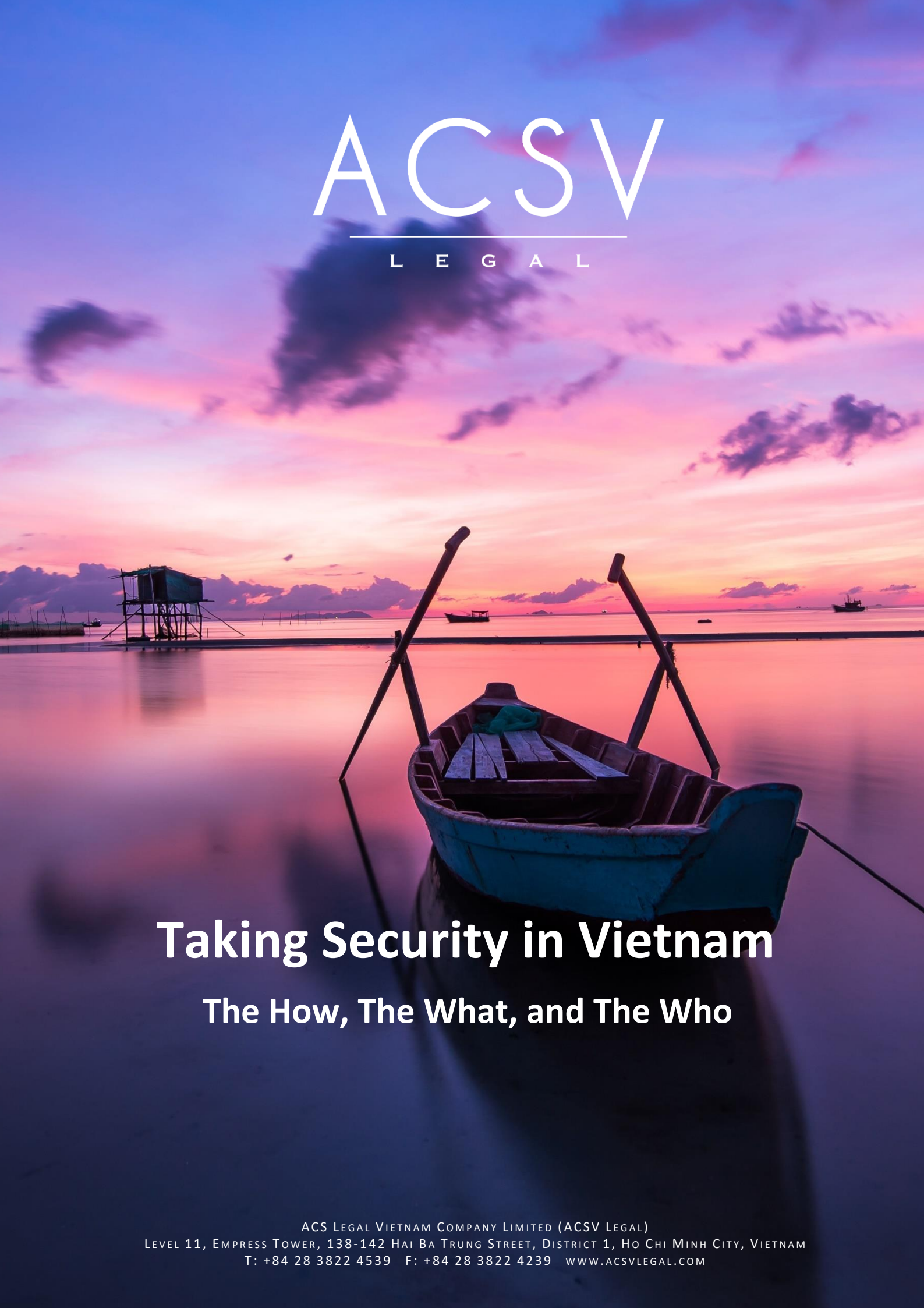


ACSV

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Taking Security in Vietnam

The How, The What, and The Who

ACS Legal Vietnam Company Limited (ACSV Legal)
Level 11, Empress Tower, 138-142 Hai Ba Trung Street, District 1, Ho Chi Minh City, Vietnam
T: +84 28 3822 4539 F: +84 28 3822 4239 www.acsvlegal.com

