
Insolvency and Restructuring Procedures: Vietnam

Prepared in conjunction with leading Vietnamese Law Firm, YKVN

Introduction

The Vietnamese legal system is based on communist legal theory and French civil law. There are many similarities with the laws of the former Soviet Union countries but some French influences remain from the French colonial period.

The Bankruptcy Law (as defined below) contains insolvency concepts and procedures which insolvency practitioners from Commonwealth jurisdictions will be accustomed to. However, in practice, there has been a lack of usage by the local Vietnamese business community and professionals because of a lack of experience and familiarity with these bankruptcy concepts. The recent rise in the number of insolvencies in Vietnam has highlighted some inadequacies in the Bankruptcy Law. Some observers say that this may put pressure on the government to look into a reform of the Bankruptcy Law.

Main Legislation

The **Law on Bankruptcy** (No. 21-2004-QH11) dated June 15, 2004 came into effect on October 15, 2004 ("**Bankruptcy Law**").

The **Law on Enterprises** (No. 60-2005-QH11) dated November 29, 2005 came into effect on July 1, 2006 ("**Law on Enterprises**") also contains provisions for reorganisation of an enterprise.

The Law on Enterprises governs limited liability companies, shareholding companies, partnerships and private enterprises in all economic sectors and whether or not the investment is domestically or foreign owned. The Law on Enterprises expressly provides that any enterprise which is in bankruptcy is subject to the Bankruptcy Law. In addition, there are a number of implementing regulations of the Bankruptcy Law and guidelines issued by the Supreme Court, the Ministry of Finance and the Ministry of Justice on certain provisions of the Bankruptcy Law.

Common Forms of Legal Entity

The Law on Enterprises provides for four different types of enterprises. Briefly, these are:

Limited liability companies

The number of members in limited liability companies is limited to fifty. With the exception of one member limited liability companies, any member selling its equity interests must first offer those interests to the other members. Members are only

liable to the extent of the amount of capital it has undertaken to contribute. Limited liability companies are not permitted to issue any shares.

Shareholding companies

The capital of shareholding companies is divided into shares of equal portions. The minimum number of shareholders is three and there is no restriction on the maximum number. Shareholders are free to transfer their shares to any persons except that within the first 3 years of a shareholding company, founding shareholders can transfer their shares to non-founding shareholders only after approval of shareholders of the company has been obtained. Shareholders are only liable to the extent of the amount of capital it has contributed. Shareholding companies are permitted to issue shares to raise funds and may be listed.

Partnerships

Partnerships have a minimum of two members conducting business and operating under one common name. In addition to unlimited liability partners, there may also be limited liability partners. Partnerships are not permitted to issue any shares.

Private enterprises

Private enterprises are owned by individuals who are personally liable for the activities of that enterprise. Private enterprises are not permitted to issue any shares.

The most common form of business vehicle used in Vietnam for foreign investment is the limited liability company because the number of foreign investors is usually less than three. Prior to the enactment of the Law on Enterprises, joint ventures or 100% foreign owned companies could be set up only in the form of a limited liability company. However, the above-listed forms of business entities can now apply to both domestically owned and foreign owned entities (including any joint ventures or enterprises with 100% foreign capital).

Restrictions on Foreign Ownership in Vietnam

Formalities for foreign investors investing in Vietnam

A foreign investor must obtain an investment certificate from the "relevant licensing authority" to invest in Vietnam. The investment certificate normally sets out the specific scope

of business activities that a foreign investor is permitted to undertake in Vietnam, the amount of investment capital, the location and the land area to be used, the relevant incentives (if any), and the project implementation schedule. Depending on the location of the project or the project company, the “relevant licensing authority” may be either the provincial people’s committees or a provincial board of management of industrial zones, export processing zones and hi-tech zones.

Foreign exchange controls

Vietnam’s exchange control policy is administered primarily by the State Bank of Vietnam (“**SBV**”) which has historically imposed exchange control mechanisms designed to limit foreign currency outflows, generally requiring the use of the Vietnamese local currency (the “**dong**”) for domestic transactions and channeling the flow of foreign currencies into the banking system.

Government regulations allow companies to hold more than one foreign currency account in Vietnam and to hold an offshore bank account with the approval of the SBV. Foreign invested enterprises (“**FIEs**”) may convert dong into foreign currency to cover current payments denominated in foreign currency and to repay foreign loans. In addition, the Government has undertaken to provide certain support and guarantees for foreign currency requirements of infrastructure projects and other high priority projects.

Any person or organisation, including FIEs, may change dong into foreign currency at official rates provided that they declare the intended use of the money. Foreign currencies may freely be exchanged into dong provided official exchange rates are used.

There are no restrictions on inward remittances of foreign currency but any cash over USD 7,000 must be declared at customs. Outward remittances of foreign currency by domestic enterprises may only be made to pay for imported goods and services, to repay registered offshore loans or to make overseas investments. Outward remittances of foreign currency by Vietnamese citizens may be made for tourism, education, health care, private residential, inheritance and other legal purposes.

