudential ratios operating as borrowing limits for short-, medium- and long-term loans set by SBV from time to time.

State-owned enterprise (**SOE**)

There is no general formula for borrowing limits applicable to an entity wholly owned by the States and their subsidiaries. Rather, they are subject to additional approvals from competent authorities and more stringent financial conditions (eg debt and equity ratio requirement).

An SOE can only provide a guarantee for a loan of its subsidiary where it holds more than a 50% stake and in proportion to its shareholding in such subsidiary.

THIN CAPITALISATION

A non-State owned borrower using project land (eg land leased from the State to develop and lease/resale) is subject to a debt-to-equity ratio of 20% for project land having an area of less than 20 hectares and 15% for land area of 20 hectares or more.

RESTRICTION ON ACQUISITION FINANCING

SBV tends to disapprove registration of a medium- or long-term foreign loan to fund a share acquisition if the borrower is not an investment fund or an organisation whose main business is share trading (eg securities trading companies). There are a few exceptions approved by SBV, where SBV requested detailed explanations on the borrower's business plan and the sources for repayment.

RESTRICTION ON FUNDING RESIDENTIAL HOUSING PROJECTS

Residential real estate projects cannot be financed by foreign loans³.

Arguably, raising funds via a bond issuance may be permitted. In practice, it is not uncommon for Vietnam real estate groups to issue bonds to fund their project companies to develop residential housing projects.

CAPS ON INTEREST AND FEES

Generally, Vietnamese law does not impose any cap on a foreign loan interest rate. Although SBV has the power to fix or impose caps on interest rates and fees of foreign loans, no such cap has ever been set.

In practice, the following issues may arise:

- unreasonably high interest rate may be challenged by the Vietnamese remitting bank (as commercial banks have an obligation to prevent money laundering activities, they are cautious about the remitting amount); and
- SBV may be reluctant to approve foreign loans required to be registered if the interest rate is considered to be too high compared to 'standard' loans in the Vietnamese market.

³ Permissible funding sources include: (i) the developer's own capital; (ii) capital contributions or investment cooperation; (iii) a purchaser's advanced payments for the purchase/lease of residential houses; and (iv) domestic loans from credit and financial institutions in Vietnam.

How can a foreign loan be disbursed and repaid?

Generally, drawdown and repayment of foreign loans must be made via:

- a 'direct investment capital account' (**DICA**) of the borrower or a separate foreign loan account (in the case of the borrower being a direct FIE)⁴; or
- a separate 'foreign loan account' of the borrower being a Vietnamese enterprise.

Nevertheless, foreign loans may be drawn in other ways in limited circumstances. For instance, foreign loans can be disbursed directly to the borrower's non-resident beneficiary to pay for imported goods and services or to an offshore account of the borrower opened overseas for which a special SBV approval has been obtained. Likewise, repayment of foreign loans can be made in other ways in limited circumstances, such as in the form of issuing shares to the lender.

When the borrower uses the loan proceeds to make payments in the territory of Vietnam, those proceeds need to be converted into VND and credited to a VND-denominated current account of the borrower before payment. On the other hand, the proceeds need to be credited to a USD-denominated current account of the borrower before it makes payments to offshore entities.

Payment of a guarantee amount can be made directly to the lender's account by the guarantors. Once the guarantee has been performed, the borrowers are obliged to reimburse the guarantors for such guarantee amount, payment of which shall be made via its DICA or a foreign loan account in the case of offshore guarantor and via its current account in the case of onshore guarantor.

⁴ A direct FIE include: (1) a newly established enterprise having foreign members or shareholders and having been issued an IRC; (2) a domestic enterprise having foreign investors holding 51% or more stake; or (3) project enterprises established by foreign investors to implement PPP projects.

Documentation and registration

DOCUMENTATION

The following sets out typical provisions of a foreign loan agreement.