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INTRODUCTION

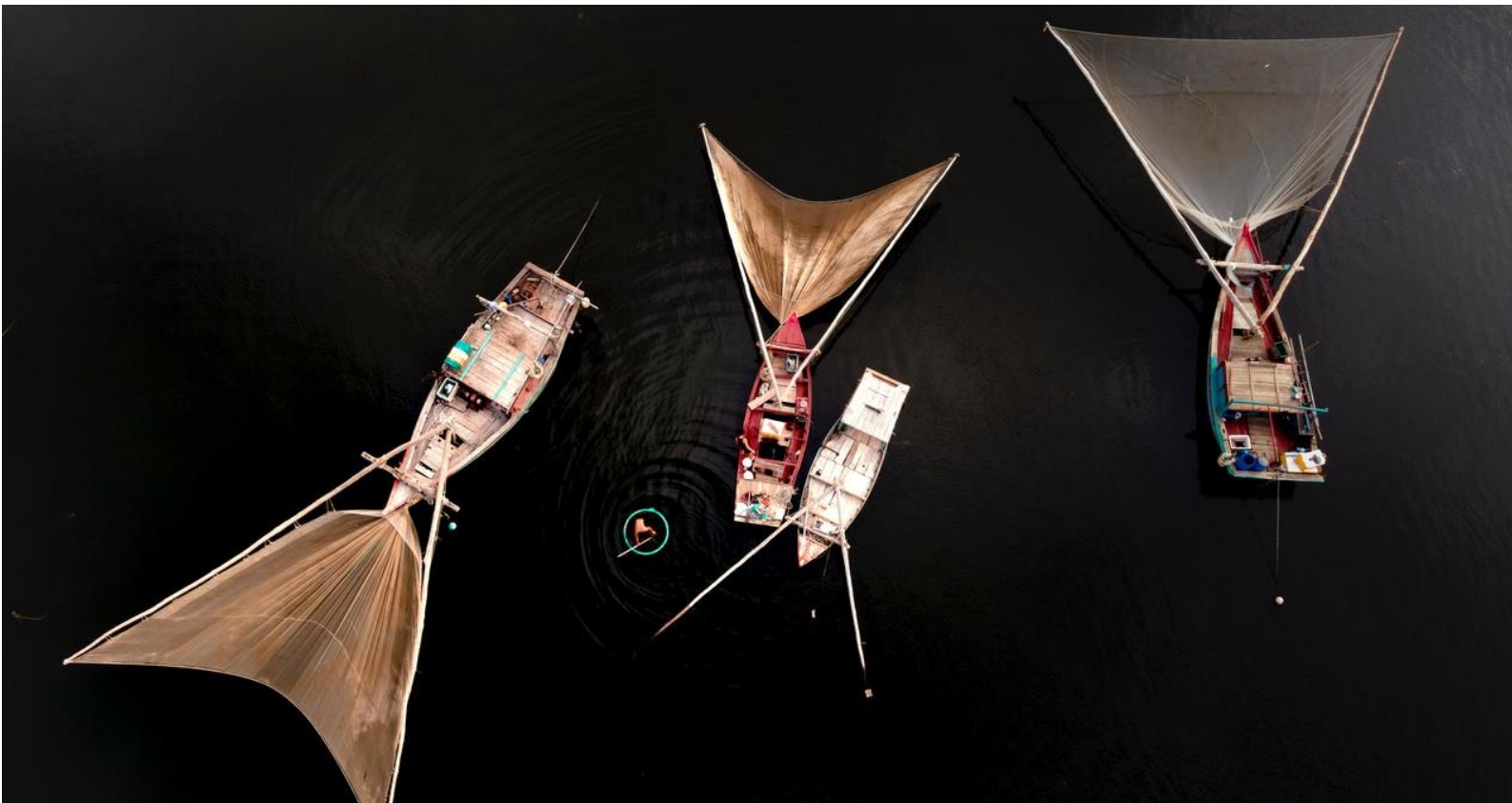
In Vietnam's bustling investment environment, companies are scrambling for liquidity to ramp up their operations. However, successful businesses need deep pockets if they wish to scale in proportion to the rapidly growing domestic market. Eager to soak up capital to boost their commercial success, local companies have started reaching for foreign funding to augment their expansion plans. This cash can come in multiple forms. It could be provided by private equity investors, classic financial institutions, or modern credit facilities. In the context of a developing economy and propelled by the global economic crisis induced by the Covid-19 pandemic, an increasing share of funds also originates from venture capital.

What unites all these sources of new money invested into a business's growth – and, ultimately, its revenue – is the investors' desire to obtain the highest achievable security for their (re)payment claims against the borrower. Viable security can be obtained from third-party guarantors. However, collateral more commonly consists of mortgages, pledges, and other security instruments between borrower and lender. The parties typically document these through a security agreement. This may or may not form part of the underlying credit facility and sets out the conditions for foreclosure and exploitation of the security asset. It allows the lender to satisfy his claims for repayment through the liquidation of a provided collateral asset (such as real estate, shares, or other assets) against a defaulting debtor.

Therefore, the actual commercial value of the lender's secured payment claim against a borrower (or third-party guarantor) also depends on evaluating the collateral provided against the loan. This includes the asset's commercialized monetary value, its availability for monetarization, any related transactional costs for recovery, as well as the legal enforceability of the security agreement against the counterparty or any involved third parties.

It is equally important to predict the consequences of debtor bankruptcy and any existing formal, legal, or procedural hurdles for exploiting the collateral. The recovery of claims for repayment might have to be translated into an enforceable, local court judgment, which can be lengthy and expensive.

This document outlines the legal framework for taking out security in Vietnam. It examines the most used contractual structures, security assets, and typical enforceability issues when setting up a credit facility with a Vietnamese borrower. It also provides a high-level summary of the security vehicles available under Vietnamese law and touches on the most important structures and prevalent legal issues when taking out security in Vietnam.



Any obligation under a contract can be subject to a security interest as long as it is legitimate and supported by a valid security agreement. In Vietnam, secured transactions are widely used in a variety of industries, such as financing activities involving debts or bonds, project partnerships where the performance is guaranteed with a contractual bond, or deposits into an escrow account, which provide security for payment agreed under a joint venture.

Secured obligations may be current obligations, future obligations, or conditional obligations. Future obligations can only be subject to security if they are formed during the term of the individual security, unless otherwise agreed. An obligation may be wholly or partly secured, as agreed or as provided by law. Where there is no such individual agreement or provision in law, the obligation - including the obligation to pay interest, fines, and compensation for any damages - shall be deemed to be wholly secured.

One asset can provide security for several obligations if, at the time the security transaction is established, the value of the property is greater than the total aggregate value of the secured obligations. In this case, the securing party must inform any other secured parties that the asset is also employed as security for the performance of other obligations. The provision of security must be made in writing.

