Cross-Border Lending in Vietnam

December 2016
Vietnam continues to be an attractive destination for foreign investors. As well as raising capital from equity investors, both Vietnamese and foreign-invested enterprises continue to require foreign debt capital in the form of loans from overseas banks to establish and grow their businesses here. Although foreign loans are not new in Vietnam, there are a number of longstanding, and more recent, issues that arise for both borrowers and lenders in the process of borrowing such a loan. This guide covers the basic principles of cross-border lending into Vietnam, and aims to address some common questions relevant to those lending, or borrowing, in Vietnam for the first time.
Who can lend?

Offshore, non-resident lenders are permitted to lend to Vietnamese entities without needing any licence in Vietnam. A loan from such a lender to a resident Vietnamese borrower is termed a ‘foreign loan’.

In contrast, under the Law on Credit Institutions, an enterprise domiciled in Vietnam must be licensed as a credit institution to carry out banking activities, which includes lending activities. However, lending on a one-off basis (by, for instance, a shareholder or an individual) is considered acceptable without a licence.

Who can borrow?

In principle, any Vietnamese entity may borrow funds, subject to prohibitions or conditions in its charter and any applicable borrowing limits.

Do borrowing limits apply?

Overall limits on the total amount of foreign loans to be made into Vietnam are approved by the Prime Minister on an annual basis. In our experience, these limits do not give rise to practical issues for privately-owned borrowers. Separate limits apply to government guaranteed and non-government guaranteed foreign loans.

In addition to the overall limits, individual limits may apply to a borrower. For foreign invested companies, in order to borrow a medium- or long-term foreign loan, the total amount of the company’s existing medium- and long-term loans (whether domestic loans or foreign loans) must not exceed the difference between its charter capital (ie. equity) and the total investment capital specified in its investment certificate/investment registration certificate. A medium- or long-term foreign loan is a foreign loan with a term of more than 12 months, which is measured from the date of initial drawdown to repayment of all amounts outstanding under the loan. A short-term foreign loan is any foreign loan with a term of 12 months or less.

If the borrower is a Vietnamese credit institution, separate prudential ratios are set by the State Bank of Vietnam (SBV) from time to time, which operate as borrowing limits for short, medium and long-term loans of credit institutions.

In the case of State-owned enterprises (SOE) (ie. an entity in which the State holds more than 50 percent of the charter capital), a general formula for borrowing limits is not specified. Rather, such foreign loans are subject to additional approvals from authorised levels of government, and more stringent financial conditions apply (for instance, the debt to equity ratio of the SOE in the preceding quarter and financial year must not exceed 3:1).
What are the permitted currencies of domestic and foreign loans?

A foreign loan can be made in any freely convertible foreign currency.

Under the law, foreign loans can also be made in Vietnamese Dong (VND) in very limited circumstances (for instance, if the borrower is a micro-finance institution, or is borrowing a shareholder loan derived from the shareholder’s profits distributed in VND). Otherwise special approval is required from the SBV, though we are not aware of any such approvals being given to date.

Conversely, domestic loans are mostly required to be made in VND. Local Vietnamese banks (including Vietnamese branches of foreign banks) may also make loans in a currency other than VND in very limited circumstances.

Are there any registration requirements for foreign loans?

Medium- and long-term foreign loans must be registered with the SBV prior to any drawdown. Failure to comply with the registration requirements may result in a fine for the borrower, and funds will not be able to be remitted out of Vietnam, such as to pay interest or for repayment of the loan, until registration is completed.

An application for registration is required to be lodged by the borrower with the SBV within 30 days of signing the loan agreement (or, for a guaranteed loan, within 30 days of signing the guarantee).

Registration of a loan subsequent to drawdown is possible and, in fact, is required where either:

- the term of the loan agreement is extended so that it is longer than 12 months from initial drawdown; or
- despite no formal extension of the term of a short-term loan, any balance remains outstanding 12 months after initial drawdown.

In practice, this is likely to be more difficult than registration prior to drawdown.

Registration of foreign loans with the SBV is effectively a foreign exchange control and approval process. Drawdown and repayment must be made, via the direct investment capital account of the borrower (in the case of a foreign-invested enterprise) or a separate foreign loan account of the borrower (in the case of a Vietnamese company), in accordance with the details specified in the SBV registration certificate (provided that, if payment is made in the 10-day window around the registered dates, payment is permitted without amendment to the registered details). The details specified in the SBV registration certificate include, among other things, the identity of the borrower and lender(s), the amount of the loan, the interest rate, a proposed drawdown schedule (if applicable) and when repayments of principal and payments of interest are due.