FORM	<ul style="list-style-type: none">The loan agreement is not subject to any requirement regarding a specific statutory form in order to be effective and enforceable in Vietnam. Normal contractual principles apply to form a loan contract.
CONTENT	<ul style="list-style-type: none">Bilateral loans are not subject to any requirement. An international form/template (eg ALPMA) may be used.Syndicated loans must contain certain statutory content.
GOVERNING LAW	<ul style="list-style-type: none">The choice of foreign law is permitted, provided that its application is not contrary to the 'fundamental principles' of Vietnamese laws. Such 'fundamental principles' are not clearly defined and have been construed by Vietnamese courts to require compliance with the substantive laws of Vietnam.
DISPUTE RESOLUTIONS	<ul style="list-style-type: none">The parties can choose a foreign dispute resolution forum, being foreign courts or arbitration forums.Foreign court judgments are not enforceable in Vietnam (except in very limited circumstances on a reciprocal basis, which has not been seen in the context of a foreign loan dispute).Foreign arbitral awards are enforceable under the New York Convention but must be approved/recognised by Vietnamese courts for enforcement and must not be contrary to the 'fundamental principles' of Vietnamese laws.
LANGUAGE	<ul style="list-style-type: none">A loan agreement can be made in any foreign language, with a Vietnamese translation required for SBV registration purposes.A language clause is typically included to ensure that the English version prevails. However, Vietnamese courts will likely consult the Vietnamese language version.

LOAN REGISTRATION

APPLICABILITY	<p>The following must be registered with SBV:</p> <ul style="list-style-type: none">medium- or long-term loans;short-term loans being extended to last longer than 12 months from first drawdown;non-extended short-term loans with an outstanding balance that lasts more than 12 months (plus 10-day window) from first drawdown; andany amendments to the terms of a registered loan eg principal, interest, or repayment schedules, except payments being made in the 10-day window around the registered dates.
WHAT NEEDS TO BE REGISTERED	<p>Basic information of a loan such as principal, interest, fees, drawdown and repayment schedule, and guarantee will need to be registered with the SBV</p>
DEADLINE	<p>Within 30 days of the execution of:</p> <ul style="list-style-type: none">the loan/guarantee agreement;the agreement to extend the loan beyond 12 months; orthe date which is one year from the first drawdown of a loan with an outstanding balance that lasts more than 12 months from first drawdown.
APPLICATION METHOD	<p>Online or through physical submission to:</p> <ul style="list-style-type: none">the central SBV in Hanoi (for loans valued at more than US\$10 million); orSBV local branch (for loans valued at US\$10 million or less).
TIMELINE	<p>The law requires SBV registration to be processed within 15 working days (or 12 working days for an online submission). This may take longer in practice (noting that the process is usually straightforward and should not be materially extended).</p>

Security package and enforcement

GENERAL OVERVIEW OF SECURITY MEASURES

Vietnamese laws recognise typical forms of security familiar to international lenders, such as mortgages, pledges and guarantees. Likewise, the laws provide that security may be taken over a range of assets, including moveable assets such as shares, capital contributions, accounts, machinery and inventory and contractual rights, and immovable assets such as land use rights, ships, aircrafts and more.

Further, assets to be formed in the future (eg future receivables or residences to be constructed in the future) may also be taken as security.

COMMON SECURITY PACKAGES AND ENFORCEMENT ISSUES

Enforcement of security by foreign lenders is generally challenging and not a straightforward process in Vietnam, particularly compared to developed common law jurisdictions. Foreign lenders 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 co-operative 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 involve significant time and expense.

The following highlights key enforcement issues in relation to common security in the Vietnam market:

