

LEXCOMM

Solicitors & Barristers

Public Private Partnerships in Vietnam Infrastructure

American Chamber of Commerce in Vietnam

Ho Chi Minh City 22 May 2018

Pham Ba Linh

Managing Partner

LLB (Hanoi) LLM (Nottingham) FSI Arb

Public private partnerships

- PPPs originate from UK's Private Finance Initiative (PFI)
- Vietnam market trends and challenges ahead
- Limited number of closed energy and infrastructure deals financed by int'l lenders
- Momentum building with pipeline of new projects in power generation, toll road and social infrastructure
- GOV newly issued Decree 63/2018/ND-CP on PPPs (effective on 19 June 2018)

Market update - Power

- Proposed Power Master Plan No. 8 (PDP8)
- A strong pipeline of IPPs with a total installed capacity of 24,000MW by 2030
- Nghi Son 2 IPP (1,200MW, coal-fired)
 - ✓ Marubeni and Kepco awarded as sponsors in March 2013
 - ✓ project documents signed on 11 November 2017
 - ✓ financing documents signed on 13 April 2018
- Vung Ang 2
 - ✓ VAPCO (One Energy Asia Limited jointly owned by Mitsubishi Group and CLP Holdings)
 - ✓ investment agreement signed on 16 January 2017

Market update - Power

- Van Phong 1 IPP (1,320MW, coal-fired)
- Duyen Hai 2 IPP (1,200MW, coal-fired)
- Vinh Tan 3 IPP (1,980MW, coal-fired)
- Long Phu 2 IPP (1,320MW, coal-fired)
- Song Hau 2 IPP (3,000MW, coal-fired)
- Nam Dinh 1 IPP (1,200MW, coal-fired)
- Quang Tri 1 IPP (1,200MW, coal-fired)
- Hai Duong IPP (1,200MW, coal-fired)
- Son My 1 IPP (2,250MW, gas-fired)
- Dung Quat 1 IPP (750MW, gas-fired)

Market update - Transport

- Long Thanh int'l airport, Lach Huyen seaport development
- Dau Giay - Phan Thiet Expressway project
 - ✓ initially approved by PM's Decision 1597 in 2012
 - ✓ appointment of Bitexco as first sponsor formally cancelled by way of GOV's Resolution 20/NQ-CP on 28 March 2018
- 8 new North - South expressway projects approved by Resolution 52/2017/QH14 to be delivered as PPP projects
 - ✓ Mai Son - NH 45 (63km)
 - ✓ NH 45 - Nghi Son (43km)
 - ✓ Nghi Son - Dien Chau (50km)
 - ✓ Dien Chau - Bai Vot (50km)
 - ✓ Nha Trang - Cam Lam (29km)
 - ✓ Cam Lam - Vinh Hao (91km)
 - ✓ Vinh Hao - Phan Thiet (106km)
 - ✓ **Dau Giay - Phan Thiet (98km)**

Public-Private Partnerships

Procurement and delivery of public infrastructure and related services

```
graph TD; A[Procurement and delivery of public infrastructure and related services] --- B[Government has a direct interest in the provision of public services]; A --- C[Long-term contractual obligations, sharing risks and rewards between ASA and sponsors]; A --- D[Performance on a whole-of-life basis]; A --- E[Value for money drivers];
```

Government has a direct interest in the provision of public services

Long-term contractual obligations, sharing risks and rewards between ASA and sponsors

Performance on a whole-of-life basis

Value for money drivers

Public-Private Partnerships

- Drivers for PPP in Vietnam
 - ✓ Government cash constraints
 - ✓ access to a wider range of private sector financing sources
 - ✓ more sophisticated view of risk management
 - ✓ more flexibility to ensure long-term value for money
 - ✓ delivery of projects on time and on budget

Public-Private Partnerships

- a concession arrangement between public and private sector
- provision of public infrastructure or services with a reward system based on performance or output
- private sector designs, builds, finances and operates asset
- cost recovery and returns on equity through
 - ✓ direct charges to the private end users of the asset and/or
 - ✓ availability payments by public sector on delivery of services to specified quality standards
- public sector to assist with planning, licensing and other regulatory approvals and focus on service delivery
- project assets are transferred to public ownership at end of concession (BOT)

