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Legal Update
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Vietnam passed the Law on Public-Private Partnerships

On 18 June 2020, the National Assembly of Vietnam duly passed the Law on Public Private Partnerships (**PPP Law**) after several draft bills had been released by the Ministry of Planning and Investment (**MPI**) for public consultation. The PPP Law is one of Vietnam's long-awaited legislative instruments which shall enter into force on 1 January 2021.

As public private partnerships (**PPP**) has become a significant part of Vietnam infrastructure and there is a continued reliance on long-term, limited recourse project financings, the PPP Law aims to develop an improved enabling legal framework for PPPs to promote private sector investors to invest, design, construct, finance, operate and maintain complex large-scale "ring-fenced" energy and infrastructure projects over a concession term. Whilst it makes a number of significant changes to the current PPP regime set out in Decree 63/2018/ND-CP (**Decree 63**) issued by the Government of Vietnam (**Government**), hope remains that implementing decrees and circulars being prepared by MPI shall provide sufficient clarity on a number of key risk areas for investors and lenders.

In this legal update, we look at key Vietnamese law issues in the PPP Law from project finance and development perspectives.

1. General requirements

1.1. Eligible investment sectors

The PPP Law expressly contemplates five (5) distinct investment sectors, including:

- transport;
- power grids, power plants (except hydropower plants and other power plants subject to the State monopoly under the Electricity Law);
- irrigations, clean water supply, drainage and wastewater, waste treatment;
- healthcare, education and training; and
- information technology infrastructure.

The PPP Law, compared to Decree 63, removes agriculture, rural developments and office buildings for the State agencies from eligible investment sectors for PPP projects. The list of PPP projects in the PPP Law is an exhaustive list and the provisos for inclusion of other projects outside of such list as provided in Decree 63 have been removed.

1.2. The Vietnamese authorities to issue in-principle investment approvals

One of the first steps for the development of a PPP project is for project sponsors to obtain an in-principle investment approval. Depending on the size and sectors of the projects, one of the following competent Vietnamese authorities shall issue an in-principle investment approval (please see Appendix 1 to this legal update for more details):[1]

- the National Assembly;
- the Prime Minister;
- the Ministries and/or central and local bodies; and
- the provincial-level People's Council.

2. Contract structures for PPP concession

2.1. Types of Project Agreement

Unlike Decree 63, the PPP Law broadly contemplates two (2) distinct groups of concession afforded to project sponsors in the structuring and development of Vietnam PPP projects:

- user pays: Build-Operate-Transfer (**BOT**), Build-Transfer-Operate (**BTO**), Build-Own-Operate (**BOO**) and Operate-Manage (**O&M**); and
- Government pays in return for the use of infrastructure facilities: Build-Transfer-Lease (**BTL**), Build-Lease-Transfer (**BLT**).[2]

This is a welcome move from the Government, recognising the importance of availability payments over the life of a project subject to compliance with agreed performance criteria and standards to address demand risks. However, such fee structure of availability payments is intended for BTL/BLT delivery models, and it shall not be made available for financially free-standing IPP power projects, which are traditionally considered by the Government as a user-pays model. Further, the PPP Law expressly provides that the user pays model does not apply to PPP projects that involve the expansion, upgrade or improvement of existing infrastructure facilities.[3]

<u>Model forms of contract</u>

The PPP Law also contemplates that the Government shall prepare and issue model forms of a project agreement for each group above.[4] It remains to be seen how improved whole life cost risk allocation between the Government and private sector investors shall be from a project finance

[1] Article 12 of the PPP Law.
[2] Article 45 of the PPP Law.
[3] Article 45.4 of the PPP Law.
[4] Article 47.3 of the PPP Law.

perspective in those model forms of contract, as it is likely that the application of those model forms of contract for Vietnam PPP projects is mandatory.

2.2. Abolishment of the Build-Transfer structure

A notable difference between Decree 63 and the PPP Law with respect to the types of project agreement is the abolishment of Build-Transfer (**BT**) type from the eligible types of project agreement. Implementation of a new project in the form of BT contract for which an in-principle investment approval has not yet been issued shall no longer be permitted from 15 August 2020.[5]

This move is the result of a long discussion between the State authorities for the abolishment of BT structure since it is does not feature the key characteristics of a PPP project such as it does not focus on providing public service and does not share risks between the State and private investors.

From 1 January 2021, the implementation of a project under the form of BT shall be as follows:[6]

- New projects which the tender invitation documents or set of requirements have not yet been issued shall be stopped. If the tender invitation documents or set of requirements have been issued, then the project shall continue to be implemented on the basis of the tender invitation documents, set of requirements or the law at the time of issuance of the tender invitations documents or set of requirements;
- If the result of investor selection for the project were provided before 1 January 2021, the authorised State agency (**ASA**) is responsible to organize negotiation or signing the PPP contract on the basis of the results of the investor(s) selection, the tender, the sets of proposals, the tender invitation documents, the set of requirements and the law at the time of issuance of the tender invitation documents and set of requirements.
- A BT project that the BT contract was signed prior to 1 January 2021 shall continue to be implemented and payment shall be made in accordance with the provisions of the signed BT contract and the law at the time of signing the BT contract.

