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Vietnam Enforcement Agency's Right to Attachment of Secured Assets under Decree 44/2020/ND-CP

On 8 April 2020, the Government of Vietnam issued Decree 44/2020/ND-CP regulating judicial enforcement proceedings in respect of criminal judgment debtors being Vietnam-domiciled corporate entities (**Decree 44**), effective 1 June 2020.

Of particular note is a statutory restriction under Article 21 of Decree 44 in a circumstance where a criminal judgment debtor being a company (**Judgment Debtor**) fails to discharge its payment obligations under a criminal judgment (**Criminal Judgment**), a relevant Vietnam enforcement agency (**Enforcement Agency**) would be entitled to attach and enforce the secured assets of the Judgment Debtor which have been duly mortgaged or pledged to a secured party pursuant to the terms of a valid and enforceable security agreement, provided that (1) the Judgment Debtor does not own any other assets or owns other assets that are not sufficient for the discharge of its payment obligations under the Criminal Judgment; and (2) the value of secured assets is greater than the aggregate of the value of secured obligations of the Judgment Debtor to the secured party and the cost of enforcement. The Enforcement Agency is required to serve an attachment notice on the secured party at least 2 days prior to the time for exercise of the attachment.

In our view, this new Vietnam legal authority has left a lot to be desired as it will have a far-reaching interference with existing Vietnam regulations on secured transactions in respect of the priority rules. In addition, it is likely to bring more questions than answers for enforcement in the absence of any further guidance from the Vietnam governmental authorities, including:

- How the value of secured assets, the cost of enforcement and the value of secured obligations are determined?

- Will the secured transaction and debt obligations under the underlying transaction (e.g. the debt financing transaction) be early terminated? If so, will the secured party lose secured assets to secure the underlying transaction?
- Will all the secured assets be attached or just part of the secured assets whose value exceeds the value of the secured obligations be attached?
- How the allocation of the enforcement proceeds is made toward payments of secured obligations and the Judgment Debtor's payment obligations under the Criminal Judgment?
- Generally, how to balance the interests of the secured parties and the Enforcement Agency in respect of a particular secured transaction.

One of Vietnam's fundamental legal principles for secured transactions is that if a secured transaction is legally entered into and duly perfected to achieve enforceability against third parties' competing claims, Vietnamese courts and any other governmental authorities should not be afforded with the right to attach and enforce the secured assets provided by the securing party to senior secured lenders in order to discharge other obligations of the securing party (Article 4.4 of Decree 163/2006/ND-CP). The provision under Article 21 of Decree 44 somehow undermines this legal principle.

In the light of this latest legal development, commercial banks acting as senior secured lenders should be particularly concerned that this backward-moving provision would adversely affect their secured lending business. As a matter of Vietnam market practice, banks would typically take secured assets whose value is greater than the value of secured obligations (e.g. 130% or 150% of the amount of the loan facility) so as to have a sufficient buffer against any decrease in the value of secured assets in the event of security enforcement. However, this new legal authority now effectively enables the Enforcement Agency to be preferred over senior secured lenders for repayment of debt obligations by way of exercising the right to attachment of the secured assets that have been duly granted by the securing party in favour of senior secured lenders exclusively.

It is obvious that there will be a lot of works to be done by the Vietnam governmental authorities in order for this provision to be fully implemented in practice, and time will tell how this provision balances the interests of secured parties on the one hand and enforcement agencies on the other hand.

Key contact

If you have any questions or would like to know how this might affect your business, please contact the key contacts.

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