Project finance



Project structuring

- Key considerations
 - ✓ protection of a single source of income from detrimental actions over the length of project term
 - ✓ plethora of interweaving contractual obligations of parties
 - ✓ management of project risks holds the key to success or failure of a PPP project in Vietnam
- international lenders will undertake detailed legal, financial and technical due diligence and risk analysis of projects

Key issues for lenders

- regulatory approvals and consents
- non-completion, cost overruns and inadequate performance (will not generate projected cashflow)
- market risk on sale of product (pass-through offtake agreements), supply and transport arrangements (take or pay/cost of service)
- change in law and force majeure
- technology and operations risk
- limits on sponsors taking their return, financial covenants
- credit support and privatisations of Vietnam project counterparties (e.g. EVN as offtaker)

Project agreement

- Can take a multitude of legally mandated forms of contract
 - ✓ Build - Operate - Transfer (BOT)
 - ✓ Build - Transfer - Operate (BTO)
 - ✓ Build - Transfer (BT)
 - ✓ Build - Own - Operate (BOO)
 - ✓ Build - Transfer - Lease (BTL)
 - ✓ Build - Lease - Transfer (BLT)
 - ✓ Operate - Manage (O&M)
 - ✓ hybrid contracts
 - ✓ other forms of contract subject to PM approval

NEW

Art 40.5 of Decree 63

Relevant ASAs to provide guidance on details of model forms of project agreement

Information disclosure

ASA must publish a project summary upon execution of a project agreement by the parties (NEW!!!)



Aim to ensure transparency, fairness and the long-term sustainability of large-scale infrastructure projects in Vietnam

- Project summary includes (amongst others):
 - ✓ project name, date of execution, particulars of ASA and sponsors, total project investment, Government participation, sponsors' debt and equity finance
 - ✓ project location, land acquisition, type of concession, project term, pricing (?), concession conditions relevant to project revenue

Selection of sponsor

- scope of investment sectors and classification of projects
- selection of sponsors may take one of the following forms
 - ✓ competitive bids
 - ✓ direct appointment
- mechanics of private sector bids

Viability gap funding

- lenders' risk appetite and funding availability
- minimum equity of sponsors
 - ✓ 20% of total investment capital up to VND1,500bn
 - ✓ 10% for the investment capital which exceeds VND1,500bn
- Government participation includes
 - ✓ Government contributions (VGF)
 - ✓ availability payments for BTL and BLT models
 - ✓ land areas, public assets and concession rights for BT model
 - ✓ Government funds to be used for land clearance, relocation and compensation, construction of ancillary facilities

Assignment of rights

- Art 43.1 is a **NEW** statutory restriction imposed on sponsors!!!
- technically, a sponsor may not transfer its equity to a third party until after completion of construction works
- must be made in writing

Direct agreement

- Art 42 of Decree 63 re extent of rights in a step-in situation
- Intended for lenders to maintain continuity of project where sponsors or ProjectCo as borrower defaults
 - ✓ the project agreement and the financing agreement
- Lenders' step-in rights typically included in a direct agreement
 - ✓ a right to step into the position of the borrower
 - ✓ a confirmation from a third party that security can be taken over the underlying contract
 - ✓ an undertaking that no termination by a third party will be made without giving lenders prior written notice
 - ✓ an opportunity to cure defaults of the borrower

Sovereign immunity

- waiver of sovereign immunity
- Art 67.4 of Decree 63
 - ✓ disputes subject to arbitration under a project agreement and other related contracts are commercial disputes
 - ✓ foreign arbitral awards are subject to the mandatory procedures for recognition and enforcement in Vietnam

Dispute resolution

- Choice of law
 - ✓ may apply a foreign law as the governing law of project documents in accordance with the Civil Code 2015
- Arbitration vs local courts
- Tiered dispute resolution provision
 - ✓ negotiation
 - ✓ mediation
 - ✓ expert determination
 - ✓ arbitration
- International treaty claims