3. Selection of investors

3.1. Eligibility of investors

The PPP Law provides additional conditions to be satisfied by an eligible investor of a PPP project, including: [7]

- the investor is not debarred from PPP investment activities;
- the investor must associate with investors of private sectors to participate in bidding, if it is a wholly State-owned enterprise; and

[5] Article 101.6 of the PPP Law.
[6] Article 101.5 of the PPP Law.
[7] Article 29 of the PPP Law.

- investors established according to foreign laws must meet market access conditions when participating in bidding for projects of conditional market access sectors and fields subject to laws and regulations of investment.

3.2. Investors selection

The PPP Law provides for three (03) methods for selection of investors of a PPP project, including:

- Open tender process: This is the general method that applies to all PPP projects which do not fall within the scope of competitive negotiation or direct appointment.
- Competitive negotiation: This is a new selection method under the PPP Law which applies to limited circumstances, including (i) no more 3 eligible investors are invited to attend, (ii) projects use high technologies on the list of high technologies prioritized for investment and development under the law regarding high technologies and (iii) projects use new technologies prescribed in the law on technology transfer.[8]
- Direct appointment: This method applies to (i) projects serving the national defense and security, State secrets protection; or (ii) projects with urgent needs to ensure the continuity in provision of public products or services.

We note that in case a project with specific conditions is not likely apply any of the above methods, the competent authority may report to the Prime Minister to consider and decide a method of investor selection.

4. Project Company

4.1. Restriction on conducting alternative businesses

The PPP Law prohibits a project company, typically structured as a thinly capitalised special purpose vehicle (**SPV**) on a limited or non-recourse basis, from entering into alternative business activities that fall outside of a PPP project. On a strict interpretation, it may not introduce any change from the present definition of a special purpose entity duly established to enter into a project agreement with ASA.

4.2. Statutory requirements for minimum equity funding

Project finance in Vietnam typically involves a high debt-equity ratio of 80/20, 75/25 or 70/30. Successful development and commercialisation of major PPP infrastructure projects in Vietnam are primarily funded by a mix of equity funding and multi-source debt financings.

The PPP Law expressly requires that the equity component of a PPP project must be at least 15% of the total investment capital expenditure of the project (excluding State capital on construction of support facilities or site clearance).[9]

[8] Article 38 of the PPP Law.
[9] Article 77 of the PPP Law.

Other sources of funding are typically mobilised through shareholders loans from sponsors and multi-tranche syndicated senior secured debt facilities from domestic and international lenders. Determination of viability gap funding and Government participation are key issues to note.

The PPP Law requires that a PPP project must have a total investment capital of:[10]

- no less than VND200 billion (approximately USD8.5 million) in respect of the projects within sectors (i) transportation, (ii) power grids, power plants, (iii) irrigation, clean water supply systems, drainage and wastewater systems, waste treatment and (iv) information technology infrastructure works; or
- no less than VND100 billion (approximately USD 4.25 million) in respect of the projects in areas with difficult socio-economic conditions or areas with especially difficult socio-economic conditions; or
- no less than VND100 billion (approximately USD 4.25 million) in respect of projects in healthcare education and training.

This minimum equity funding requirement does not apply to Operate-Manage (O&M) projects.[11]

4.3. Statutory timeline to achieve financial close

The PPP Law imposes a particular requirement for sponsors and the project company to achieve financial close within 12 months (or 18 months for projects which an in-principle investment approval was approved by the National Assembly or the Prime Minister) following the execution of a project agreement.[12]

This is likely to be a risk area for lenders and sponsors as they shall be effectively under time pressure to negotiate and execute financing documents and then achieve financial close within such tight statutory timelines, particularly in light of protracted commercial negotiations by parties over the years in previous BOT power projects in Vietnam.

4.4. Project bond offerings [13]

In terms of the types of debt instruments, the PPP Law contemplates the possibility of the project company to mobilise capital markets financing by way of private placement of bond offerings to qualified securities investors to fund a PPP project. It is note-worthy that the debt finance raised through the private placement offerings must not be higher than the debt component of the PPP project provided under the PPP contract.

We note that:

- the bonds in question are exclusive of convertible bonds or bonds with warrants; and
- the bond proceeds shall only be used for funding the development of the PPP projects.

[10] Article 4.2 of the PPP Law.
[11] Article 4.2 of the PPP Law.
[12] Article 76.2 of the PPP Law.
[13] Article 78 of the PPP Law.

4.5. Governing law of project documents

English law has been the most common foreign law typically selected by parties for financing documents, including facility agreements and intercreditor agreements, and certain Government-guaranteed project documents, including a project agreement, long-term supply and offtake agreements, in previous complex large-scale IPP power projects in Vietnam.

Unlike the previous approach of Decree 63, the PPP Law contemplates a mandatory application of Vietnamese law as the governing law of a project agreement (including appendices) and other relevant documents signed between ASA and the investors and/or the project company.[14]

The taking of security over Vietnam-based assets shall generally be governed by Vietnamese law.