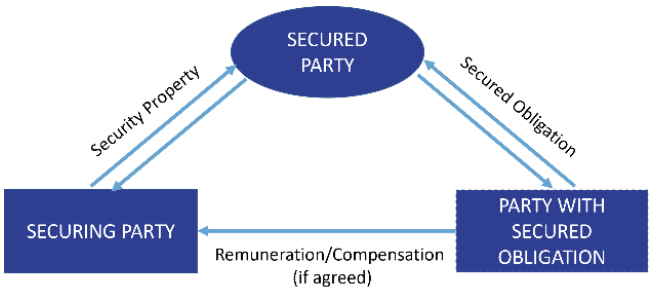
Conversely, a single obligation may be secured with several security assets. In case the debtor defaults and, in the absence of any other agreement between the parties about the succession of exploitation, the secured party will select the order of exploitation.

A single obligation may be secured with several security assets. The security agreement between the securing and secured parties sets out the scope and value of each provided security asset for the underlying obligation. Where there is no such agreement, the secured party may use any of the assets to exploit a mature claim at its discretion.

I. Identity of Security Givers

Another critical factor in securing an obligation or other transaction is identifying the security provider, i.e. the securing party. By law, under a security agreement, the securing party may be a pledger, mortgagor, or deliverer of a performance bond, security deposit, or escrow deposit. It can also be the purchaser in a purchase and sale agreement (**PSA**) in which the ownership right to a property is reserved (retention of title) or a guarantor.

The securing party may provide security for its own or a third party's obligations. However, in any event, the securing party must be the rightful owner of the security asset, except in the case of retention of title or the reservation of ownership rights. Where the property owner and the secured party agree to use the property to secure the obligations of third parties, the regulations on pledges or mortgages apply. The latter's structure can be twofold: Either the asset owner and the secured party enter into a security agreement, or both parties enter into an agreement with the beneficiary of the security agreement.



II. Challenges of the Security Law

Vietnamese law has recognised secured transactions for decades. At the same time, the local legal system has continuously updated its regulations and guidance governing these transactions. As security transactions are generally associated with administrative procedures on statutory or contractual form and enforcement, legislators have focused on simplifying procedures and enforcement. Amongst these developments, Decree 21/2021/ND-CP (**Decree 21**) forms one of the most recent, that came into force on 15 May 2021.[1] This new regulation is a significant step towards bringing the legislation on security transactions to the next level of maturity.

[1] Read our update New Decree on Security for Performance of Obligations.

III. Legal Framework (the How)

1. General

Vietnamese security mechanisms can be divided into two major groups: possessory and non-possessory security obligations. As the name suggests, a possessory security is held by the obligee until the secured obligation is fulfilled. Whereas, with a non-possessory security, the securing party (also referred to as the "obligor" or "security giver") usually holds the collateral property and must only surrender it to the secured party in case of the main debtor's default. Non-possessory security is primarily applied to immovable assets and other properties that must remain under professional operation by the obligor (such as aircraft and sea vessels). Movable properties customarily fall under possessory security.

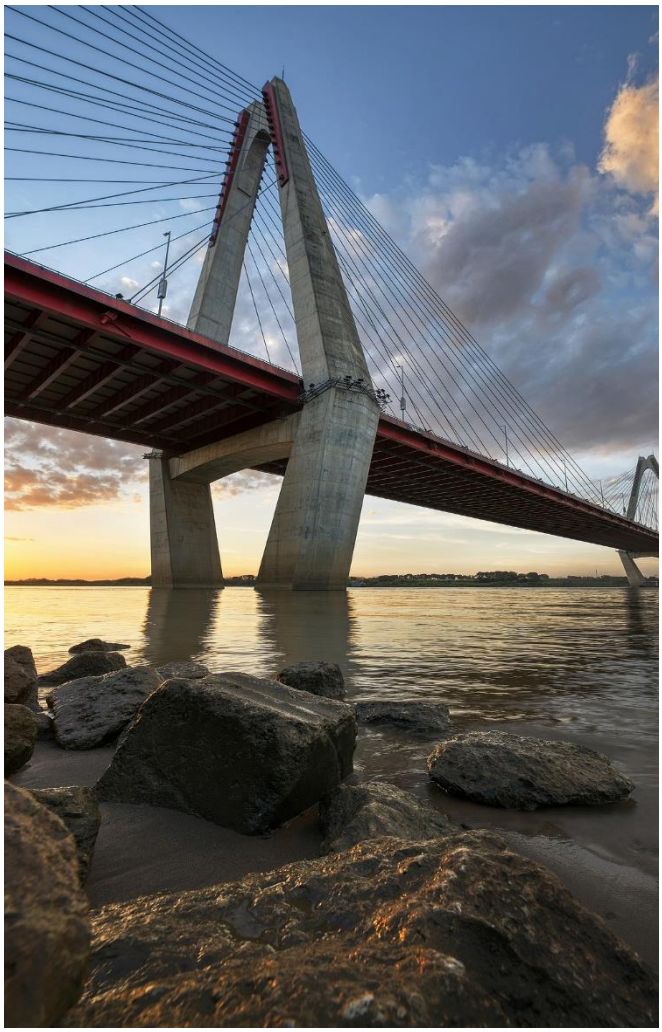
Certain Vietnamese courts have already recognised the legitimacy and enforcement of possessory security over immovable property such as a pledge of land. Vietnamese legislators later codified this in the 2015 Civil Code (**CC**). Accordingly, in general, possessory security over immovable property may be subject to implications that are, in essence, the same as those applicable to non-possessory security. However, the security asset may be held by the obligee directly or by way of a third party delegated to manage the security property under an additional agreement.

The next sections provide an overview of the most commonly used security methods under Vietnamese law. However, the terminology is not the defining factor for the nature of a security agreement. The interpretation and nature of a security agreement, and its underlying mechanism, are always determined by substance rather than name.