Subsequent amendments to the terms of the loan covered by the registration (including an amendment to the repayment schedule) generally require the borrower to register amendments with the SBV.
For both initial registration and amendment registration may be made online via an official website operated by the SBV or by way of physical submission. In case of online submission, the law requires the SBV to give approval within 12 working days of receipt of lodgement of a complete application. In case of physical submission, the statutory timeline is 15 working days. In practice, actual timing can vary from a week to several months for large scale project finance loans. It should be noted that a Vietnamese translation of the loan agreement must be submitted to the SBV in order to register the loan and the translation process can cause an initial delay in filing post-signing if the parties are not well prepared.

How can foreign loans be repaid?

Until recently, a foreign loan had to be repaid in cash via the foreign loan account of the borrower. However, since 15 April 2016, different forms of repayment by borrowers are also recognised. Such additional forms of repayment include repayment in the form of the supply to the lender of goods or services of the borrower, set off against payment for shares or contributed capital of the borrower and set off against receivables owed by the borrower to the lender.

Are there any caps on interest rates and fees?

Generally speaking, Vietnamese law allows commercial banks and their customers to negotiate and agree the interest rate applicable to a loan. Interest on loans from Vietnamese lenders that are not commercial banks are subject to a limit of 150 per cent of the base interest rate set by the SBV from time to time (currently 9 per cent for loans in VND). This limit is not applicable to foreign loans, though the SBV may scrutinise ‘excessive’ interest rates during the registration process.

The SBV also has power to fix, or impose ceiling limits to, interest rates and fees of foreign loans, ‘in order to manage the limit on self-borrowed foreign loans’, and to domestic loans from Vietnamese credit institutions, in order to ensure the safety of the banking system. The only currently applicable limits that have been set by the SBV are maximum interest rates for short-term VND loans in certain economic sectors, including agriculture and exported goods.

Default interest for loans from Vietnamese credit institutions is limited to 150 per cent of the rate applicable to the underlying loan that is in default. While this technically does not apply to foreign loans (and, in any event, should not apply to loan agreements that are governed by a foreign law), in practice, it is difficult to register and enforce default interest rates that are higher than this.
Can parties agree to a foreign governing law?

Under generally applicable Vietnamese law, the parties are free to choose a foreign governing law for a contract, where the transaction has a foreign element, provided that the application of foreign law is not contrary to the ‘fundamental principles’ of Vietnamese law (although there is no legal guidance as to what these ‘fundamental principles’ are).

Vietnamese law also specifies that foreign loan agreements ‘must not be contrary to the law of Vietnam’. It is unclear what these requirements mean and, in practice, can make enforcement of foreign law-governed contracts problematic (see below).

However, a loan agreement with a foreign lender may be expressed to be governed by a foreign law (eg. English law), subject to caveats.

Can disputes be resolved offshore and enforced in Vietnam?

Under Vietnamese law, transactions with a foreign element can include a dispute resolution forum outside of Vietnam. However, Vietnamese courts do not recognise foreign court judgments, other than where either Vietnam has entered into an international treaty to recognise the judgment of the foreign courts in question, or, if there is no applicable treaty, on a reciprocal basis. Such treaties and reciprocal agreements are very limited in number.

On a more positive note, Vietnam is a party to the New York Convention on Recognition and Enforcement of Arbitral Awards and, accordingly, many offshore lending arrangements provide for the option of arbitration at, for example, the Singapore International Arbitration Centre or the London Court of International Arbitration.

Lenders should note that any arbitral award submitted to the Vietnamese courts for enforcement must not conflict with the ‘fundamental principles of Vietnamese law’. Most court proceedings and decisions in Vietnam are not publicly accessible and, in any event, examples of enforcement proceedings are limited. However, we are aware of examples of overseas judgments or awards not being enforced because the judgment or award is determined by the Vietnamese court, for procedural or technical reasons, to breach such fundamental principles.
What are the applicable language requirements?

Foreign loan agreements may be signed in a foreign language. However, a Vietnamese translation of the loan agreement is required for registration with the SBV.

In some cases, security documents may also need to be translated for the purpose of registration with the National Registration Agency for Secured Transactions (NRAST) or applicable land registry (see below).

In the case of domestic loans, all ‘official documents’ entered into between foreign-owned banks (including branches of foreign banks) with their customers must be in Vietnamese, as well as any other language. Strictly speaking, this legal requirement does not apply to domestic banks in Vietnam; however, in practice this is applied to all banks operating in Vietnam. In addition, all bank guarantee agreements must be signed in Vietnamese.

A language clause is typically included in documentation with a foreign bank to make it clear that, for example, the English version prevails. However, lenders should be aware that any Vietnamese court dealing with the transaction, in an enforcement scenario or otherwise, will most likely only consult the Vietnamese language version.