FIEs are generally allowed to repatriate profits from business operations and are allowed to make outward remittances of foreign currency for the purchase of raw materials and supplies, the provision of services, licensed technology transfers, payments of principal and interest on offshore loans registered with the SBV, salaries and payments of other legally owed sums of money and assets. Upon termination or dissolution of a business enterprise, foreign investors may repatriate their capital. Remittances must be made through certain registered accounts.

Restrictions on foreigners owning land

Under Vietnamese land laws, foreign investors are not permitted to own land in Vietnam. However, joint venture companies and companies with 100% foreign owned capital can lease land from the State for normally up to 50 years, and in exceptional cases up to 70 years. Lease terms are usually renewable.

Restrictions on business sectors operated by an enterprise with foreign investment

Foreign investors are generally allowed to invest in any sector in Vietnam without any restrictions however investments in certain sectors are prohibited, restricted or subject to conditions. A general summary of the sectors in which investments are prohibited, restricted or subject to conditions is set out in Schedule 1 to this note, however if you require more specific input, please contact one of the contacts listed at the end of this note.

Restrictions on foreign shareholders or ownership

The cap on foreign ownership for an equity investment in an existing Vietnamese entity depends on, among other things, the sector in which the investment is made and whether the target company is listed or not. Investment in certain sensitive sectors like banking, insurance and telecommunication is subject to specific restrictions applicable to such sectors. For example, a foreign bank cannot own more than 10% in a Vietnamese bank, unless it is qualified as a strategic investor in which case it can own up to 15% subject to SBV approval, and 20% subject to the Prime Minister’s approval, and cannot, in all cases, own more than 30%. For non-sensitive sectors, foreign investors can own up to 100% for unlisted private companies. For unlisted but public companies (that is, those having more than 100 shareholders, having conducted public offering of its shares) or listed companies, the caps are 40% and 49% respectively.

Taking security in Vietnam

Vietnamese security law

Vietnamese security law is primarily based on:

- the Civil Code No. 33-2005-QH11 (National Assembly, June 14, 2005) (the “**Civil Code**”);
- Decree No. 163/2006/ND-CP on Security Transactions (Government, December 29, 2006) (“**Decree 163**”); and
- Decree No. 08/2000/ND-CP on Registration of Security Transactions (Government, March 10, 2000) (“**Decree 08**”).

Where the security property involves listed shares, Vietnamese laws on securities and securities markets will also be relevant. Decree 163 is applicable to security transactions of credit institutions (including the local branches of foreign banks) operating in Vietnam. The Civil Code provides for security transactions involving a “foreign element” (for example, where a party to the transaction, or the security property, is located outside of Vietnam).

The terminology typically used in Vietnamese security law is similar to that recognized in Commonwealth jurisdictions and is specifically defined in Decree 163. Some specific terms are:

“*Future property*” means property owned by the securing party after the time when the obligation is created or the security transaction is entered into. Future property shall also include property which has been formed at the time of entering into the security transaction but is only owned by the securing party after the time of entering into the security transaction.

“*Secured party*” means a party with rights in a civil relationship, the exercise of which rights is secured by one or more security transactions and includes a pledgee; a mortgagee; the recipient of a performance bond or security deposit; a beneficiary of a guarantee or a credit institution in the case of a fidelity guarantee; and the party with the right to be paid by a bank and/or to receive compensation for loss in the case of an escrow deposit.

“*Securing party*” means an obligor or third party which undertakes to secure the performance of civil obligations and includes a pledgor; a mortgagor; a party delivering a performance bond, security deposit or escrow deposit; a guarantor; and a grassroots socio-political organisation providing a fidelity guarantee.

“*Security property*” means property used by the securing party for the purpose of securing the performance of the civil obligation owed to the secured party. Security property may be current or future property and must be permitted to be traded.

Types of security interests

The Civil Code and Decree 163 set out the primary forms of security interests in Vietnam:

- **Mortgage:** security transactions in which the securing party or a third party takes possession of the security property. Mortgages are typically taken over land use rights, assets attached to lands, listed or unlisted shares and other forms of intangible assets, such as intellectual property rights, rights to claim payments and other property rights arising from a contract or other legal basis.

- **Pledge:** security transactions in which the secured party takes possession of the security property. Pledges are typically applied to unlisted shares, chattels and other forms of tangible assets capable of being pledged.
- **Performance bonds and security deposits:** security transactions in which the securing party deposits a sum of money, precious metals, gems or valuable papers into a blocked bank account.
- **Guarantees:** transactions in which a third party undertakes with the obligee to perform an obligation for the obligor.
- **Floating charges:** under Decree 163, a concept similar to an English law floating charge is recognized,¹ however it is not as useful in practice or as extensive as an English law floating charge. It permits the creation of a security interest over “goods circulated during the course of production and business”² such as machinery, equipment, raw materials and fuel. The mortgagor is entitled to sell, exchange any such properties and then the right to demand payment, sale proceeds or assets received from the sale shall form part of the mortgaged property in substitution for the property which is sold. If the mortgagor sells, exchanges or donates mortgaged property not being goods circulated during the course of production and business, the consent of the mortgagee should be obtained. If such consent is not obtained, the mortgagee is entitled to recover the mortgaged property subject to certain exceptions. If the mortgagee does not exercise the right to recover the mortgaged property, then the proceeds received, the right to demand payment or other assets received from the purchase and sale or from the exchange of the mortgaged property shall form part of the mortgaged property in substitution for the property which was sold or exchanged.