Government guarantee

- Key legal authorities
 - ✓ Art 12.1 of the Investment Law 2014
 - ✓ Art 61 of Decree 63
- Large demands for infrastructure financing in emerging markets
- Policy and institutional environment
- Limited government support in certain critical areas
 - ✓ utility performance
 - ✓ fuel supply
 - ✓ access to foreign exchange
 - ✓ creditworthiness of Vietnam project counterparties

Government guarantee

- GGU scope
 - ✓ legal and fiscal stability
 - ✓ payment obligations
 - ✓ performance obligations typically excluded
 - ✓ currency risk
- Currency risk
 - ✓ denomination, availability, convertibility and remittance
- Vietnam's foreign exchange controls
- Implications of the Prime Minister's Official Correspondence 1604/TTg-KTN

MOJ legal opinion

- Legal authority
 - ✓ Decree 51/2015/ND-CP
- International lenders typically require MOJ to opine on the validity and enforceability of obligations of Vietnam project counterparties in project documents under Vietnamese law
- Limited scope, technically excludes SOEs
- MOJ legal opinion cover the following [project] documents
 - ✓ a project agreement
 - ✓ a Government guarantee
 - ✓ a land lease agreement
 - ✓ other [project] documents to which the State of Vietnam, the Government or a State body is a party

Termination payments

- ASA typically pays a termination payment to the private party for a Vietnam side default or Government event on early termination of the project agreement
- TP calculations:
 - ✓ all indebtedness and other liabilities due and owing to international lenders
 - ✓ any break costs payable
 - ✓ returns on equity
 - ✓ subordinated shareholder loans
 - ✓ other equity contributions
- no compensation is payable if termination results from a private party default

Other bankability issues

- complex and lengthy master planning processes in multiple industries
- lack of a robust and consistent risk allocation framework to provide greater certainty on certain key risks that should be retained by the Government and the private sector
- limited scope of available sovereign guarantees , including inadequate Government support on foreign currency availability and conversion
- statutory restriction on mortgage of land use rights in favour of international lenders, complex land acquisition process and compensation
- payment ability and creditworthiness of Vietnam project counterparties

Credit risks of Vietnam project counterparties

Lenders' measures to allocate risks among participants

recourse to sponsors on certain defined events or conditions

locked-in period for controlling sponsor while debt is outstanding
requirement of reserves for debt service

take all available onshore and offshore security interests
impose contractual covenants against dilution of security

require assignment of rights under project documents for benefit of international lenders

obtain "step-in" rights in direct agreement(s) on event of defaults to maintain option of taking control of project

Loan syndication

- Syndicated facilities used to spread exposure to credit risk of borrower - several obligations and divided rights
- Process of arranging syndication and roles of key parties
- Funding documentation
 - ✓ common terms agreement, facility agreements
 - ✓ intercreditor agreement, shareholders undertakings
 - ✓ converting bank accounts agreement
- Security
 - ✓ statutory restriction on taking mortgage over land use rights
 - ✓ assignment by way of security, fixed and floating charges are not recognised under Vietnamese law
 - ✓ priority subject to the order of registration

PPP challenges

- adequacy of legal framework
- project structuring and tax planning, implications of DTAs
- lenders' risk appetite on Vietnam as one of emerging markets
- depth of market participants and [unpredictable] investment preparation costs, land acquisition
- protracted negotiations over risk allocation
- level of public sector (ASA) expertise to negotiate deals in an efficient and timing manner
- require MPI and ASAs on consistent approaches to key issues
 - ✓ a robust pipeline of 'bankable' PPP projects
 - ✓ transparent and efficient bidding processes
 - ✓ standardised risk allocations and project documentation

LEXCOMM

Solicitors & Barristers

Lexcomm Vietnam LLC is a premier full-service commercial law firm licensed to practice in Vietnam

HO CHI MINH CITY OFFICE

Unit 2106-07, Level 21, Saigon Trade Center
37 Ton Duc Thang Street, District 1, Ho Chi Minh City, Vietnam
Tel: +84 8 3936 5018 - Fax: +84 8 3936 5019

HANOI OFFICE

Unit 1702, Level 17, TNR Tower
115 Tran Hung Dao Street, Hoan Kiem District, Hanoi, Vietnam
Tel: +84 4 3971 0888 - Fax: +84 4 3971 0999

Website: www.lexcommvn.com