2. Possessory Security

2.1 Possession and Ownership in Vietnamese Law

In principle, Vietnamese civil law and language distinguishes between possession and ownership (e.g., Art 158 CC). Property may be possessed by its owner as a part of the ownership right (VN: *chiếm hữu*). Property can also be possessed without holding an ownership right to the asset (VN: *nắm giữ*). In security constellations, ownership and possession may each be



For instance, a PSA obliges the seller (owner) to transfer ownership of the sold asset to the buyer. If the asset is currently in possession of a third party (with or without the consent of the owner), possession of the asset may be transferred to the buyer by such a third party. The transfer of ownership and property are therefore separate and mutually independent. The transfer of each of them to another party requires a separate transaction and may serve different commercial, legal, or practical purposes.

2.2 Pledge

2.2.1 Possession of Collateral

The collateral property is owned by the securing party, the pledgor, and delivered to the secured party, the pledgee, as security for the performance of an obligation.

This delivery may consist of the handover by the pledgor to either the pledgee or a third party retaining

the collateral. The pledgee may also decide to keep the collateral at its place of origin or another location.

2.2.2 Rights to Collateral

The pledgor must inform the pledgee of any third-person rights with respect to the collateral. In case the pledgor fails to provide this, the pledgee shall have the right to (i) cancel the security contract and demand compensation for loss and damage, or (ii) maintain the contract and agree on the rights of the third person to the collateral.

The pledgee is not allowed to sell, exchange, or transfer the collateral. Nor can they use it as security for the performance of another obligation. Unless otherwise agreed, this prohibition includes the lease or exploitation of the benefits or income derived from the collateral.



2.2.3 Risks to Collateral

The pledgee shall bear the risks during the term of security. In particular, the pledgee must maintain and preserve the collateral. If the collateral is lost or damaged, the pledgee must provide compensation upon the pledgor's request. The pledgor shall pay reasonable expenses for taking care of the collateral, unless otherwise agreed.

If the collateral's value is subject to fluctuations, a pledgee in possession of the asset must inform and request the pledgor to advise a remedy within a reasonable period. If the pledgor fails to respond within this period, the pledgee will be entitled to adopt necessary preventive measures at its discretion.

2.3 Performance Bond or Security Deposit

2.3.1 Possession of Collateral

If the collateral comes in the shape of a performance bond or security deposit, it must be denominated as a sum of money, precious metals, gemstones, or other valuable objects.

In performance bonds, these are delivered by the depositor to the recipient of the performance bond for a period of time defined in the security agreement. When a predefined event happens, the performance bond property will be returned to the depositor or deducted from the amount of a remaining monetary obligation. If the depositor defaults, the performance bond property will belong to the recipient of the bond. If the recipient defaults, it must return the performance bond property and pay an amount equivalent to the value of the property to the depositor, unless otherwise agreed.

2.3.2 Security deposits

These are typical for lease agreements. Assets that are subject to such an agreement are delivered by the lessee of a moveable property to its lessor for a period of time as security for the return of the leased property.

If the leased property is returned, the lessee is entitled to recover the property used as a security deposit after settling open payments. If the lessee does not return the leased property, the lessor is entitled to reclaim it. If the leased property has been lost or destroyed – and can, therefore, not be returned – the security deposit property shall belong to the lessor.

2.3.3 Rights to Collateral

The depositor in the performance bond – or the lessee in the security deposit – is not allowed to exploit, use, or establish any civil transactions using the performance bond or security deposit property without the prior consent of the recipient.

In case of a default by the depositor or the lessee, the defaulting party will conduct the registrations required by law for the recipient of the performance bond or security deposit to acquire the ownership rights.

2.3.4 Risk Allocation

The recipient of the performance bond or security deposit shall maintain and preserve it. Reasonable costs and expenses for this maintenance and preservation will be borne by the depositor or lessee.

3. Right of Retention

A right of retention allows the oblige to remain in legitimate possession of a moveable asset until an underlying obligation has been fully satisfied.

3.1 Rights to Collateral

The obligee is entitled to exploit the benefits and revenue of the retained property subject to the obligor's agreement. The value of this exploitation will be offset against the value of the secured obligation. The obligee is not allowed to transfer or use the retained property without the obligor's consent.

3.2 Risk Allocation

The obligee shall compensate for any loss or damage to the retained property. The obligor shall bear the expenses necessary for the maintenance of the retained property at the obligee's request.

4. Non-possessory Security

4.1 Mortgage

4.1.1 Possession of Collateral

To mortgage a property also means using it as security for the performance of a (monetary) obligation to the mortgagee. It does not include the transfer of title to this property. Unlike other legal systems, Vietnamese law does not limit mortgages to immovable property (i.e., real estate). The mortgaged property usually remains in the mortgagor's possession. The parties may also agree to deliver the mortgaged property to a third person for retention.

4.1.2 Rights to Collateral

If a mortgaged property is insured, the insurer will pay the insured sum directly to the mortgagee if an insured event occurs, provided that the mortgagee has notified the insurer of the mortgage. If the mortgagee fails to do so, the insurer will pay the insured sum in accordance with the insurance contract. The mortgagor will then be obliged to forward the payment to the mortgagee.

The mortgagor must notify the mortgagee of any third-party rights with respect to the mortgaged property. If this notice is not provided, the mortgagee will have the right to (i) cancel the mortgage agreement and demand compensation for loss and damage or (ii) maintain the agreement and agree on the rights of the third party with respect to the mortgaged property.

The mortgagor is entitled to exploit the benefits and revenues derived from the mortgaged property, except where the benefits and income are an integral part of the mortgaged property. The mortgagor may also lease or lend the mortgaged property, provided that the lessee or the borrower and the mortgagee are informed.

The mortgagor has the right to sell, replace, or exchange mortgaged property as a matter of rotation through its regular production and business process. In this case, the mortgaged property comprises the right to demand that a purchaser of these goods pay money directly to the mortgagee, including all assets formed from the proceeds or other derived assets. When a mortgagor commits a warehouse to a mortgage, the mortgagor may substitute goods in the warehouse. However, he must ensure that the aggregate value of these goods never drops beneath an agreed value threshold.

