

NO DICHOTOMY BETWEEN BOT AND 'BANKABILITY'

(Vietnam Investment Review, Issue Nos. 0440 & 0441, March 20, 2000 & April 3, 2000)

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The Government issued Decree 02 modifying important provisions of the regulations governing foreign-invested BOT projects earlier this year. The government has taken a very positive step to create better conditions for the financing of BOT projects in Vietnam. It has resolved certain key issues of concern to foreign investors and lenders, particularly the choice of governing law for project documents.

A BOT project is a partnership between the government and a foreign investor to implement an infrastructure project that would normally be carried out by a government agency. In order to encourage a foreign investor to undertake development of a BOT project and provide financing for it, the government agrees in a BOT contract to allow the investor to operate the project and earn a profit from the cashflow it generates over a specified period of time, such as 40 years. At the end of this time period, the investor must hand over the project in operating condition to the government. Bridges and power plants are examples of infrastructure projects well-suited to being carried out in the BOT form because the tolls and electricity charges provide a stable and predictable cashflow.

One of the critical conditions that need to be created for a BOT project to be successful is the "bankability" of the project. The scale and cost of most BOT projects often make it impossible for investors to make their investments entirely in the form of equity. In addition to equity, foreign investors must raise capital from banks, the international bond market and portfolio investors. For the investors providing financing, it is important that the rights and obligations of all parties are specified and understood with the greatest degree of predictability about the meaning a court or arbitrator would give them as possible. A BOT project, or more specifically, its project documents, are said to be "bankable" if their provisions are transparent so as to provide this predictability.

Foreign investors and lenders want to use international contract law in BOT project documents to avoid what they perceive as risks associated with using Vietnamese contract law as a result of the fact that (i) it is not clear whether any of the main Vietnamese contract laws - the Civil Code, the Ordinance on Economic Contracts and the Law on Commerce - apply to a BOT contract and ancillary contracts; and (ii) if any of these contract laws apply, it is still not clear whether such contract law is sufficiently developed in terms of issues covered and consistency of interpretation that it can protect the rights and interests of foreign investors and lenders.

The necessary level of predictability can be achieved when the governing law in the contracts is New York or English law, which are the best-known systems of law in the international financial markets. A BOT project's documents are more likely to be considered "bankable" with New York or English law.

Under Decree 02, parties are free to choose a foreign governing law in BOT projects documents for project documents subject to the approval of the Ministry of Justice (MOJ) and thus can achieve the necessary level of transparency for the bankability of a BOT project. The MOJ has already approved the application of international law for project documents on the basis of Decree 02 in at least one case. In this article, we analyse the changes in law between Decree 02 and Decree 62, the decree on BOT projects that is amended by Decree 02, and the role of the MOJ in facilitating BOT projects in Vietnam.

Decree 62 and Decree 02

Prior to the enactment of Decree 02, the choice of law rule applicable to BOT projects in Vietnam was stated in Article 24.3 of Decree 62: "In case Vietnamese law does not have provisions governing relations relating to investment under BOT, BTO, BT contracts, parties may agree in the contracts on the application of foreign law, provided that such agreements are not contrary to the provisions of Vietnamese law." (emphasis added).

The application of Article 24.3 presented two problems for foreign investors. First, it was unclear whether the parties could agree to apply international law to (i) key issues raised under BOT contracts and ancillary contracts, or (ii) BOT contracts and the ancillary contracts themselves. Second, it was also unclear whether the expression "such agreements" referred to (i) the agreement of the parties on the application of foreign law, or (ii) BOT contracts and ancillary contracts.