COLLATERAL	LEGAL AND PRACTICAL ISSUES
REAL PROPERTY	Foreign lenders cannot take security over real property (including land and assets attached to land).
SHARES	<p>A mortgage of shares is commonly taken out by foreign lenders. Nevertheless, the enforcement of a share security may be subject to foreign ownership limits in Vietnamese companies and regulatory approvals (such as M&A approval).</p> <p>Normally, an offshore lender should prioritise enforcement of the security package at a holding company or the sponsor level offshore, with enforcement of a shares mortgage in Vietnam being a last resort.</p>
DEBT SERVICE RESERVE ACCOUNT (DSRA)	<p>Foreign lenders may require debt service (with a required balance) reserved in an offshore DSRA in a jurisdiction where the lenders could have immediate recourse to such amount upon the borrower's default. However, this arrangement is not common in practice as the opening of the offshore account is subject to SBV's approval.</p> <p>An onshore DSRA is more commonly implemented, noting that a foreign currency-denominated onshore DSRA may be used only if the borrower has its own foreign currency sources or is permitted by lenders to use the loan proceeds to fund the DSRA.</p>
BANK ACCOUNT	<p>An account mortgage does not automatically prevent the borrower from debiting any funds in the mortgaged accounts.</p> <p>Given that, in practice, foreign lenders will usually require the borrower to procure an account control agreement or acknowledgement from the account bank such that: (1) withdrawals or transfers from the mortgaged accounts exceeding the agreed thresholds are subject to the foreign lenders' approval; and (2) the handling of the mortgaged accounts upon default is subject to the instruction of the foreign lenders.</p>
CONTRACTUAL RIGHTS	<p>An assignment of contractual rights in the underlying agreements upon enforcement may require an assignment of obligations as the rights may not be exercised without the performance of the corresponding obligations by the counterparty. Accordingly, under the law, such assignment of obligations would require prior consent of the counterparty. Further, the assignment of rights may be subject to specific terms and conditions under the underlying agreements that may restrict such assignments or require other consents/approvals.</p> <p>In practice, foreign lenders usually require the borrower to notify the counterparties to the underlying agreements of the mortgage and to make reasonable efforts to obtain acknowledgement from such counterparties to assist the lenders with the enforcement of the mortgaged rights upon the borrower's default.</p>
GUARANTEE	<p>Corporate guarantee for offshore lending: A company in Vietnam cannot provide a security or guarantee to a foreign lender in respect of an offshore loan to a foreign borrower, without prior approval of the Prime Minister of Vietnam. This approval is not often granted in practice and is limited to SOEs investing overseas in line with government policies.</p> <p>Government guarantee: Subject to certain requirements, foreign loans financing projects can obtain a guarantee from the Vietnamese government (typically large infrastructure projects of national importance). The government guarantee is limited to 70% of the total investment capital of the projects.</p> <p>Local guarantee: A bank in Vietnam can provide a guarantee to a foreign lender in respect of borrower's obligations under the foreign loan. Such guarantee for any customer is limited to 15% (or 25% with respect to a single customer and its related persons) of the bank's allocated capital. In monetary terms, such limits can be low, particularly for registered branches of foreign banks.</p>

SECURITY CREATION AND PERFECTION

Generally, security transactions are effective from the time they are lawfully entered into or at a time specified in the security agreement, except for secured transactions required to be registered (which are effective from the time of registration).

Specifically, the creation of security over certain assets (eg security over land use rights, ships, aircrafts and other immovable assets) must be registered at the appropriate registry (eg registration of security over land is carried out with the relevant Department of Natural Resources and Environment) in order to be legally binding and effective. In addition, prior to registration, mortgages over land use rights and real property, including future property, must be notarised at a public notary in order to be effective.

It is not necessary to register security over other assets for them to be effective and enforceable. However, registration of such security at the National Registration Agency for Security Transactions (**NRAST**) is recommended since it gives the lenders priority over unregistered security interests (whenever created) and subsequently registered security interests in respect of the same assets.

Registration with the NRAST is a simple process and can be completed within a day. If only the lender executes the NRAST registration form without the security provider, the security document must be filed with NRAST.

ENFORCEMENT PROCESS

Vietnamese laws allow the parties to agree upon the specific security enforcement procedure. In the absence of such agreement, enforcement shall be done by way of public auction.

A typical security enforcement procedure is as follows:

- **Delivery of an enforcement notice:** Upon the occurrence of an enforcement event (eg upon default of borrower), the secured party or its security agent shall deliver an enforcement notice to the securing party and other registered secured parties, if any, within a reasonable period agreed by the parties in the security agreement. While the failure to deliver such notice will not affect the secured party's enforcement right, it provides a basis for the securing party to seek compensation for any loss therefrom.