The obligee may retain documents relating to the mortgaged property as agreed between the parties, unless otherwise provided by law.

4.1.3 Risk Allocation

The mortgagor will be responsible for the maintenance and preservation of the mortgaged property. If the property is in danger of depreciating due to its

exploitation, the mortgagor must take necessary remedial measures. This may include ceasing the exploitation of the property. If the mortgaged property is damaged, the mortgagor must conduct repairs or replace the asset with another asset of equivalent value within a reasonable period.

4.2 Escrow Deposit

4.2.1 Possession of Collateral

Under an escrow deposit, the collateral can be a sum of money, precious metals, gemstones, or other valuables. The obligor deposits these assets into an escrow account at a credit institution. If the obligor defaults, the obligee is entitled to compensation for any loss or damage incurred from the bank after deduction of bank service charges.

4.2.2 Rights to Collateral

The rights and duties of the parties to an escrow agreement for security purposes are subject to negotiation between the parties and the selected credit institution.

4.2.3 Risks Allocation

Risk allocation also forms part of the case-by-case agreement of the parties with the credit institution chosen to hold the assets in escrow.

4.3 Reservation of Ownership

4.3.1 Possession of Collateral

Subject to a PSA, the seller may reserve the ownership right to the property until the buyer makes full payment. If the buyer fails to do so, the seller (who is still the owner of the asset) has the right to reclaim possession of the sold asset from the defaulting buyer. In this case, the seller shall return any amount of money paid by the buyer after deducting the value of wear and tear resulting from the buyer's (interim) use and possession of the asset.

4.3.2 Rights to Collateral

The buyer is entitled to use the property and enjoy its benefits and revenues during the effective reservation of ownership.

4.3.3 Risks to Collateral

Unless otherwise agreed, the mortgagor shall bear all risks concerning the property during the reservation of ownership. The seller shall have the right to demand compensation for loss and damage caused to the property by the buyer through possession and use.

If the guaranteed obligation is a future obligation, the scope of the guarantee is limited to the guarantor's death or the termination of the respective legal entity.

4.4 Guarantee

4.4.1 Possession of Collateral

A guarantee is an undertaking between three parties. It contains a commitment to perform an obligation on behalf of an obligor who fails to perform the secured obligation. The obligee must inform the guarantor of such a failure if and when it occurs.

The guarantee may secure an obligation in whole or in part. If the secured obligation is a debt payment, it shall include interest on the principal, penalties, compensation for any loss or damage, and interest on late payment. Under Vietnamese regulations, taking out security over a property is also an adequate and enforceable type of guarantee.



4.4.2 Rights to Collateral

If the obligor fails to perform the secured obligation, typically, the guarantor must do so instead. If the guarantor also fails to perform the guaranteed obligation, the obligee is entitled to claim the value of the obligation from the guarantor and compensation for any incurred loss or damage.

4.4.3 Risk Allocation

In a guarantee agreement, the guarantor bears the risk of non-performance. If the principal obligor defaults, the guarantor must step in to perform in his place or compensate the obligee for any failure to do so.

5. Other Relevant Laws

In addition to the general laws described above, a security transaction can also be subject to additional rules specific to either the type of asset chosen for security or the parties to the transaction. For instance, while real estate (i.e. land) can be subject to security agreements, the provisions of the Law on Land require specific attention. A security agreement over a residential property can be further subject to the Law on Residential Housing. If a residential facility has been developed by a company in the form of an investment project, the parties should also consider the Law on Enterprises, Law on Investment, and Law on Real Estate Business.

The specifics of mandatory security regulations can, thus, vary on a case-by-case basis. In particular, they might include the Law on Securities and Law on Foreign Exchange when offering secured bonds. It is crucial to understand the mechanism of each security agreement and ascertain that it contains all required covenants. Only then can it provide adequate security for the interest of the creditor.

6. Offshore Securities for Vietnamese Entities

Vietnamese law does not govern offshore securities for Vietnamese entities. To address this, the Vietnam Chamber of Commerce and Industry has previously said that lawmakers should supplement their previous draft of Decree 21. It proposed a provision allowing non-residents to use their properties located overseas to secure (i) their obligations in Vietnam and (ii) obligations of a third-party resident. However, the draft Decree 21 was not amended to contain such regulations. Offshore securities, therefore, should only be established after careful consideration of associated risks.



IV. Types of Collateral *(the What)*

A security property may be either current or future property from the perspective of the date of the security agreement. All security collateral must be identifiable. It is, therefore, preferable to make a security interest over individual assets rather than over a whole business. The value of a security property may be less, equal to, or greater than the value of the underlying obligation.

In Vietnam, the most commonly used properties for collateral purposes can be classified into three groups:

- **real estate** consisting of land-use rights and assets attached to land;
- **asset rights** consisting of securities or other asset rights with commercialised monetary value; and
- **movable assets** which form the majority of available assets.

The graphic below provides a list of properties that are explicitly recognised in law as security assets:

Real Estate

- Land use rights;
- Construction facilities, such as houses, apartments and other facilities constructed in a residential housing development project, or independent houses constructed in individual land lots;
- Perennial plants, planted forest for production; and
- Other movable objects attached to land as provided by law.

Asset Rights

- Deposit balance at a credit institution;
- Securities, such as shares or capital contribution portions or derived income, bonds, investment fund certificates, securities rights, share purchase rights, and depositary receipts;
- Asset rights formed from a contract, such as the right to demand payment of a debt or receivables; the right to exploit, manage an investment project; the right to lease, sublease; the right to enjoy benefits, income and other interests; the right to compensation of damage;
- Asset rights deriving from intellectual property rights, information technology, science and technology activities;
- The rights to exploit natural resources; and
- Investment projects and their assets.