Decree 02 resolves these ambiguities. Article 1.3 of Decree 02 revises Article 24.3 of Decree 62 and states the new choice of law rule: "Parties to 'BOT, BTO, BT Contracts' and parties to contracts the performance of which is guaranteed by competent authorities of Vietnam as provided in Article 10.2 of this Regulation are entitled to agree in the contracts on the application of foreign law provided that the agreement on choice of foreign law is not contrary to the provisions of Vietnamese law and is approved by the Ministry of Justice." (emphasis added) Article 1.3 therefore makes three changes. First, the expression "relations relating to investment under BOT, BTO, BT contracts" is replaced with the expressions "BOT, BTO, BT Contracts" and "contracts the performance of which is guaranteed by the competent authorities of Vietnam." Second, Article 1.3 also deletes the expression "such agreements" and replaces it with the expression "the agreement on choice of foreign law." Finally, that agreement must be approved by the MOJ.

Agreement on Choice Of Law Should Not Be Contrary to Vietnamese Law

When compared to Decree 62, Decree 02 simplifies the choice of law analysis. Under Decree 62, issues that arose from the relations relating to investment under BOT contracts could be governed by foreign law if an agreement to apply foreign law to those issues or an agreement in which those relations are established are not contrary to the provisions of Vietnamese law. Decree 62 thus required an issue by issue analysis that compared foreign law and Vietnamese law on each point. Article 1.3 of Decree 02 is a practical and positive step. It allows the MOJ to determine whether there are choice of law rules contained in Vietnamese BOT regulations that conflict with the choice of law rule stated in Article 1.3. If no such rules exist, then the parties should be allowed to agree that foreign law would govern the interpretation of the BOT contracts and any related contract, the performance of which is guaranteed by relevant Vietnamese authorities.

In Vietnam, the only relevant source of Vietnamese BOT regulations is the Law on Foreign Investment and its implementing regulations, including Decree 12, Decree 62 and Decree 02. Since Vietnamese BOT regulations do not provide any choice of law rule for BOT projects conflicting with Article 1.3 of Decree 02, the parties to a BOT project should be free to choose a foreign law as long as they obtain the approval of the MOJ.

Continued Applicability of Vietnamese BOT Regulations

The choice of a foreign law to govern a BOT contract and ancillary contracts does not mean that Vietnamese BOT regulations no longer apply.

Vietnamese BOT regulations address numerous issues and procedures relating to the implementation of BOT projects, including the preparation of the pre-feasibility study, selection of foreign developers, preparation of the feasibility study, granting of land-use rights, bidding for selection of contractors, tax incentives, foreign exchange, taking of the BOT company's assets as security, choice of law and dispute resolution.

In Vietnam, as in all other countries where BOT projects are carried out, the legal framework for the BOT project is always the BOT law of the country in which the project is located. Role of the justice ministry Decree 02 introduces the MOJ into BOT projects. The MOJ is now empowered to facilitate legal aspects of BOT projects while safeguarding the legitimate interests of the state.

There are two key functions the MOJ can perform: (i) determining whether any Vietnamese BOT regulations (whether issued prior to or after the enactment of Decree 02) limit the application of Article 1.3 of Decree 02, and (ii) supporting BOT projects by providing legal opinions regarding the validity and enforceability of the obligations undertaken by the government and the authorised state bodies in connection with the projects. The first step in the MOJ legal review should be to determine if Article 1.3 conflicts with or is limited by any Vietnamese BOT regulations. If such a conflict exists, the parties should be so advised and the problem resolved or identified in the enforceability opinion of the Minister of Justice discussed below if the project continues to be implemented.

International lenders will typically require the highest possible level of legal assurances from all parties, including the government, regarding their obligations under a BOT contract and its ancillary contracts.

Legal opinions of the MOJ on the enforceability of the choice of law agreement and the obligations undertaken by the government and its agencies in connection with a BOT project will be very important factors additional to that of governing law to make BOT project "bankable."

Conclusion

Creating conditions for Vietnamese BOT projects to be "bankable" will help to give Vietnam access to the capital needed to develop its infrastructure. In light of the new provisions of Decree 02, the approval of foreign governing law and the issuance of legal opinions by the MOJ are key steps in achieving such access.