



**INDOCHINE
COUNSEL** —

Business Law Practitioners



Cross-border Lending in **VIETNAM**

December 2021

Contents

Introduction	2
Cross-border Lending Transactions	2
Class of Foreign Loans	2
General Requirements	2
Registration and Report	4
Foreign Loan Account	5
Disbursement of Foreign Loans	5
Regulations on Penalties for Violations of Foreign Exchange Regulations in relation to Foreign Loans	6
Repayment of the Foreign Loan	6
Common Security Measures For Foreign Loans	6
Pledges and Mortgages	6
Guarantees	7
Security Enforcement.....	8
Other Remarkable Issues	9
Cross-border Syndicated Loan	9
Governing Laws	10
Dispute Resolution.....	10
Language for Agreements	10
Taxes and Fees	10
Contact Us.....	12

Abbreviation

CAAV	Civil Aviation Authority of Vietnam under the Ministry of Transport
DICA	Direct Investment Capital Account
DPI	Provincial Department of Planning and Investment
ERC	Enterprise Registration Certificate
FIE	A foreign invested enterprise (or “economic organization with foreign investment capital” as defined under the Investment Law)
IRC	Investment Registration Certificate
LRO	Land Registration Office under the Provincial Department of Natural Resources and Environment
New York Convention	1958 New York Convention on Recognition and Enforcement of Arbitral Awards
NRAST	National Registration Agency for Secured Transactions under the Ministry of Justice
SBV	State Bank of Vietnam
VMA	Vietnam Maritime Administration under the Ministry of Transport
VSD	Vietnam Securities Depository

Introduction

Most local enterprises and FIEs in Vietnam raise capital through hybrid financing (equity financing and debt financing). As part of this scheme, loan capital raised from internal entities (e.g. parent company, shareholders, investors) and/or external entities (e.g. credit institutions, banks, company's partners) plays an important role in financing a business's operation and growth. In practice, it is common for enterprises to mobilize loan capital via cross-border lending transactions from offshore entities.

Due to the fact that the majority such loans are inward lending transactions, cross-border lending transactions in Vietnam are generally referred to as foreign/offshore loan transactions, in which the loans are provided by offshore lenders (non-resident) to onshore borrowers (resident). Within the scope of this guide, we provide an overview of the regulations as well as highlight particularly important issues, of which both foreign lenders and local borrowers should be aware of when entering into a foreign loan transaction in Vietnam.

Cross-border Lending Transactions

Class of Foreign Loans

Foreign loans can be categorized into various kinds based on different criteria, of which, the lending terms are primary. Foreign loans are divided into two types, (i) short-term loans (with a term of 12 months or less), and (ii) medium and long-term loans (with a term of more than 12 months). In general, the term of the loan is measured from the first drawdown to the completion of payment of the principal and other payable amounts under the loan agreement (if any).

Foreign loans can also be divided into, (i) traditional loans (i.e. money lending), (ii) credit sales, (iii) entrusted loans, (iv) financial leasing, or (v) debt instruments (i.e. bonds). Foreign loans can also be classified into bilateral loans and syndicated loans that rely on the number of offshore lenders jointly providing the loan to the local borrower.

General Requirements

Loan Purposes

Foreign exchange management regulations in Vietnam stipulate that the local borrower is only permitted to borrow an offshore loan for the following purposes:

- financing business plans or investment projects of the borrower or a company in which the borrower directly contributed capital; or
- restructuring other offshore loans of the borrower without increasing the borrowing cost.

The business plans or investment projects financed by the foreign loans are required to show, (i) the legitimacy and reasonability of lending purposes, (ii) the necessary demand of the foreign debt

capital, and (iii) the capability of the borrower to repay the loan. The competent authority to approve the business plans or investment projects may be either a state competent authority (i.e. the DPI) or the borrower's internal competent body (i.e. the General Meeting of Shareholders, Members' Council, or Owner).

Lending Currencies

In principle, foreign loans must be disbursed in foreign currency units. There is no restriction on the nationality of the foreign currency so long as it is freely convertible.

Vietnamese Dong (VND) can also be used in certain limited circumstances, if the borrower is a micro-finance institution, or the borrower receives a loan from its foreign shareholders derived from that shareholder's profits distributed in VND. Other foreign loans denominated in VND must be approved by the Governor of the SBV on a case-by-case basis.