Movable Assets

- Goods rotating through the production and business process;
- Warehouses;
- Aircrafts and sea vessels; and
- Other movable assets.

Identifying the correct type of security property is the key to determining which conditions and restrictions may apply. In particular, public registration and other publicity requirements should be closely observed to enhance the validity and enforcement of a security interest. Additionally, and irrespective of the type of security property, a guarantee securing the payment of a foreign loan must also be registered with the State Bank of Vietnam (**SBV**).

Below, we set out some typical issues that securing parties must consider when using specific types of assets to secure an obligation.

1. Real Estate

In Vietnam, there is no private land ownership. Land belongs to the people and can only be obtained for use under so-called land-use rights (**LuRs**). Legally speaking, land itself cannot be used to secure the performance of an obligation. The ownership of LuRs, therefore, is used as a substitute for traditional land property in these transactions.

Unlike land, other forms of real estate are not subject to these restrictions. They can be owned, possessed, transferred and are therefore a commercialized asset that can be used as security. While the CC recognizes the pledge and other security methods over real estate, other laws like the Law on Land (2013), the Law on Real Estate Business (2014), and the Law on Residential Housing (2014) mention the mortgage as only available security tool for real estate. That said, in some cases (e.g., hire purchase of a construction facility), owners are entitled to reserve their ownership over the facility until full payment under the 2014 Law on Real Estate Business.

Typical issues associated with security over real estate include the following.

1.1 General Conditions

The mortgagor must possess the real estate as generally certified on a LuR certificate while the mortgagee must exercise his rights during the land-use term and/or possession term of the real estate.

The real estate must not be in dispute and not seized to guarantee the enforcement of a judgment. The mortgage of a residential housing development project must satisfy conditions regarding the project documentation and performance, while the mortgage of assets attached to land located at an airport must be approved by the Ministry of Transport.

1.2 Typical Restrictions

Foreign-invested enterprises cannot be a mortgagee of real estate unless they are a licensed credit institution in Vietnam. Real estate can only be mortgaged to a licensed credit institution in Vietnam in case of ownership of an economic organisation or an overseas Vietnamese investor where residential houses and buildings are mortgaged for funding, construction, or purchase thereof, and it is attached to leased land located at an airport.

LuRs over land situated at an airport or used by a religious establishment or community of citizens, cannot be mortgaged. Important to note is that future LuRs cannot serve as security. LuRs can only be mortgaged if the respective fee or land lease has been paid as a one-off for the entire lease term. Finally, the mortgagee of a residential house must be individually entitled to own residential housing.

1.3 Registration and Publicity Requirements

The mortgage of LuRs and other real estate may have to be registered with the land registration agency. If registration is required, mortgages shall only take effect once they have been entered into the respective cadastral register. Mortgages over future assets attached to land and reservation of ownership in case of sale and purchase of assets attached to land may be registered upon request with the land registration agency to secure its effect against third parties. Under the 2015 Civil Code, where an immovable property – i.e. land or assets attached to land – is the subject matter of a pledge, this pledge may also be registered to secure its enforceability against third parties as of the time of registration, and the mortgage of assets and rights to trade construction facilities or infrastructure systems of a public-private partnership (**PPP**) project must not affect the objectives, scales, technical criteria, schedule of implementation of the project, or other conditions agreed in the project agreement.

2. Asset Rights

Vietnamese law defines asset rights as rights that can be evaluated in terms of money. They include rights in respect of intellectual property rights, land-use rights, and other asset rights. For ease of reference, the list below outlines typical issues that should be considered when establishing security over asset rights.

2.1 General Conditions

The information describing an asset right in the security agreement must reflect the name and legal ground of the asset right. Deposit balances at a credit institution, valuable papers, or securities must be described in accordance with the relevant laws, and investment projects which must be licensed under a certificate, the decision of a competent authority, and/or another legal ground must be described as per that legal ground.

2.2 Typical Restrictions

A pledge or mortgage of securities does not automatically limit the rights of the pledgor or the mortgagor as holder of the securities, e.g., their right to vote or receive dividends, and a security interest over securities may be subject to the charter of their issuer. If an overseas secured party enforces share security, whether by taking ownership of the shares themselves or by sale to a foreign third-party purchaser, the enforcement may further be subject to foreign ownership limitation(s) applicable to the securities issuer.

2.3 Registration and Publicity Requirements

Whenever securities that shall be used as collateral have been centrally registered with the Vietnam Securities Depository and Clearing Corporation (**VSDC**) any security agreements regarding such assets must

also be recorded with the same authority. Other securities may be subject to registration at the National Registration Agency for Secured Transactions (**NRAST**) under the Ministry of Justice. In the former case, the securities shall be frozen at the VSDC during the term of the registration. When the central registration of the securities is liquidated, the registration of the security interest shall be removed.

Mortgaging the right to demand payment of debts or receivables does not require the consent of the debtor. However, the mortgagee must notify the debtor before the obligation matures to enable him to select the right recipient. The law does not require acknowledgement of this notification. That said, the mortgagee has an interest in obtaining such acknowledgement because it may serve as evidence against the debtor in case of default. Similarly, a secured party over a deposit balance is not required to obtain consent or acknowledgement from the credit institution. Nevertheless, for the same reasons described above, it is advisable to obtain the acknowledgement for evidential purposes.

3. Movable Assets

Movable assets can be sub-categorised into registered and non-registered assets.