Third party security

Third parties may grant pledges or mortgages over their assets, deliver a performance bond, security deposit or escrow deposit, or provide a guarantee to secure the obligations of obligors (including borrowers and guarantors) to foreign lenders.

1 In very simplified terms, a floating charge is a charge over all the assets or a class of assets owned by a company from time to time where, prior to insolvency, such charged assets can be bought or sold or otherwise dealt with by the borrower without the permission of the chargeholder. Only when an event of default or similar event occurs will the floating charge “crystallize” and become a fixed charge over such assets as exist within the description of the assets over which the floating charge has been taken at that time.

2 “Goods circulated during the course of production and business” means moveable property used for the purpose of exchange, purchase and sale or leasing out within the scope of the production and business activities of the securing party.

Taking security over land

- Vietnamese land law
 - > In Vietnam, there is no private ownership of land. Land is owned by the people and administered exclusively by the State. Land use rights therefore represent the maximum ownership interest that an individual or organisation may have in land. Land users may, among others, transfer, lease or mortgage their land use rights. The duration of allocation of land or of lease of land is considered and decided on the basis of the investment project or the application for allocation or lease of land, but does not usually exceed 50 years (unless it is an investment project with large capital requirements but a slow capital recovery rate, or investment projects in areas with difficult socio-economic conditions or specially difficult socio-economic conditions, in which case such period may be more than 50 years but not exceeding 70 years).
- Can security be granted over land in favour of foreign lenders
 - > Vietnamese land law only permits a company to mortgage land use rights and assets attached to the land (that is, buildings) to Vietnamese credit organisations, joint venture banks and local branches of foreign banks operating in Vietnam. Therefore, it appears that a mortgage over land use rights and assets attached to the land may not be possible where it is made in favour of foreign lenders which do not have a local branch in Vietnam, unless approval is obtained from the SBV or the Government. Such approval is not usually forthcoming in practice. As it is likely to be difficult to enforce security involving land use rights or assets attached to the land, such security is primarily for defensive purposes and for strengthening the negative pledge covenant.
- Registration
 - > Mortgages of land use rights must be registered and such a mortgage is only effective upon registration. A mortgage over land use rights or assets attached to land must be registered within 5 business days from the date of signing of the loan agreement with the land use rights registrar in the province where the land is located. The applicant can either be the securing party or the secured party, but the application must be signed by both parties.

Taking security over shares

Vietnamese law expressly recognizes the creation of a security over shares (both listed and unlisted) and equity in companies in Vietnam (including foreign invested companies) in favour of foreign lenders.

- Listed shares
 - > Listed shares are in scripless form. A mortgage of listed shares is subject to both the security transactions law and the securities law. Under the securities law, listed shares are kept in the custody of a custodian (that is, a securities company or a bank licensed by the State Securities Commission (“SSC”) to provide custodian services), which has registered to be a member of the Vietnam Security Depository (“VSD”). The custodian maintains securities accounts at the VSD on behalf of shareholders. The custodian assists a shareholder as a customer, when mortgaging its listed shares in favour of a mortgagee. On the creation of a mortgage over certain listed shares held by the mortgagee, the custodian sends a list of mortgaged shares signed by the custodian and the mortgagee to the VSD. The VSD then transfers the mortgaged shares from the securities accounts to “blocked” securities mortgage accounts in the name of the custodian at the VSD. No transfer of such shares is permitted during the term of the mortgage.
- Unlisted shares
 - > When security is taken over unlisted shares, it is advisable that the lender requires delivery of the following:
 - share certificates;
 - share register (annotated with the pledge/mortgage);
 - share transfer form (executed and undated);
 - power of attorney; and
 - pre-approval/acknowledgement of the pledge or the mortgage by the relevant governmental authority.
- Registration
 - > Although Decree 163 and Decree 08 prescribe that registration of security over shares need only be done under certain circumstances, it is usually advisable that registration is done in all cases, and that this arrangement is set out in the relevant loan documentation. Registration should be made at the National Office for Registration of Security Transactions of the Ministry of Justice (“NORST”). In the case of listed shares, registration should also be made at the VSD. There is no set deadline for registration of a mortgage of listed shares; however, the registration should be made as soon as possible.