Borrowing Limit

The amount of medium or long-term foreign loans are limited by the following regulations:

- In general, the total amount of foreign loans into Vietnam shall not exceed a commercial foreign debt quota which is annually approved by the Prime Minister. The commercial foreign debt quota for fiscal year 2021 was announced at US\$6,350 million and this number could be raised up to US\$7,000 million for the next two years;
- For FIEs, the restriction is that the total amount of outstanding medium and long-term debt (regardless of foreign or domestic debt) of the borrower must not exceed the difference of the paid-up capital/charter capital and the total investment capital in accordance with the IRC of the borrower. If the FIEs do not have an IRC, the total outstanding medium and long-term debts (including foreign or domestic debts) shall be capped by the total demand of lending capital as illustrated in the business plan / investment project approved by the competent authority; and
- For the scenario that the foreign loan is borrowed for the purpose of funding the business plan of the borrower's subsidiary, the ratio of foreign loan amount to the total foreign loan capital serving such business plan shall not exceed the capital contribution ratio of the borrower in such subsidiary.

Caps on Interest Rates and Fees

Interest rates and fees of foreign loans are permitted to be freely negotiated by the parties. The interest rate of the loan lent by a non-credit institution shall not exceed 20 percent per year and the overdue interest rate shall be capped at 150 percent of the principal interest rate; such limits are not technically applicable to foreign loans, especially those governed by foreign laws.

As a matter of practice, if the interest rate of the loan is higher than the Vietnamese limits or the

market norm, the excess interest rate may be scrutinized by the SBV during the registration process. In this case, the borrower shall be responsible to furnish reasonable explanations to the SBV about the high interest rate; otherwise, the foreign loan may be refused by the SBV.

For the purpose of moderation of the limit on foreign loans, the Governor of the SBV has the power to fix, or impose ceiling limits to lending fees of foreign loans for each period. In practice, a ceiling on the borrowing costs for offshore loans has neither been imposed nor has the registration of a loan been challenged to date.

Registration and Report

Initial Registration

According to the current foreign exchange management regulations, medium and long-term foreign loans are required to be registered and obtain a registration confirmation from the SBV to enable their first drawdown. Short-term loans are not subject to this requirement, however, registration shall be applicable to short-term loans not repaid and settled within 12 months. The registration confirmation shall record key information of the foreign lenders, borrowers, core terms of the loan, etc. The specific regulations regarding registration of the foreign loans are summarized below:

Issue	Medium and long-term loan	Short-term loan	
Loans subject to registration	All medium or long-term foreign loans which are not guaranteed by the Government	Having the tenor to be extended by an agreement, which results in the total loan term of more than 12 months	The tenor is officially extended by an agreement; however, the outstanding debt of the principal remains over 12 months as from the date of initial drawdown
Regulatory timeframe for registration	Within 30 days as from the signing date of the loan agreement (for non-guaranteed loans) or the signing date of the guarantee agreement (for guaranteed loans)	Within 30 days as from the signing date of the annex to extend the period of the loan	Within 30 days as from the date on which the loan term reaches one year
Competent authorities to issue the registration confirmation	<ul style="list-style-type: none"> ▪ Foreign loans having the value of more than US\$10 million or foreign loans denominated in VND: SBV Central (Department of Foreign Exchange Management); and ▪ Foreign loans having the value of US\$10 million or less: Provincial Branches of the SBV (where headquarters of the borrower is situated). 		
Timing for issuance of registration	<ul style="list-style-type: none"> ▪ Foreign loans denominated in foreign currencies: 12 working days (digital submission) or 15 working days (traditional submission) from the date of receipt of fully valid dossiers; and 		

Issue	Medium and long-term loan	Short-term loan
confirmation	<ul style="list-style-type: none"> Foreign loans denominated in VND: 45 working days from the date of receipt of fully valid dossiers. 	

Subsequent Registration

Onshore borrowers are also required to update any amended details of the registered loan which are recorded in the registration confirmation within 30 days from the date of signing the amended agreement / appendix or occurrence of any de facto amendment.

Reporting Regime

A written report on the status of implementing foreign loans, including short-term loans and long-term loans is required to be submitted by the local borrowers on a periodic basis (quarterly) and an extraordinary basis (under request by the SBV for certain unpredictable cases or urgent incidents).

Foreign Loan Account

Disbursement and repayment of foreign loans, as well as other transactions related to foreign loans (collectively, the **"Foreign Loan Related-Transactions"**), must be implemented via an account of the foreign borrowing and foreign debt repayment opened by the borrower (the **"Foreign Borrowing and Debt Repayment Account"**). It is to be opened and registered at a commercial bank allowed to conduct foreign exchange activities. There is an exception for FIEs involved in medium and long-term Foreign Loan Related-Transactions that may be made via the DICA and short-term Foreign Loan Related-Transactions that may be made via either the DICA or Foreign Borrowing and Debt Repayment Account.

