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**LAW TIGHTENED OVER OFFSHORE LOAN SECURITY**  
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Regulations in relation to foreign loans to Vietnamese entities have undergone some significant changes recently. On November 7, 1998, the Government issued Decree 90, which provides management regulations in regards to the borrowing and repayment of foreign loans to replace existing regulations as provided in Decree 58 (passed on August 30, 1993). The purpose of this article is to (i) review the current status of the forms of security available to foreign lenders under Decree 58 and related regulations; and (ii) identify and assess the changes in the law between Decree 58 and Decree 90 with respect to the availability of new forms of security.

Prior to the enactment of Decree 90, offshore lenders generally were not permitted to take security in Vietnam. Decree 58 only referred to a Vietnamese bank guarantee as a form of security for foreign loans incurred by a domestic enterprise and was silent on the mortgage or pledge of a borrower's assets. In 1996, the application of Decree 58 to foreign and international organisations' loans for projects in Vietnam was reviewed by Official Letter 582 (State Bank decree dated October 5, 1996).

In Official Letter 582, the State Bank, Ministry of Planning and Investment, Ministry of Trade and Ministry of Justice adopted the position that the taking of security in any form other than a Vietnamese bank guarantee by a foreign lender is contrary to Decree 58. Official Letter 582 does provide, however, that in exceptional cases foreign lenders may obtain permission for security over a Vietnamese borrower's asset. Despite requests from the above ministries for additional guidelines on such matters, the prime minister has yet to give any guidance as to interpretation and, as a result, Vietnamese bank guarantees have been viewed as the only form of security permitted in securing a foreign loan.

Decree 90 now allows various forms of security in relation to foreign loans, including Government, domestic bank or offshore guarantees; mortgages or pledges over a borrower's assets "which are financed by the loan proceeds"; as well as other forms of security "in accordance with Vietnamese law." Since Decree 90 replaces Decree 58, the cloud created by Official Letter 582 has now been removed. We review below in turn each new form of security provided for in Decree 90.

### **Guarantees**

Guarantees provided by an offshore entity Decree 90 empowers borrowers to obtain offshore guarantees. For loans of any state-owned enterprise, Decree 90 specifically requires that the terms and conditions of the guarantees securing such loans be agreed to only after the State Bank has been "consulted." Since the draft loan documentation package, including the guarantee, is subject to approval of the State Bank, it is not clear what additional involvement by the State Bank in the negotiation and preparation of the guarantee is contemplated under Decree 90.

### **Guarantees Provided by the Government**

Guarantees are not directly issued by the Government but vicariously by the Ministry of Finance (MoF) or State Bank. Decree 90 clearly sets forth the scope of the guarantees issued by each agency. Guarantees issued by the State Bank only secure foreign loans from banks while those

of the MoF relate to foreign loans from enterprises that are not banks. Such provisions represent a significant clarification of policy in regards to which authority are authorised to grant Government guarantees and is consistent with existing provisions on the authority of the State Bank under new State Bank legislation.

Decree 90 also partially addresses the enforceability of Government guarantees. The MoF or State Bank is now empowered to "take measures and [use] financial-credit instruments in accordance with current laws" in order to honour all given guarantees. In addition, such agencies will be entitled to use the Fund for Foreign Loans to be provided for under the State Budget by the MoF in the future. Decree 90 however requires that the aggregate amount of guarantees issued by the MoF or State Bank in a given year is not to exceed 10 per cent of State Budget revenue collected in that year without the prime minister's prior approval. These provisions thus require further clarification. Decree 90 does not specify what are permissible "measures and financial-credit instruments," the Fund for Foreign Loans has not been established and it is not yet certain how the Fund will be financed and operated.

### **Taking a Borrower's Assets as Security**

Article 23.5 of Decree 90 provides that: "An enterprise may use assets which are financed by the loan proceeds, or other forms of security in accordance with Vietnamese law, to secure foreign loans."

While it appears from Article 23.5 that foreign lenders may now take security in Vietnam with respect to assets that are financed by the proceeds of foreign loans, the status of assets that are not financed or partially financed by the proceeds of the foreign loans is not clear and probably is still subject to the limitation set forth in Official Letter 582; that is, such assets cannot be mortgaged or pledged. Certain types of collateral, including the value of land-use rights and revenue streams under off-take agreements, may not be secured in favour of foreign lenders since they are not assets that are financed by the loans. In addition, Decree 90 is also silent on the perfection and enforcement of security taken by a foreign lender.

### **Other Forms of Security Available**

Article 23.5 of Decree 90 permits the use of "other forms of security in accordance with Vietnamese law" without specifying them. Other forms of security currently offered to international and foreign lenders include charges over offshore bank accounts and conditional assignments of venture interest (CAVIA). Lenders may require borrowers to open offshore bank accounts and charges are created over the moneys in such accounts to secure loan repayments. Under a CAVIA, the assignment of the equity interests of parties in a project in favour of the lender is conditional upon the occurrence of an event of default under the relevant loan agreement. The State Bank should take into account these practices and provide for them in its implementing regulations.

### **Conclusion**

Although it is comparatively sketchy, Decree 90 clearly is a positive step towards the articulation of a comprehensive legal framework governing the forms of security that are available to foreign and international lenders. Some of the necessary elements are present, but the Government needs to acknowledge that international financing provided by foreign and international lenders on a secured basis with which they can be comfortable is a necessity and thus provide regulations that reduce the risks faced by such lenders. We understand that the State Bank is drafting a circular providing guidelines for the implementation of Decree 90 and hopefully the circular will deal with some of the issues mentioned herein.