



LOAN TRANSACTIONS IN SOUTHEAST ASIA: GETTING THROUGH THE CHALLENGING TIMES

May 2020 Update

INTRODUCTION

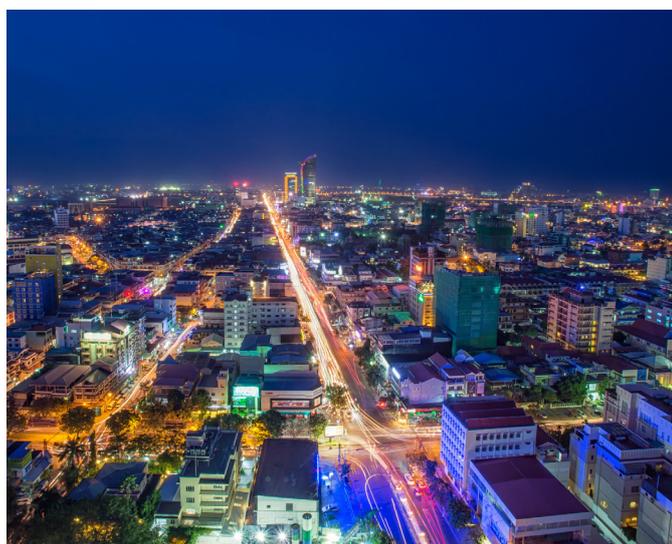
The evolving pandemic has substantial implications on all sectors and forms of business. In this report VDB Loi banking and finance experts are looking in particular detail into possible impact on lending transactions taking into account the local practices and regulatory regime in several jurisdictions in Southeast Asia.

There has been quite a surge in lending activity in the region over the last several years. With a lot of specifics in each country of course, there has been an increase in the number of infrastructure projects financed by loans from development institutions and commercial banks. Many projects have been undergoing the pre-funding and structuring stage. Work was actively performed with respect to the “building bricks” of bankable structures, such as concession contracts, power purchase agreements, offtake and related arrangements.

In relation to many finance transactions parties are now actively discussing the impact that the developing situation has on the borrower and whether any changes are required. Amendments to loan and security documentation need to be made in line with the relevant local requirements and practices, some of which are discussed below.

COUNTRY BY COUNTRY ANALYSIS

CAMBODIA



Current status

Loans represent a major source of funding for developing and expanding businesses, which are the factors contributing to Cambodia’s economic development and poverty reduction. Banks and financial institutions (including microfinance institutions) (“**Institutions**”) have been providing credit to the major sectors of the economy: retail trade, wholesale trade, agriculture, forestry and fisheries, construction, personal essentials, real estate activities, manufacturing, hotels and restaurants. With respect to other sectors such as energy, mining, telecommunication and infrastructure, the projects are frequently financed by the offshore financial institutions.

Relief measures

In response to the current economic situation caused by the COVID-19 pandemic, and to relieve the burden on borrowers facing financial hardship, the National Bank of Cambodia (“**NBC**”), which is a sole regulator over banking sector in Cambodia, issued Circular No. T7.020.001 (“**NBC Circular**”) directing the Institutions in Cambodia to be flexible with

regard to debt repayment by offering loan restructuring for customers in four priority sectors: (1) tourism (hotels, guesthouse, restaurants, as well as food and beverage, and other supporting services); (2) garment manufacturing; (3) construction (only for loans for first-time home and shop construction, and first-time home purchase); and (4) transportation (particularly for taxi drivers and tuk-tuk drivers) and logistics. The Circular appears to apply to local loan only and not to apply to loans in other sectors such as real estate (other than the construction mentioned above), agriculture, energy, infrastructure, or telecommunication, etc.

The NBC Circular specified a number of measures for Institutions to consider in their loan restructuring:

1. Reduction of the principal amount
2. Reduction of the interest rate to a rate lower than in the original loan agreement
3. Extension of time for the loan principal or interest repayment, or interest capitalization
4. Extension of maturity
5. Addition of and/or change of joint borrower or guarantor (if any)
6. Change in loan type from an installment loan to a bullet loan
7. Waiver of or reduction of collateral requirement
8. Reduction of contract conditions
9. Provision of a grace period, which could last for six months counting from the effective date of the new contract.

The NBC also issued Letter No B7-020-657 on 20 April 2020 to the Institutions to urge them to apply further exemptions to their customers, such as service fee reductions related to loan and/or exemptions on penalties from the date of the letter until the end of December 2020.