■ Shareholding thresholds and other regulatory issues

- > There are certain shareholding thresholds potentially applicable to a purchaser of the shares. If foreign lenders want to receive the shares in lieu of performance of an obligation by the securing party, such thresholds may apply to such foreign lenders, triggering approval, reporting or notification requirements. The key thresholds are:
 - 5% shareholding of a public company: any acquisition resulting in the ownership by an investor (whether local or foreign) of 5% of the total outstanding shares of a public company must be reported to the SSC, the relevant company and the stock exchange on which the company is listed.
 - 25% shareholding of a public company: any acquisition resulting in the ownership by an investor (whether local or foreign) of 25% or more of total outstanding shares of a public company must be subject to approval of the SSC.
- > In the case of shares in listed companies, it is advisable to seek clarification or confirmation from the SSC on whether these thresholds apply or if they could be waived in particular circumstances. However, please note that giving advice on these thresholds is beyond the scope of this note and it is recommended that specific legal advice is sought when such issues arise. Please contact one of the contacts listed at the end of this note for more information.
- > In addition, the percentage of security taken over shares should not exceed any cap on foreign shareholding under Vietnamese laws (please see discussion in “Restrictions on foreign shareholders or ownership” above).

Other types of security interests and security property

Under the Civil Code and Decree 163, other forms of security may be given in the forms of performance bonds, security deposits, escrow deposits, guarantees and fidelity guarantees. Security may also be taken over intellectual property rights, rights to claim payments, and the rights to receive insurance proceeds. These areas are, however, beyond the scope of this note and it is recommended that specific legal advice is sought if security over these assets is contemplated. Please contact one of the contacts listed at the end of this note for more information.

Assignments by way of security are not available in Vietnam. The Bankruptcy Law appears to only recognize pledgees and mortgagees as secured creditors in bankruptcy proceedings.

Taking security over future property

Decree 163 expressly recognizes the creation of security interests over future property in addition to current property. The procedure for taking security over future property is essentially the same as taking security over current property.

Taking security over assets outside of Vietnam

In general, a Vietnamese entity may create security over its assets which are located outside of Vietnam. However, certain assets, such as profits from an offshore investment, are subject to foreign exchange control regulations. In such cases, approval of, or notification or reporting to, the SBV should be taken into account.

Security agency arrangements

The concept of agency is recognized under the Civil Code. However, as the security provisions of the Civil Code make no specific reference to a security agent, there is concern that security agency arrangements are not recognized in Vietnam.

However, in practice, the concept of security agency has been adopted for foreign loan transactions in Vietnam where the security interest is normally created in favour of all secured parties and the security agent is authorized to carry out administration and the enforcement of the security. The appointment of the security agent may be provided in the loan agreement. Once appointed, the security agent is able to sign the security documents on behalf of all lenders. It is possible for the security documents to contain an acknowledgement from the borrower that if the security agent is not able to enforce the security on behalf of the lenders, the lenders may directly enforce such security to the extent permitted by Vietnamese law.

The issue of whether a local branch of a foreign bank is able to act as a security agent (for onshore lenders or offshore lenders) remains questionable, though in practice, there have been certain precedents. There are two reasons for this. First, as a general principle, any action taken by a local branch of a foreign bank should be within the scope of business stated in the branch's license. However, acting as a security agent in loan transactions is not expressly stated as one of business activities in licenses of local branches of foreign banks. Second, as noted above, creation of security over land use rights or assets attached to land in favour of offshore lenders is not legally permissible, and therefore the use of a local branch of a foreign bank as agent for security over those assets can be considered as circumvention of that prohibition and accordingly not valid. In practice, certain security agency arrangements in which local branches of foreign banks acted as security agents were used in relation to offshore loans, even for the purpose of taking security over land use rights and assets attached to land. Although the security interests granted to such branches were at times notified or registered with regulators, including the SBV, the enforcement of such security interest remains questionable.

Enforcement or realisation of property secured by a pledge or mortgage

Prior to the realisation of security property by a secured party, a written notice of realisation of security property must be given to the party holding the security property as well as any other secured parties. Such notice should contain certain details regarding the procedure for seizure of the security property. If the securing party or any party holding the security property as permitted by the secured party fails to deliver it in accordance with the time specified in the notice, the secured party may seize the security property in order to realize it or may also petition a court to resolve the matter.

Security property shall be realized within the time limits which the parties may agree. However, if there is no such agreement, then the secured party may determine the time for realisation of the security property which shall not be earlier than 7 days in respect of moveable property and 15 days in respect of immovable property. However, the secured party may immediately realize the security property if, for example, such property is in danger of losing or diminishing in value.

Vietnamese law allows the parties to contractually agree on measures to realize property which is subject to a pledge or mortgage, as well as the timing for such realisation procedures. In particular, the methods of realizing security property pursuant to an agreement include: a sale of security property by a secured party; receipt by the secured party of the actual security property in lieu of performance of the secured obligations by the securing party; receipt by the secured party of a sum of money or another property from a third party in the case of the mortgage of a right to reclaim a debt; or use of other methods as agreed by the parties. If there is no agreement between the parties, the security property (for example, moveable and immovable properties) shall be sold by auction in accordance with law. Where the specific value of any moveable property may be clearly determined on the market, the secured party may sell the property at the market price without going through a sale by auction, however, the securing party and any jointly secured parties must be notified of this.

If the law requires: (a) a written consent of the securing party or the owner of the security property to the transfer of ownership of, or land use right of, the security property; or (b) a contract for purchase and sale of the security property as between the owner of the security property or the judgment debtor (if any) with the purchaser, then the pledge or security agreement relating to the security property is deemed to substitute such consent or such contract for purchase and sale.