Are there any additional requirements for syndicated loans?

Vietnamese co-financing regulations require that, in co-financing arrangements, the role of facility agent, security agent or arranger can be carried out by either onshore credit institutions or offshore credit institutions. However, an offshore credit institution is prohibited from acting as a paying agent and this role needs to be taken by an onshore credit institution. These requirements only apply where there are at least two Vietnamese credit institutions participating in the financing and, as such, are not relevant to syndicates comprised of only overseas lenders.
Security and guarantees

What can foreign lenders take as security? What are the limitations?

The Civil Code of Vietnam provides for several forms of secured transactions. The most commonly used are mortgages and pledges.

Security over most assets is possible, including many of the usual suspects – insurance proceeds; intellectual property; debts; bank accounts; shares (physical and dematerialised); and moveable assets.

However, significantly, security over land and real property is not possible for foreign lenders. Security over land use rights and real property is available to Vietnamese credit institutions only and is generally achieved by way of a mortgage. Strictly speaking, under the relevant regulations on land security, 'credit institutions' does not include foreign bank branches operating in Vietnam. However, in practice, foreign bank branches in Vietnam are also permitted to take, and register, security over land use rights.

Security over paper shares and shares in dematerialised form is possible. Trading of pledged dematerialised shares will be blocked by the Vietnam Securities Depository. For this reason, it is advisable for the pledgee to notify the Vietnam Securities Depository of the security, as well as to carry out registration at the NRAST.

An overseas lender enforcing share security, whether by taking ownership of the shares itself or by way of sale to a third party purchaser, should note that foreign ownership in Vietnamese companies may be subject to foreign ownership caps and official approvals, which vary according to the sector in which the company operates.

The equivalent of a floating charge is achievable by way of a security agreement over moveable assets, including future assets. It is generally advisable to register security arrangements (see below), and, in the case of a changing pool of assets, it is advisable to update the registration from time to time for ease of enforcement.

Security over a contractual claim or a receivable requires notice to be given to the person that has the payment obligation. Acknowledgement of the notice is not a legal requirement but, in the usual way, lenders are advised to obtain an acknowledgement as a condition precedent to funding for particularly significant contracts. Similarly, the law does not require bank consent to, or acknowledgement of, security over a bank account, but as a matter of best practice, lenders are advised to try and obtain this.

Upstream guarantees from a Vietnamese domiciled entity to secure the obligations of an offshore borrower are not possible, unless the prior approval of the Prime Minister is obtained.

Do security agreements need to be registered?

Security over certain assets must be registered at the appropriate registry in order to be effective (eg. security over land use rights, immovable assets, aircraft and ships). The statutory timeframe for registration of security interests is no more than three working days, though, in practice, registration of security in respect of land use rights or immovable assets can take materially longer than this. In addition, prior to registration, mortgages over land use rights and immovable assets must be notarised in the province in which the real estate is located.
Security over other assets may be registered at the NRAST. Although not essential for legal validity, registration is strongly recommended since it gives priority over unregistered security interests (whenever created) and subsequently registered security interests.

**Does Vietnamese law recognise security agents/trustees?**

As is the case with most civil law jurisdictions, the concept of a trust is not recognised in Vietnam.

The role of a security agent is recognised in the regulations on co-financing. However, in practice, it is unlikely that a security agent would be able to pursue enforcement proceedings successfully in Vietnam on behalf of a syndicate without each member of the syndicate either bringing its own claim or granting a specific authorisation to the security agent to bring the claim on their behalf.

**How does security enforcement work in Vietnam?**

In principle, if the security agreement deals with enforcement, the secured party does not need court approval to enforce the security (ie. the parties are free to agree on enforcement mechanics, including the triggers for, and timing of, enforcement). However, a lender wishing to enforce is required to notify any other secured creditors and the NRAST prior to enforcement, and minimum notice periods apply before the secured assets can be realised.

Where the security agreement does not deal with the mechanics of enforcement, enforcement will normally be carried out by way of auction, although the regulations on security enforcement do permit other forms of realisation.

In practice, enforcing security is challenging. Where possible, security documentation may include pre-signed powers of attorney and transfer forms and other similar documentation designed to facilitate enforcement as much as possible.

In addition, we advise that offshore lenders look at taking offshore security where possible, such as a share pledge of the shares of an offshore holding company that, in turn, holds the shares in the Vietnamese borrower, or a parent company guarantee (see section below).