4.6. Investment incentives

In addition to incentives listed under respective laws and regulations on investment, law on tax, law on land, some of preferences that a project company may enjoy include:

- priority right to provide public services: in special cases, the project company may have the priority to provide public services or to use public construction to implement the project;[15]
- right to grant mortgage over assets or commercial rights.[16]

5. Government support

5.1. Guarantees on performance obligations

The PPP Law, which shall come into effect on 1 January 2021, does not include the equivalent provision of Article 61 of Decree 63 on granting a Government guarantee (**GGU**) to investors of a PPP project to guarantee on performance obligations of Vietnam project counterparties (e.g. EVN's payment obligations under the PPA).

The Government's recent position has generally been that it is not prepared to grant a GGU in favour of investors. It is, therefore, increasingly difficult for investors to obtain a GGU, and investors are recommended by the Government to explore project structures and innovative financing solutions available in the market that can be successfully delivered without a GGU in place. This shall have significant implications for the bankability of the PPP projects.

5.2. Guarantees on foreign currency availability [17]

The PPP Law does proceed to recognise the requirements of the Prime Minister's Official Correspondence 1604/TTg-KTN issued in 2011 for coal-fired IPP power projects to the effect that

[14] Article 55 of the PPP Law.
[15] Article 80.3 of the PPP Law.
[16] Article 80.4 of the PPP Law.
[17] Article 81 of the PPP Law.

the Government guarantees on foreign currency availability for the development of large-scale energy and infrastructure projects in Vietnam shall be no more than 30% of project revenue in the local currency Vietnam Dong after subtracting expenditures. This guarantee should be distinguished from a guarantee on performance/payment obligations of Vietnam project counterparties.

Such cap on foreign currency risks has been one of key bankability issues from international lenders' perspective, and it remains to be seen how this risk exposure shall adversely affect pricing conditions of international lenders for Vietnam's upcoming PPP projects.

5.3. Revenue risk allocation [18]

Of particular note, the PPP Law contemplates a new revenue risk sharing mechanism between sponsors/project company and the Government, particularly:

- If the actual revenue is lower than 75% of the contracted revenue, the Government agrees to bear 50% of the shortfall between the actual revenue and the 75% of the contracted revenue.

  This risk allocation shall only apply for BOT, BTO and BOO projects. In other words, O&M, BLT and BTL projects are not entitled to enjoy the risk allocation.
- In contrast, if the actual revenue is higher than 125% of the contracted revenue, investors shall share 50% of the difference between the actual revenue and the 125% of the contracted revenue with the Government.

It remains to be seen how the market will respond to the Government's latest initiative, noting however that the concept of this revenue risk sharing mechanism, the operation of which is subject to strict conditions, is no equivalent to the concept of a minimum revenue guarantee issued by the Government, which was initially included for discussions in the earlier draft bills of the PPP Law.

6. Restriction on equity transfers

There is a statutory restriction under the PPP Law that shares/equity interests in a project company may not be transferred by a shareholder to a third party until completion of construction of the PPP project.[19]

This move is seen as attempts of the Government to avoid any sale of equity to unqualified investors and minimise prolonged project construction delays that occurred recently in some of other large-scale IPP power projects in Vietnam.

[18] Article 82 of the PPP Law.
[19] Article 54 of the PPP Law.

Key contacts

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

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Legal notice

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Appendix 1

Vietnam State authorities to decide and issue an in-principle investment approval

Competent authority	Scale of the project
National Assembly	• Projects have the public investment capital over VND 10,000 billion. • Projects have substantial impact or posing potential risks to the environment, including nuclear power plants, projects require land use purpose conversion with respect to specialized use forest land; upstream protective forest or border protective forest of 50 hectares or more; protective forest as windbreak, shelter from sand or breakwater and protective forest for breakwater or for reclaimation from the sea with an area of 500 hectares or more; or a forest for production with an area of 1,000 hectares or more. • Projects require land use purpose conversion of more than 500 hectares of land for growing rice from 2 seasons or more. • Projects require the resettling of 20,000 inhabitants in mountainous areas or at least 50,000 inhabitants in other regions; or • Projects require special legal frameworks or policies under the National Assembly's resolutions.
Prime Minister	• Projects require the resettling of 10,000 inhabitants in mountainous areas or at least 20,000 inhabitants in other regions. • The projects use the central budget capital, ODA, etc. • The projects for construction of new airport or aerodrome, runways of an airport or aerodrome, international airport passenger terminal or airport or aerodrome cargo terminal with the capacity over 1 million ton per year or more. • The projects for construction of new seaport or port area under a special seaport, or a seaport or port area under a special seaport of Grade 1 with the total investment capital equivalent to Group A project under the Law on Public Investment.
Ministries or equivalent authorities	Other projects under the authority/ management of the Ministries.
The Provincial People’s Council.	Other projects located in the province.

Appendix 2

PPP Project Development Timeline