Proceeds from the realisation of security property are applied in the following orders: (a) costs and expenses for maintaining and selling security property; (b) payments for taxes and fees to the State relating to the enforcement of the security; (c) other necessary and reasonable expenses relating to the enforcement

of the security; and (d) payments to secured creditors (principal, interest and default interest). If the proceeds exceed the secured obligations, the remaining amount of the proceeds is paid to the pledgor or mortgagor; and if the proceeds are less than the secured obligations, the pledgor and mortgagor must pay the deficiency.

In the case of enforcement by foreign lenders, depending on type of security assets, approval of state agencies may be required. For example, if the security assets are shares of local non-listed bank, SBV approval is required. Please contact one of the contacts listed at the end of this note for more information.

Bankruptcy Procedures

Under Vietnamese law, the term “bankruptcy procedures” is used to describe the processes beginning from the filing of the petition, to either the “Recovery Procedures” or the “Liquidation Procedures” until the end of the liquidation process when the debtor is declared “bankrupt” (in Commonwealth jurisdictions this is commonly referred to as “dissolution”).

There are two main types of process under the **Bankruptcy Law**:

- **“Recovery Procedures”** – for the recovery of the business operations; and
- **“Liquidation Procedures”** – to liquidate the debtor’s assets and to write off its debts.³

The flow chart in Schedule 2 to this note illustrates the steps from the filing of the petition to the end of the bankruptcy procedures. The process begins with the filing of a petition (see below for persons entitled to file a petition) in the Vietnamese court for a determination on whether the debtor is insolvent and for the commencement of “bankruptcy procedures”.⁴ If the court decides to commence bankruptcy procedures, it may not, at that time, know whether the debtor will survive or not (and eligible for the Recovery Procedures). Therefore, there may be an interim period when the debtor is subject to the “bankruptcy procedures” without any specific reference to whether it is in the Recovery Procedures or the Liquidation Procedures modes (see discussion on “Consequences of Commencement of Bankruptcy Procedures” below on interim measures as soon as the bankruptcy procedures are commenced).

3 There appears to be no concept of class or group arrangements or compromise under Vietnamese law (such as there is under the section 425 of the UK Companies Act 1985 or Chapter 11 of the US Bankruptcy Code).

4 The Bankruptcy Law is applicable to enterprises, co-operatives and co-operative alliances established pursuant to the law. The term “enterprises” include all four forms of entities described earlier. In this note the term “debtor” and “enterprise” are used interchangeably and refer specifically to limited liability companies and shareholding companies owned in the private sector and not by the State.

Test for insolvency: A debtor is deemed to be insolvent when (a) an unsecured or partially secured debt is payable; (b) requests have been made for payment of the debts; and (c) the debtor has failed to repay the debts. The legislation appears to only set out a deeming provision but does not set out whether a petitioner can file a petition on other grounds of insolvency such as a balance sheet only test. It remains to be seen whether it is possible for a petitioner to take any such action.

Standing to file a petition: The following persons have standing to file a petition to commence bankruptcy procedures against a debtor:

- An **owner** or **legal representative** is required to file a petition upon it becoming aware that the enterprise is insolvent.
- An **unsecured** or **partially secured creditor** may file a petition if it observes that an enterprise is insolvent.
- The **employee representative** (elected by a majority of more than half the number of employees) may file a petition if the enterprise fails to pay wages or other debts owing to its employees.
- The **shareholders** or **group of shareholders** may (in accordance with the enterprise's charter) file a petition if it observes that an enterprise is insolvent.

In practice, when an unsecured creditor institutes proceedings, it is unlikely that the creditor would refer to the Bankruptcy Law in the originating process. Rather, the Civil Code or the Commercial Law (No. 36-2005-QH11) dated June 14, 2005 came into effect on January 1, 2006 ("**Commercial Law**") would often be cited instead. The main reason for the lack of usage of the Bankruptcy Law is the lack of familiarity and understanding by the local stakeholders and professionals of the bankruptcy system and procedures. There does not seem to be any cases where a leading law firm in Vietnam has been retained to represent a party to the bankruptcy proceedings.

Consequences of Commencement of Bankruptcy Procedures

After the commencement of the bankruptcy procedures, the judge then makes a decision on whether the debtor should be subject to one of the following procedures:

- **Recovery Procedures:** The Recovery Procedures begin when the judge accepts the creditors' (by the Requisite Majority) decision at the first creditors' meeting to restructure the business of the debtor. Once the process begins, the debtor is obliged to submit to the court a rescue plan within thirty

(30) days of the creditors' resolution (or such longer time as the court may approve) to rescue the debtor. However, if within such time limit, any creditor or person accepts an obligation to recover the business, it shall have the right to formulate a draft Rescue Plan for submission to the court.

- **Liquidation Procedures:** A debtor is liquidated in the circumstances described in the discussion on "Liquidation Procedures" below. If a debtor is subject to the Liquidation Procedures, the assets of the debtor are liquidated and distributed.

Note: A judge may order a debtor to be transferred from the Recovery Procedures to the Liquidation Procedures. See "Liquidation Procedures" below for the circumstances when a debtor may be transferred to the Liquidation Procedures.