3.1 General Conditions

If required to be registered by law, the description of a movable asset in the security agreement must be consistent with the information stated on the registration certificate. Goods rotating through the production and business process and warehouses may be described under their value or type. The warehouse description must also reflect the address, identification number (if any), or other indicators of warehouse location, and the mortgage over a vessel must receive the hirer's written consent, if the vessel is being hired under a bareboat charter arrangement.

3.2 Typical Restrictions

The mortgagee over an aircraft or vessel is not permitted to keep the original copy of the registration certificate of the mortgaged aircraft or vessel, and the mortgage over a vessel cannot prevent third parties from retaining the vessel to secure their claims in relation to the vessel.

3.3 Registration and Publicity Requirements

Any pledge or mortgage of an aircraft and mortgage of a vessel must be registered with the Civil Aviation Authority of Vietnam or the Seagoing Ship Registration Authority of Vietnam under the Vietnam Maritime Administration (**VMA**), and a mortgage or reservation of ownership over other movable assets may be registered upon request with NRAST, the Civil Aviation Authority of Vietnam, or the Seagoing Ship Registration Authority of Vietnam, as applicable.



V. Security Agreement (the Who)

1. Content

While it is not mandatory for all transactions, security agreements should always be made in writing. In some cases, for example reservation of ownership or if one security asset is used to secure multiple obligations, this is prescribed in law. The mandatory written form also applies to mortgages over LuRs and other real estate, residential houses, seagoing ships, or assets and rights to trade construction facilities or infrastructure systems of a PPP project, and others.

A security agreement may take the shape of either a separate agreement or a security clause in a compound agreement (e.g., the reservation of ownership).

In principle, the parties are free to make their agreements on the security measures within the boundaries of dispositive Vietnamese law, if they are in conformity with the basic principles of Vietnamese civil law, not in breach of conditions for the effectiveness of civil transactions, and not beyond the limitations on the execution of civil rights.

2. Key issues

2.1 Effect of Security Agreement

Vietnamese law prescribes notarization as a condition of validity for certain types of security agreements. These include security agreements with respect to LuRs as well as other real estate and residential housing. Notarisation is also an option for the parties where it is not mandatory.

Notarisation marks the effective date of the security agreement. Where this is not legally required, the security agreement may take effect from the time it is signed, or another time as agreed between the parties.

Where registered, a security interest shall also be enforceable against third parties with claims to the asset after registration. If an obligation falls due under an agreement for the retention of property, the retained property shall permanently remain in the hands of the obligee, in case the obligor fails to perform the obligation.

2.2 Effect Against Third Party

A security interest shall only be enforceable against a third party after the relevant security agreement has entered into force.

The timing of enforceability against a third party depends on (i) whether it is possessory or non-possessory or (ii) registration with the competent authority. Generally, a security interest shall be enforceable against a third person from the time the secured party holds the security property (in the case of possessory security). Non-possessory securities are effective as of the date of registration. The registration date is also the effective date for third-party enforceability.

A non-possessory security (in the form of a mortgage or reservation of ownership) may be enforced against a third party from the time of registration. Meanwhile, possessory security in the form of a pledge, performance bond, or security deposit is enforceable from the time the secured party takes possession of the security property. Registration, whether mandatory or optional, always overrides any other relevant dates or events for enforceability.

Escrow deposits will be enforceable against third parties after their deposit into an escrow account at a credit institution. Meanwhile, retained property is effective against third parties from the date the obligee takes possession of the asset. Security agreements take priority over and remain unaffected by other securities over the same asset that are not enforceable against third parties (e.g., for lack of registration).

Secured rights and obligations are transferable unless otherwise agreed or provided by law. If a secured right is transferred, this transfer will include the respective security right. However, in the case of the transfer of a secured obligation, the security shall terminate unless otherwise agreed.

Generally, the transfer of a secured right does not require the consent of the obligor. However, unless otherwise agreed, a notice of the transfer should be given to the obligor in writing before the performance of the obligation.

For the transfer of a secured obligation, the consent of the obligee must be obtained. When a secured right to demand payment of debts, receivables, or others is sold, assigned, or otherwise transferred (e.g., factoring), the buyer, assignee, or transferee inherits the security. The secured new party must notify the securing party of the change of the secured party before performing the secured obligation.

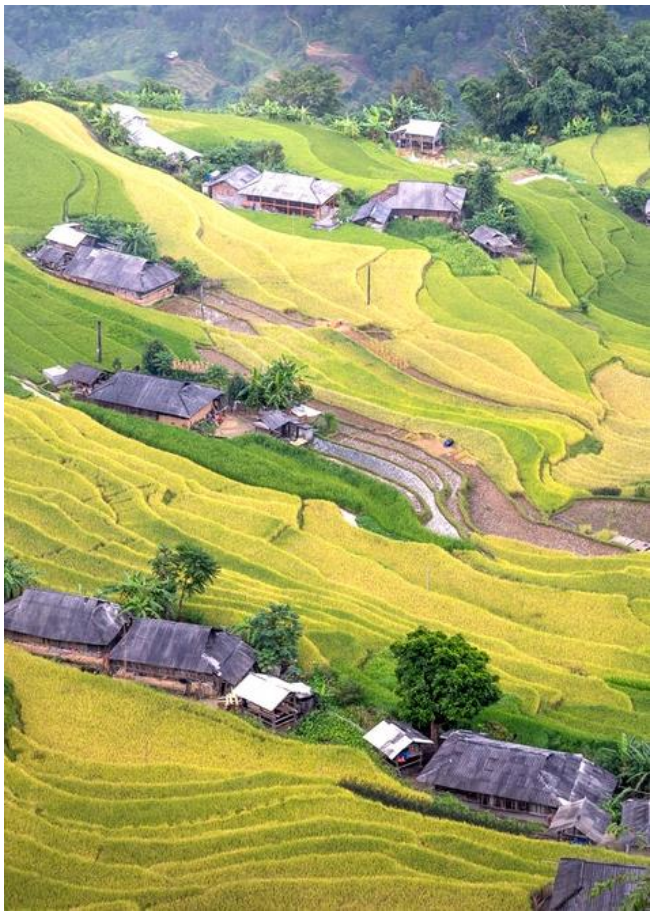
2.3 Termination

Decree 21 distinguishes between the security agreement and the underlying principal obligation. In particular, the nullification, rescission, or unilateral termination of a security agreement shall not automatically terminate the principal obligation. However, if the principal obligation is nullified, rescinded, or unilaterally terminated, the relevant security agreement follows the principal obligation.