Disbursement of Foreign Loans

The disbursement of the foreign loan is usually made via the Foreign Borrowing and Debt Repayment Account; however, in some cases the disbursement of the loan could also be conducted via disbursement in the form of importing goods under credit sales agreements or importing of assets under financial leasing agreements.

Registration of medium and long-term foreign loans as well as the obtaining of the registration confirmation from the SBV is a prerequisite for the disbursement and repayment of the offshore loan.

Notwithstanding the above, as short-term loans are not required to be registered, a foreign loan transaction can be structured to be withdrawn without prior registration by way of first executing a short-term loan agreement and then converting the loan into a long-term loan by extending the loan agreement and registering the same with the SBV. It should be noted that from a legal perspective, short-term foreign loans are prohibited to be borrowed for long-term purposes. In practice, registration subsequent to the drawdown could be refused and the borrowers shall be imposed with a penalty if their behavior is considered as using a short-term foreign loan for long-term purposes.

Regulations on Penalties for Violations of Foreign Exchange Regulations in relation to Foreign Loans

The local borrower may be fined if they fail to comply with the provisions of law on opening, closing and using the Foreign Borrowing and Debt Repayment Account or conducting activities of disbursement and/or repayment of foreign loans in contravention of the provisions of law.

Repayment of the Foreign Loan

Besides the repayment of loans in currency, there are various repayment methods recognized, which offers more options for borrowers in the repayment of their loans. The foreign loans could be settled by way of supplying the lender with goods or services to offset against payables under the loan agreement; or through the capitalization of the loan (e.g. converting the foreign loan into shares / capital contribution).

Common Security Measures for Foreign Loans

Pledges and mortgages are classic forms of securities that are usually used to protect the interests of foreign creditors when things go wrong. Pledges and mortgages benefit foreign lenders by way of furnishing them a right to either seize a secured asset or sell it to take back their loans. The guarantee provided by a third party to take over the repayment responsibility of the debtor should they fail to meet their obligations is also considered as a security measure under Vietnamese laws. In practice, taking securities in foreign loan transactions by the manner of a guarantee is usually conducted along with pledges and mortgages over assets of the guarantor.

Pledges and Mortgages

Certain Distinctions

The key difference between pledges and mortgages is the party having a lien over secured assets. The pledgor is required to deliver its possession of the pledged property to the pledgee, while the mortgagor is not subject to the same. As the mortgaged assets remain within the possession of the borrower, the mortgaged asset could be leased to a third party by the mortgagor, provided that all related parties are informed about such lease. The mortgagor is entitled to receipt of income derived from the leasing transaction, unless those benefits form a part of the secured asset.

Generally, both mortgages and pledges come into effect among involved parties from the signing date of the security agreement. Mortgaged security transactions take effect against third parties from the time of registration, while pledged security transactions take effect against third parties from the time of pledged assets being delivered to the pledgee.

One further essential difference between pledges and mortgages is that only mortgages are applicable to collaterals being immovable assets or assets formed in the future (*as clarified hereunder*).

Secured Assets

Most assets, including immovable assets and movable assets, are available as collateral for secured transactions. Under Vietnamese laws, immovable assets include land, buildings, construction works, and other properties attached to land; and all other assets are deemed to be movable assets. To be more specific, movable assets comprise tangible properties (e.g. machinery and equipment) and intangible properties (e.g. intellectual properties). Other kinds of assets such as contractual receivables (e.g. debts, contractual property rights), shares (capital contribution), securities, bank accounts, and assets formed in the future are also recognized as legally securable assets.

Foreign lenders should be aware that ownership by foreign entities of real properties is restricted in Vietnam. Because of this it is normally considered that foreign lenders are not permitted to take securities over immovable assets. In fact, securities over land, properties attached to land could only be provided in favor of onshore licensed credit institutions. There are still available structures facilitating foreign lenders to indirectly take collateral of real estate through onshore credit institutions providing security agent services, but the validity of such mechanisms has neither been clarified under the prevailing laws nor confirmed by the Vietnamese courts or other relevant competent authorities.