Appointment of the committee for management and liquidation of assets: An appointment of the committee for management and liquidation of assets is made at the same time as the judge decides to commence bankruptcy procedures. The committee for management and liquidation of assets comprises of: (i) a bailiff; (ii) an officer of the court; (iii) a representative of the creditors; (iv) a legal representative of the debtor; and (v) subject to the judge's determination, a union representative, a representative of employees and representative of expert institution. For more information on the duties of the committee for management and liquidation of assets, please contact one of the contacts listed at the end of this note.

Management of debtor during bankruptcy procedures: After a decision to commence bankruptcy procedures has been made, the business activities of a debtor continues to be operated and conducted as usual but is subject to the supervision of the judge and the committee for management and liquidation of assets. However, the judge may appoint a person as manager and operator of the business activities of the debtor on the following grounds:

- the existing manager lacks the ability to operate the business of the debtor; or
- the existing manager's continual operation of the debtor will not be advantageous for the preservation of the assets of the debtor.

Moratorium: From the date the court issues a decision to commence bankruptcy procedures, the execution of any civil judgment is suspended. Any pending cases affecting a debtor's assets are suspended and transferred to the court conducting the bankruptcy.

Security: Secured creditors are permitted under the Bankruptcy Law to enforce their security during any bankruptcy procedures provided that:

- the debt to be enforced is matured;
- enforcement does not materially affect the production and business activities of the debtor; and
- the secured creditors provide in writing a legitimate reason for enforcing the debt.

Once there is a decision to commence the bankruptcy procedures, the enterprise is not permitted to:

- conceal or dispose of any asset;
- pay any unsecured debt;
- abandon or reduce any right to claim a debt; or
- convert unsecured debts into secured debts by the assets of that enterprise.

Any assets recovered will form part of the estate of the debtor available for distribution.

In addition, the following activities require the prior written approval of the judge.

- Pledging, mortgaging, assigning, selling, donating or leasing of any assets.
- Receiving assets under an assignment contract.
- Terminating the performance of an effective contracts.
- Borrowing a loan.
- Selling or converting of shares.
- Transferring the ownership rights of any assets.
- Paying new debts arising from the business activities of the debtor.
- Paying the wages of the debtor's employees.

Recovery Procedures/Rescue Plan

If the judge decides to proceed with the Recovery Procedures, the debtor or the creditor or person which has accepted the obligation to prepare the Rescue Plan must submit it within the time limit prescribed. See discussion on "Recovery Procedures" above.

Contents of Rescue Plan

The Rescue Plan must identify the essential measures for the recovery of the business operations, the conditions, time-limit and a plan for payment of debts. The following is a list of available measures, including:

- raising new capital;
- changing lines of production and business;
- renewing production technology;
- restructuring the management apparatus; merging, dividing or separating production sections aimed at raising productivity and quality;
- selling shares to creditors;
- selling or leasing unnecessary assets; and
- other measures which are not contrary to law.

Approval of Rescue Plan

Once the Rescue Plan is prepared, it is submitted to the court for its consideration and approval prior to its submission to the creditors' meeting. When presented to the creditors, the Rescue Plan must be approved by at least half the number of unsecured creditors representing at least two-thirds of the unsecured debt ("**Requisite Majority**"). The creditors' resolution has to be recognized by the judge and, if recognized, the decision of the judge on the Rescue Plan is sent to all creditors with seven days of its decision. Once that notice is sent, the Rescue Plan is effective.

Implementation of Rescue Plan

The Bankruptcy Law provides that the Rescue Plan must be implemented within three (3) years from the last date the notice of recognition of the Rescue Plan was published in a newspaper. During the three year period, the debtor must submit semi-annual reports to the court and the creditors are under an obligation to supervise the implementation of the Rescue Plan. Any amendments to the Rescue Plan must be approved by the Requisite Majority.

Suspension of Recovery Procedures

Once the Rescue Plan has been implemented or the Requisite Majority of the claims which remain unpaid agrees to a suspension, the procedures for the recovery of business operations are suspended. Any actions which were stayed will then continue immediately after the suspension of the procedures for the Rescue Plan.

Liquidation Procedures

A judge shall issue a decision to commence a liquidation of an enterprise in the following circumstances:

- any enterprise which has suffered losses and the State has previously provided it with special measures for it to recover its business operations (without the need to convene a meeting of creditors to consider the application of the recovery procedures);
- the first creditors' meeting is unsuccessful due to:
 - > the owner or legal representative failing to attend the creditors' meeting without a legitimate excuse or the meeting has already been adjourned once⁵ (where the petitioners are either unpaid employees, unsecured creditors or partially secured creditors); or
 - > the creditors' meeting failing to achieve a quorum (being the Requisite Majority) after having already been adjourned once (where the petitioner is the legal owner or legal representative of the debtor); or
- if after the first creditors' meeting, the Requisite Majority of creditors have passed a resolution to develop a Rescue Plan and:
 - > the debtor fails to formulate a Rescue Plan within 30 days of the date on which the initial creditors' meeting resolved to recover the business;
 - > the creditors' meeting rejects the proposed Rescue Plan; or
 - > the debtor fails to implement or implement improperly the approved Rescue Plan (unless the parties reached some other agreement).