In case there are multiple secured parties taking security over an asset, the secured party may elect to register the enforcement notice with the relevant registry authority (eg NRAST) instead of delivering the notice to each other secured party.

- **Approvals:** The secured party will need to coordinate with the borrower and securing party to obtain necessary approvals for enforcement (eg M&A approval for the taking over or sale of shares being used as collateral to foreign purchasers which must be obtained via the target company).
- **Exercise of enforcement rights:** Upon the expiry of the reasonable period as specified in the security agreement, the security will become enforceable. The secured party or its security agent may realise the collateral using the enforcement methods agreed in the security agreement (eg public auction or private sale of secured assets, taking over the secured assets or instructing account bank to debit the mortgaged account per secured party's instruction).
- **Completion of post-enforcement procedures:** Post-enforcement steps include conducting necessary procedures to update the corporate or ownership documents (eg the enterprise registration certificate or ownership certificate of moveable or immoveable assets) to record the secured party as the new owner/shareholder.
- **Security deregistration:** A registered security shall be deregistered.

REMITTANCE OF ENFORCEMENT PROCEEDS

- Currently, there is no legal guidance as to how enforcement proceeds (which are received from disposal of collateral) will be repatriated through the remitting bank. Additionally, Vietnamese banks have very limited experience in remitting such proceeds out of Vietnam.
- In practice, foreign lenders (which are often banks with a Vietnamese branch) enter into an 'account agreement' with a Vietnamese account bank (where the borrower opens and maintains its accounts mortgaged to the lender) to specify the funds flow for remittance of enforcement proceeds, whereby the proceeds from the disposal of any collateral would be credited into a mortgaged account of the borrower and then transferred to the DICA or foreign loan account of the borrower, as the case may be which will also be mortgaged to the lender before repatriation.

SECURITY AGENTS

Although the role of a security agent is recognised under Vietnamese law in the context of syndicated loans, there is no guidance on whether a security agent can enter into security documents and enforce the secured assets on behalf of foreign lenders. As Vietnam does not recognise the trust concept, whilst the agent can still perform administrative functions on a contractual basis, they can only be viewed as an authorized agent of the lenders. In practice, a security agent may not be able to successfully pursue enforcement proceedings without the lender bringing (or joining in with) their own claim.

Taxes and fees applicable to foreign loans and security

Withholding tax

Income from loan interest and fees received by a foreign lender is subject to corporate income tax which a Vietnamese borrower must withhold, currently at a rate of 5%. This can be addressed through appropriate gross-up clauses in the loan agreement.

Documentary taxes

There are currently no relevant documentary taxes, such as stamp duty, in Vietnam.

Registration fees

SBV registration for foreign loans is free of charge.

Registration fees for security interest are nominal. For security over most assets (excluding aircraft), registration fees are currently VND 80,000 (approximately US\$3.60).

Registration fees in respect of security over aircraft range from VND1,800,000 to VND 18,000,000 (approximately US\$80.00 to US\$800.00), depending on the value of the secured transaction.

Notarial fees

These depend on the value of the property being used as collateral, or the value of the transaction (depending on the details contained in the contract being notarised) and are on a sliding scale.

Further development

SBV recently released a draft circular to replace Circular 03 on foreign loans (**Draft Circular**), with the official issuance date remaining unclear. The Draft Circular proposes the following key changes:

- Repayment of an outstanding short-term loan within 30-day window from the first anniversary of the first drawdown is permitted without SBV registration. This period is 10 days under the current regulation.
- Security agent (who is a Vietnam-domiciled entity) is recognised in the context of bilateral foreign loans where it can, among others, receive proceeds from enforcement of secured assets and remit that amount to the foreign lenders via its payment account in Vietnam.
- Allowing for certain exceptions where amendments to a registered foreign loan (eg changes to the principal drawdown) are not required to be registered, but need to be notified, with SBV.

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