Secured creditors have priority over unsecured creditors (other than certain statutory claims), but their ability to enforce is suspended following a declaration and for the duration of the bankruptcy proceedings. Since 1 January 2015, asset distribution in bankruptcy is managed by an enforcement authority, while the management of the company during the bankruptcy process will be carried out by a court-appointed trustee in insolvency. Lenders should also note that, as with many other jurisdictions, there is, as from 1 January 2015, a six-month clawback period – in other words, a court may declare certain security arrangements void in certain specified circumstances where granted in the six months prior to the decision of the court to commence bankruptcy proceedings.

There are no reorganisation procedures available in Vietnam outside of court-driven insolvency proceedings.
Is it possible to take a corporate guarantee?

A Vietnamese company can, subject to its constitutional documents, guarantee the debt of a Vietnamese borrower. However, guarantees of the debt of an offshore borrower require approval from the Prime Minister.

Also, as explained above, enforcement of local Vietnamese security is challenging and, where possible, it is recommended that an offshore downstream parent company guarantee is obtained.

In all cases, Vietnamese guarantors will need to demonstrate that: the guarantee is intravires (i.e. within its corporate powers, or ancillary to them); that the granting of the guarantee is of benefit to the guarantor; and that the entering into of the guarantee does not create any issues of insolvency for the guarantor.

Is it possible to obtain a guarantee from the Government of Vietnam?

Guarantees of the obligations of Vietnamese borrowers in respect of foreign loans may, in certain circumstances, be available from the Government of Vietnam. Guarantees will only be issued by the Government for loans for projects that have been approved by the Prime Minister and are typically large infrastructure projects of national importance.

Government guarantees are granted by the Ministry of Finance to offshore lenders and will be accompanied by a legal opinion from the Ministry of Justice confirming the validity of the guarantee. However, if a Government guarantee is sought, there may be additional unexpected challenges arising from the Government being a stakeholder in the financing which requires, for example, agreeing to the form of the loan agreement with the Ministry of Finance. This can affect both the commercial agreement and timing.

Finally, lenders should note that Government guarantees are only available in respect of the proportion of the borrower or project company owned by Vietnamese shareholders.

As with all cross-border project financing, additional comfort for project financiers can be obtained from development bank lending (i.e. the involvement of supra-national institutions is generally perceived to reduce political risk) and/or political risk insurance – whether private or public from development institutions.

Can Vietnamese banks give guarantees to offshore lenders?

Guarantees given by a Vietnamese credit institution in respect of the obligations of a Vietnamese domiciled borrower to offshore lenders are possible. However, certain conditions must be met. In particular, the law stipulates that any guarantee in respect of the obligations of any one customer must be limited to 15 per cent of a bank’s allocated capital (or 25 per cent in the case of a single customer and its related persons) – this limit can, in monetary terms, be low, particularly in the case of registered branches of foreign banks. The guarantor credit institution must be licensed to conduct foreign exchange activities.

Again, these guarantees are enforceable in principle without prior recourse to court to obtain an order for enforcement.
Taxes and fees on loans, guarantees 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 per cent. This can be addressed through appropriate gross-up clauses in the loan agreement.

Registration fees
These are nominal and, for security over most assets (excluding aircraft), are currently VND 80,000 (approximately US$3.60). Registration fees in respect of security over aircraft range from VND 1,800,000 to VND 18,000,000 (approximately US$80.00 to US$800.00), depending on the value of the secured transaction.

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

Notarial fees
These depend on the value of the property being secured, or the value of the transaction (depending on the details contained in the contract being notarised) and are on a sliding scale.
About Allens

Allens is a leading international law firm in Vietnam and has been a well-established part of the country’s business community for over 20 years.

We advise clients on all aspects of business and commercial law, including on major mergers and acquisitions, the development of large-scale energy, resources and infrastructure projects and complex cross-border banking and capital markets transactions.

Our banking practice is well-known for acting for both lenders and borrowers in major cross-border financing transactions, including project financing and debt/equity hybrid instruments such as convertible debt and debt with warrants/options. Our expertise in this area is recognised by leading independent legal directories, based on client feedback and peer review. Our Vietnam practice is consistently ranked Band 1 by Chambers Asia Pacific and as a Top Tier Firm by The Legal 500 Asia Pacific in Banking & Finance, with our banking Partners also recognised by these directories as leading individuals in their fields.

Contacts

Robert Fish
Partner
T +84 8 3822 1717
Robert.Fish@allens.com.au

Linh Bui
Partner
T +84 8 3822 1717
Linh.Bui@allens.com.au

Bill Magennis
Partner
T +84 4 3936 0990
Bill.Magennis@allens.com.au

Hop Dang
Partner
T +84 4 3936 0990
Hop.Dang@allens.com.au

Chung Le
Partner
T +84 4 3936 0990
Chung.Le@allens.com.au