Liquidating the assets: Once liquidation is commenced, the court must also prescribe a plan for the distribution of assets in accordance with the prescribed order of priority described below. However, the Bankruptcy Law does not address in any detail the process to effect the liquidation/ sale of the assets and distribution of the assets.

⁵ A creditors' meeting may be adjourned once where (1) it has failed to achieve the Requisite Majority, (2) the legal representative or the owner of the debtor fails to attend for a legitimate reason, (3) more than half of the number of unsecured creditors present at the meeting vote in favour of adjournment.

Management of the business during the Liquidation

Procedures: During the process of enforcement of a decision to liquidate the assets of an enterprise, the judge may (on the proposal of the committee for management and liquidation of assets) issue a decision permitting the enterprise to undertake a number of activities (i) for the liquidation of assets or (ii) to increase the parcel of assets of such enterprise.

Appeal: Any concerned party may, within 20 days from the last date the decision to commence the liquidation was published in a newspaper, appeal the judge's decision to commence the liquidation of the assets.

Rights of secured creditors in a liquidation: Once the judge issues a decision to commence the Liquidation Procedures, priority is granted to secured creditors provided that such security was created prior to the date on which the court accepted the petition. Where the value of the assets is insufficient to cover the debt of a secured creditor, the secured creditor can claim as an unsecured creditor for the shortfall.

Undue debts: Once the Liquidation Procedures commence, all debts which are undue are dealt with as due debts (but interest shall not be calculated for the period up to the due date).

Order of Distribution: The assets of a debtor subject to Liquidation Procedures are distributed in the order prescribed below:

- *First*, the bankruptcy fees;
- *Secondly*, the unpaid wages, severance allowance and other payables to employees;
- *Thirdly*, the unsecured debts, and if the value of assets is insufficient to pay all debts then each creditor shall only be paid a portion of its debt at the corresponding proportion,⁶ and
- *Fourthly*, the members of the company, owner of the private enterprise or the shareholders in a shareholding company (as the case may be).

Bankrupt: The term "bankrupt" is used to describe a debtor which has completed the liquidation process. When the judge declares that a debtor has completed the liquidation procedures, it will declare that debtor bankrupt concurrently. This is referred to as "dissolution" in jurisdictions where the insolvency regime is derived from their English counterpart.

⁶ The Bankruptcy Law does not distinguish claims by the tax authorities or other government bodies in respect of duties and levies. Therefore these would appear to rank *pari passu* with the other unsecured creditors.

Miscellaneous

Antecedent Transactions: The following transactions are deemed to be invalid (and any recovered asset shall form part of the debtor's estate) if they are conducted by an insolvent enterprise within three (3) months prior to the date the court accepts jurisdiction to commence bankruptcy procedures.

- A donation of moveable or immovable property to another person.
- Settlement of a bilateral contract in which the obligation of the debtor is clearly greater than that of the other party.
- Payment of an undue debt.
- Conducting the mortgage or pledge of assets in respect of debts.
- Other transactions for the purpose of disposing of assets of the debtor.

Disclaimer of onerous contracts: A creditor, the debtor or the chairman of the committee for management and liquidation have the right to request the court for a declaration to suspend the performance of an effective contract (whether it is currently being performed or will be performed) on the basis that it is more advantageous for the debtor to suspend that contract. If a contract is suspended, the counter-party will have (a) a right to demand the return of any assets which the debtor received pursuant to that contract; and (b) the same rights as an unsecured creditor in respect of any loss caused by the suspension.

Set-off: The Bankruptcy Law provides that the debtor may set off any claims in respect of transactions that were established prior to the decision to commence bankruptcy provided that the two parties have "mutual obligations" and for the same type of asset.

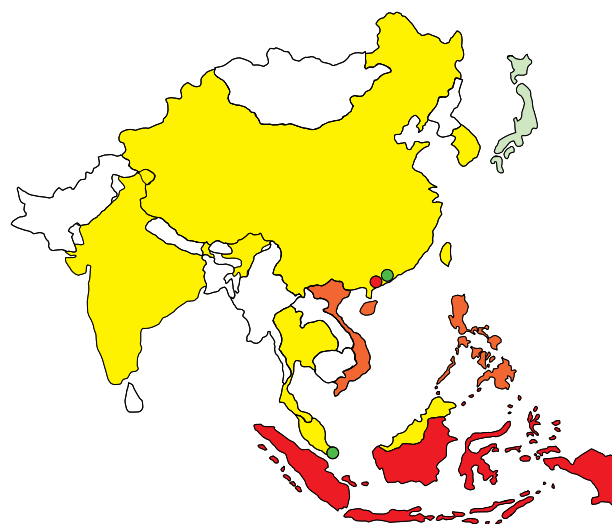
Breaches of the Bankruptcy Law: Breaches of the Bankruptcy Law may result in an administrative or criminal liability on the directors or officers. The Vietnamese Government has recently issued Decree No. 10-2009-ND-CP dated February 6, 2009 stipulating penalties applicable to administrative breaches in bankruptcy proceedings.