Registration Requirement

Security over immovable assets and typical movable assets such as vessels, aircrafts, and listed shares must be registered with the appropriate registries before they are deemed effective. Particularly, security over immovable assets must be registered with the LRO or its branch (if any) where the asset is located. The registration of security over vessels and aircrafts must be respectively made with the VMA or its branch (if any) and the CAAV. Security over listed shares must be registered with the VSD and only come into force when book entries of such secured shares are completed by the VSD.

For security over other assets, registration is not a vital requirement for the legal validity of the secured transaction between involved parties. However, it is highly recommended to carry out registration to secure enforceability against third parties, which will also determine the priority of payment when collateral is realized. Securities over all kinds of collateral not subject to compulsory registration with the aforementioned registries may be registered with the NRAFT.

Notarization Requirement

Only securities mortgaging immovable assets (including real property to be formed in the future) are required to be notarized by a provincial public notary where the secured asset is located prior to registration.

Guarantees

Guarantees over repayment obligations of borrowers may be provided via various forms and by different guarantors. A guarantee is usually provided along with additional security measures such as

pledges or mortgages over assets of the guarantor. Certain noticeable regulations should be taken into account if the foreign lender wishes to take security via the form of guarantee as follows:

Guaranteed Obligation

The scope of the guaranteed obligation is agreed between parties, and could comprise repayment of principal and interest of the foreign loan, compensation for damages arising, penalties imposed (if any), and other duties. For the case that a guarantee is granted by more than one guarantor, such guaranteed obligation shall be jointly performed by the guarantors, save for as otherwise agreed by the parties or provided by law. Any one of the guarantors is responsible for performing the guaranteed obligation entirely if such is requested by the lender.

Guarantee Parties

Guarantees could be granted upstream, downstream, or cross-stream by a related-group company (corporate guarantee); or may be provided by other entities such as banks or the Government. However, it should be noted that a public company is prohibited from providing a guarantee to its shareholders as well as its typical affiliates, and only banks licensed to conduct foreign exchange activities are allowed to provide guarantees in favor of offshore lenders.

Conditions and Limitations

Corporate guarantee: There is no particular condition for the onshore guarantor to grant a guarantee for other entities, except for certain basic requirements which must be met such as ensuring that the issuance of the guarantee (i) is not contrary to the constitutional document of the guarantor, and (ii) does not potentially cause any issues of insolvency for the guarantor.

Bank guarantee: The total value of guaranteed obligations granted by the onshore bank shall be capped at 15 percent of the bank's equity capital for a single customer (as the onshore borrower), or 25 percent for a customer and its related persons.

Government guarantee: Guarantees issued by the Government for foreign loans are only available for Vietnamese borrowers having typically large investment projects approved by the National Assembly, the Government, or the Prime Minister. For the case that there is a foreign ownership proportion in the borrower, foreign lenders should further note that the Government guarantees only cover repayment responsibility of the foreign loan on the ratio of the Vietnamese shareholder's ownership in the borrower, and do not include that ratio represented by the portion owned by the foreign shareholders.

Security Enforcement

The enforcement process for security is mainly determined by the security agreement between the parties. It does not need any approval from the court or engagement from other authorities to be enforced. Under the current laws, there are certain crucial regulations relevant to security enforcement that should be taken into account as follows:

Notice of Enforcement

Written notice is required to be sent to other secured creditors (if any) and relevant registries (where the secured asset is registered) prior to the enforcement. The minimum term of sending an enforcement notice before the realization of the secured asset may be agreed between the parties, or if not clearly specified by the parties, at least ten days for moveable assets and 15 days for immovable assets.

Enforcement Methods

The security may be enforced by the virtue of (i) direct sale of secured assets (auction or private sale); (ii) take-over of secured assets to offset against the payment obligations, (iii) receipt of direct payments in form of money or other assets from third parties (if pledge of receivables), and (iv) other enforcement methods agreed between the parties.

Priority of payment

The statutory order of payment priority of secured transactions is based on the chronological order of the secured transactions becoming enforceable against third parties. For the case that there are different creditors jointly secured by a single collateral, the regulated order can be changed by mutual agreement amongst those creditors.

Other Remarkable Issues

Cross-border Syndicated Loan

Syndicated loans are recognized under Vietnamese laws and classified as a particular kind of syndicated credit extension which could be jointly provided by more than one credit extension provider / lender.

In the syndicated loan transaction, only credit institutions are eligible to be lenders, arrangers, and agent parties (i.e. facility agent, security agent, paying agent) appointed by the lenders. The parties participating in the syndicated loan transaction could be either onshore or offshore entities, save for the paying agent must be an onshore credit institution. According to regulations of syndicated credit extension, the facility agent and security agent must be appointed from among the lenders, however, it is not clearly stipulated whether the paying agent is subject to such condition or if it may be performed by an entity not being a lender.