3. Practical Perspective for Foreign Lenders and Investors

As a rule for transactions with Vietnamese obligors, the provided collateral must remain property of the securing party during the term of the security agreement. Consistent with this proposition, Vietnamese law does not explicitly recognise the assignment of assets by way of security. Nevertheless, the parties of a security agreement may opt to supplement the absence of legal guidance for these constellations by detailed individual agreements with the same effect.

Similar contractual creativity enables foreign investors to obtain mortgages over LuRs or assets attached to land, despite legal restrictions on foreign ownership. A typical way to circumvent the tight land law restrictions is for a foreign investor to appoint an onshore security agent to take security over real estate on its behalf. In practice, for example, this enables foreign lenders to be eligible for thermal BOT projects under Official Letter No. 1604/TTg-KTN issued by the Prime Minister on 12 September 2011.



VI. Enforcement of a Secured Obligation

1. Underlying Claim

If a party wishes to enforce its security right against another party, a notice with the reason for the enforcement of the underlying claim, the underlying asset to be exploited, and the time and location of enforcement shall be given to the securing party, other parties secured with the same asset and the possessor of the collateral.

According to the notice of enforcement, the securing party or the person in possession of the underlying asset must hand over the security property to the secured party. If it fails to do so, the secured party has the right to examine and inspect the underlying asset in order to prevent loss or depreciation. This also entails the right to enforce or request the court to settle the issue. Both the securing party and any third party in possession of the underlying asset must cooperate with and not obstruct the examination and inspection of the asset by the secured party.

The enforcement of security measures with a registration requirement can be launched by the secured party. The enforcing party must also declare the termination of the enforcement procedure by submitting the application for deregistration to the competent registration authority after finishing the enforcement of its claims.

4. Competent Court

Vietnamese law classifies disputes over a secured obligation as civil disputes which are settled by competent civil courts. Commonly, disputes over secured obligations fall under the jurisdiction of district-level People's Courts. However, provincial People's Courts will handle the conflict in the event that one of the disputing parties or the disputed assets are located abroad. Provincial-level courts are also competent if the dispute requires judicial involvement of overseas courts or agencies.

By default, the forum for security disputes is at the respondent's place of residence, work (in case of an individual debtor), or where the respondent is located (in case of an organisation or legal entity). However, the parties may opt to diverge from this to the plaintiff's advantage, subject to their agreement. If a dispute arises about a contractual relation that proposes the performance of obligations in a predefined location, the courts of this location may also have jurisdiction.

Whenever immovable property is in dispute, the forum at the asset's location has sole jurisdiction over the dispute. If the land area used as collateral covers more than one court district, the plaintiff may choose one of the local forums for his claim.

5. Timeline

Generally, a secured party may choose when it wants to enforce a claim by exploitation of a security right, as soon as the conditions of the security agreement are met. If there is no prior agreement as to the enforcement timeline between the parties, the law requires the enforcing party to wait a “reasonable time” before enforcing its claim. This is defined as at least ten days of lead-time for the enforcement against movable property and at least 15 days of lead-time for immovable property. For underlying assets that run the risk of damage or depreciation, the secured party is entitled to immediately enforce a claim subject to prompt notification of all involved parties.

If the collateral is a listed security, a good traded on the commodity stock exchange, or other movable property for which a clear market price can be determined, the secured party is entitled to sell these at the price announced on the respective trading channels, subsequent to informing the securing party and other co-secured parties (if any) before selling. This right can be excluded by mutual agreement.

6. Enforcement of Foreign Awards

A foreign award can only be domestically enforced after it has been recognised by a competent Vietnamese court. This court will then preside over the enforcement procedure and pass judgment on the appropriate enforcement measures.

Normally, the time limit for requesting a court in Vietnam to recognise and enforce a civil judgment or decision of a foreign court is three years from the date the document takes legal effect. The request is made in the form of an application for recognition and enforcement and accompanied by relevant documents. This is done at the Ministry of Justice (**MoJ**) and then transferred to the competent court. This procedure also applies to the recognition and enforcement of foreign arbitral awards in Vietnam.

7. Insolvency Issues

To determine the enforceability of a security right against third-party rights the following applies:

- In case all security measures are effective against a third party, the order of priority shall be determined chronologically;
- In case one security measure is effective against a third party but another is not, the former shall prevail; and
- If all security measures are not enforceable against third parties, the order of priority shall follow the order of their chronology.



Partially secured creditors have the right to file a petition for initiation of bankruptcy proceedings three months after the due date of the secured obligation. If a company files for insolvency, the enforcement of secured debts is satisfied by the funds of the insolvency mass. For secured debts established in advance to the People's Court's acceptance of the petition to initiate bankruptcy proceedings, the respective security will be prioritised except for the case where the collateral is used, or necessary, for the recovery procedure of the company's business. If the value of the designated collateral is insufficient to pay the debt, the remaining debt may be recovered from the liquidation of the enterprise's assets.

Contact for more information

Huyen Pham / Senior Associate
huyen.pham@acsvlegal.com

Leif Schneider / Senior Associate and Head of German Desk
leif@acsvlegal.com

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