Disqualification of certain individuals: Owners, directors, chairman or members of the board of management or board of members of an enterprise that has been declared bankrupt cannot establish an enterprise or hold a managerial position in an enterprise for a period of one to three years from the date of declaration (unless the bankruptcy was due to a force majeure).

Directors' duties/insolvent trading: The owner and/or legal representative is liable if it has failed to submit a petition within three (3) months of becoming aware that the debtor is insolvent. In particular, the owner and/or legal representative is subject to a monetary fine ranging from VND 1,000,000 to VND 3,000,000 and is forced to submit the petition.

Bias of the Bankruptcy Law

Vietnam is viewed as a pro-debtor jurisdiction in respect of its bankruptcy regime.



KEY

In practice, this means that security can be taken and will be recognized; security can be enforced within a reasonable period, taking into account all statutory requirements and procedures that may need to be complied with.

In practice, this means much the same as the above category with the proviso that security may take a substantial time to enforce, that the insolvency regime is still developing and/or that there is a possible sentiment against foreign creditors.

Can be difficult to enforce security, can be significant delays in enforcement, rehab process may have debtor bias and/or possible bias against foreign creditors. Much can depend on the facts of the case.

Links to further sources of information on the internet

The following websites are useful for the persons outside Vietnam to access to information and regulations relating to Vietnam companies or important laws.

- White & Case: www.whitecase.com
- YKVN: www.ykvn-law.com
- Ministry of Finance – Vietnam: www.mof.gov.vn
- Ministry of Justice – Vietnam: www.moj.gov.vn
- State Bank of Vietnam: www.sbv.gov.vn

Please note that neither White & Case nor YKVN can vouch for the content or security of external websites.

Schedule 1

Restrictions on Business Sectors

- Examples of goods and services in which business is prohibited in Vietnam include:
 - > weapons and military equipment;
 - > illicit drugs;
 - > certain chemicals;
 - > pornography;
 - > firecrackers;
 - > certain games and toys;
 - > certain aquatic products;
 - > certain fertilizers;
 - > certain toxic minerals;
 - > imported scrap causing environmental pollution;
 - > certain medicines and cosmetics;
 - > prostitution and human trafficking;
 - > organized gambling of any form;
 - > certain private investigation services;
 - > certain medical apparatus;
 - > certain foodstuffs;
 - > products containing ammonium in the amphibole group;
- > marriage (involving a foreign element) for profit-making;
- > certain veterinary medicine and horticultural agents;
- > certain animals and plant varieties; and
- > adoption (involving a foreign element) for profit-making.
- Examples of goods and services in which business is restricted in Vietnam include:
 - > hunting guns, sports weaponry;
 - > industrial explosives or high concentration ammonium nitrate;
 - > cigarettes, cigars and other tobacco products karaoke and dance clubs;
 - > certain toxic chemicals; certain animals and plant varieties; and
 - > radioactive goods.
- Examples of goods and services in which business is subject to obtaining a certificate of satisfaction of business conditions include:
 - > petrol and oil;
 - > natural gas;
 - > medicines;
 - > high-risk foodstuffs;
 - > certain veterinary medicine and horticultural agents;
 - > insurance services;
 - > securities and securities market services;
 - > labour exportation;
 - > legal services;
 - > antiques and national treasures;
 - > certain telecommunication services;
 - > certain internet connection and access services;
 - > postal and mail courier services;
 - > films, tapes and disks;
 - > tobacco raw materials;
 - > medical, health and related services;
 - > veterinary practice;

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- > disinfecting and sterilising services;
 - > film-making;
 - > electricity-related services;
 - > international transport services;
 - > seal engraving;
 - > security; and
 - > international travel services.
- Examples of goods and services in which business is subject to other conditions include:
 - > construction and repair of inland waterways;
 - > cargo handling, logistics and ports services;
 - > shipping agency; marine broking;
 - > ship towing, repair and cleaning;
 - > customs agency;
 - > accounting;
 - > auditing and other related services;
 - > certain toxic chemicals;
 - > certain foodstuffs;
 - > medical equipment and apparatus;
 - > fishing equipment;
 - > aquaculture and animal feed;
 - > certain plant varieties;
 - > certain fertilizers;
 - > valuation;
 - > building services;
 - > building materials;
 - > coal;
 - > telecommunications equipment and agency;
 - > radio broadcasting equipment;
 - > certain machinery and equipment;
 - > gold;
 - > slaughtering, processing, preservation and transportation of animals;
- > postal and mail courier agency services;
 - > public internet agency;
 - > publications distribution;
 - > advertising;
 - > house or office leasing;
 - > pawn services;
 - > services for foreigners and Vietnamese residing overseas to rent houses in Vietnam;
 - > commercial evaluation;
 - > printing;
 - > certain maps services;
 - > machinery and equipment inspection services;
 - > occupational training and consultancy;
 - > career services;
 - > transport services;
 - > rail infrastructure and support services; and
 - > tourist accommodation, travel and other services.

Schedule 2