One of the lenders appointed by all the lenders may act as a security agent to sign the security documents and take security over debts on behalf of all the lenders. The security agent will act for and on behalf of all lenders to pursue enforcement proceedings for the disposal of secured assets. Although a security agent may be an onshore or offshore entity, it should be noted that only onshore security agents are permitted to take security over immovable assets.

Governing Laws

Parties to a transaction involving a foreign element are allowed to select foreign laws to govern their agreements, provided that the application of such laws is not contrary to fundamental principles of Vietnamese laws. Under the current laws, a transaction having a foreign element is clearly specified as (i) a transaction in which there is at least one foreign party engaged, or (ii) the transaction's objective (e.g. secured asset in security transaction) is not situated in Vietnam. Whether foreign law is contrary to the fundamental principles of Vietnamese laws is determined by the competent court on a case-by-case basis.

The security agreement is **not** permitted to apply foreign laws if (i) the secured asset is an immovable asset located in Vietnam, or (ii) such security agreement is entered into in Vietnam and wholly performed in Vietnam.

Dispute Resolution

Vietnamese laws allow parties to agree to choose local arbitration, the Vietnamese courts, or an international court or arbitration to resolve their disputes. If an international venue is selected the judgment or award must be subsequently enforced in Vietnam by a procedure of recognition and enforcement. Vietnamese courts have the authority to decide on the recognition and enforcement of foreign judgments or awards based on relevant international treaties / judicial assistance agreements to which Vietnam is a signatory or on a reciprocal basis. Vietnam is a participant of the New York Convention, thus, an arbitral award given by arbitration of a country being a member of the New York Convention could be recognized and enforced in Vietnam by a decision of a competent Vietnamese court. However, the most important condition for enforcement is that the foreign judgement or arbitral award must not conflict with the fundamental principles of Vietnamese law.

Language for Agreements

Agreements in foreign loan transaction comprising the loan agreement, security agreement, and other agreements are allowed to be executed in either Vietnamese or foreign languages. However, Vietnamese translations shall be required for certain procedures, especially for registration, whether of loan agreements with the SBV or security agreements with the other competent registries like the LRO, VMA, CAAV, NRAST, etc.

The agreements may also be signed in multiple languages including Vietnamese and foreign languages and the parties may agree to determine the prevailing version if there is any inconsistency. However, the foreign lenders should be aware that it is unlikely that Vietnamese courts will consult the version in foreign languages when dealing with disputes arising from lending transactions.

Taxes and Fees

Foreign Contractor Tax

The amount of income derived from loan interest and fees payable to the offshore lenders, which are

addressed under the loan agreement, are subject to foreign contractor taxes at the rate of five percent. The onshore borrower is liable for withholding such tax before each payment of interest or fees, and subsequently declaring and paying such tax within ten days after the payment of the loan interest and fees payable (if any).

Registration Fee

There is no fee charged for registration of the foreign loan with the SBV; however, there are fees applicable to security registration, as follows:

- Security registration with the NRAST, LRO, VMA: VND80,000 per case; and
- Security registration with the CAAV: from VND1.8 million to VND18 million (depending on the value of the secured transaction) per case.

Contact Us

For more information or assistance, please contact us:



Pham Thi Thanh Lan

Partner | Co-Head of Corporate
and M&A

E lan.pham@indochinecounsel.com



Dang The Duc

Managing Partner

E duc.dang@indochinecounsel.com



Nguyen Thi Hong Duong

Senior Associate | Head of Taxation

E duong.nguyen@indochinecounsel.com



Trinh Ngoc Ly

Associate

E ly.trinh@indochinecounsel.com

Ho Chi Minh City

Unit 305, 3rd Floor, Centec Tower
72-74 Nguyen Thi Minh Khai, District 3
Ho Chi Minh City, Vietnam

T +84 28 3823 9640

F +84 28 3823 9641

E info@indochinecounsel.com

Hanoi

Unit 705, 7th Floor, CMC Tower
Duy Tan Street, Cau Giay District
Hanoi, Vietnam

T +84 24 3795 5261

F +84 24 3795 5262

E hanoi@indochinecounsel.com

www.indochinecounsel.com

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.

The content of this Cross-border Lending guide is current as at December 2021.

© 2021 Indochine Counsel | All Rights Reserved.