In addition, in order to minimize the negative impact on the financial sector due to the outbreak of COVID-19, the NBC

provided certain recommendations to the Institutions. The Institutions are encouraged to actively continue providing loans to priority sectors, including SMEs and business activities relating to hotel/guest house tourism, construction, and garment/footwear; exercising flexibility in dealing with issues about loan repayment of customers affected by the COVID-19; and continue to observe the COVID-19 outbreak and take necessary actions to protect the employees of the Institutions and their clients to continue the reliability and sustainability of banking services.

The NBC also put in place certain measures through its Announcement No. B13-020-002 to minimize the economic impact of the COVID-19 pandemic for the Institutions themselves. These include:

- Postponement in requiring the Institutions to meet the capital conservation buffer of 50%¹.
- Reduction of the minimum interest rate of liquidity-providing collateralized operations by 0.5% for all maturities.
- Reduction of the interest rate on negotiable certificate of deposit in Khmer Riel and US dollars within a reasonable limit.
- Reduction of the reserve requirement rate from 8% for Khmer Riel and 12.5% for foreign currency to 7% for both Khmer Riel and foreign currency for a period of six months starting from April 2020.
- Reduction of the liquidity coverage ratio within a reasonable limit.

The Royal Government of Cambodia also considered to disburse the reserve budget to help banking and financial sector affected by the COVID-19 to enable the Institutions to pass-on the low interest loan to their customers. However, no specific amount has yet been disclosed by the government for such help for the banking sector.

Implications for loan documentation and possible developments

Standard of documentation. Currently loan documentation in Cambodia (for both onshore and offshore deals) varies from one institution to another. There is no universally applied standard loan documentation prescribed for application by banks and financial institutions. There is no restriction on the use of language and governing law of the loan agreement. Agreement can be made either in Khmer or English. For cross-border loans, documentation is generally made in English and governed by law of another jurisdiction other than Cambodian law.

Amendments; Regulatory approvals and formalities. If a loan is restructured and such restructuring affects repayment terms, loan maturity or any other terms, the loan agreement

and the related documents must be amended accordingly. Unlike many countries, Cambodian law provides a lot of flexibility with respect to the terms of loan transactions. There is no requirement of approval from the NBC in case of the implementation of the loan or its amendments. The loan and its amendment can be made between the parties to the loan agreement and subject to the compliance with the Cambodian law. There is no stamp duty applicable to loans or their amendments either.

Security. Compositions of the security package varies from project to project. Among other things, in Cambodia foreign lenders may take security over immovable property without local security agent structure.

The package may include security over (i) project agreement(s); (ii) land or long term lease security in the form of a hypothec; (iii) account receivables over operational / project accounts; (iv) security over plant and equipment; (v) security over the operating entity itself (by way of a share pledge); (vi) assignment of insurances; and (vii) third party guarantees.

Unlike many other countries, there are no specific taxes involved in the creation of security in Cambodia.

In order to be perfected against third parties, amendment to terms of the loan, such as loan tenure, interest rate or penalty rate, may be required to be filed in accordance with procedures applicable to the relevant security interest. Note that, for any movable security interest filed with the Secured Transactions Filing Office of the Ministry of Commerce (“**STFO**”) which is an online registration platform, the amendment must be filed with the STFO. For security interests over immovables, according to the current procedures and practices, only an amendment to principal amount, interest rate, loan tenure, penalty rate, or other registered information, if any, could be registered with the land office.

Enforcement and Dispute resolution. Typically cross-border finance transactions would include international arbitration as a primary dispute resolution mechanism (international arbitral awards are enforceable in Cambodia as the country is a signatory to the New York Convention on Recognition and Enforcement of Arbitral Awards). To date there are just a handful of cases relating to enforcement of foreign arbitral awards with large-scale projects in Cambodia. The Court of Appeals has the central jurisdiction in that regard. As for securing a stay of proceedings before a Cambodian court due to the existence of an arbitration clause, our experience has been rather varied. Often it comes down to the circumstances of the case whether a Cambodian court is willing to stay proceedings.

¹ In 2018, the NBC required the Institutions to have a capital conservation buffer in place in order to ensure that the Institutions can resist capital decrease when there are any losses or in order to strengthen the capital base for any losses, prevent capital decreases below minimum capital levels, and to reduce risks emanating from the relationship between the financial sector and economic cycle. The NBC required the Institutions to implement the capital conservation buffer, at least 50% of capital buffer to be added before 1 January 2019 and fully implement before 1 January 2020.



Current Status

Companies in the energy, infrastructure and finance sectors have been the most active borrowers in the Lao PDR. Most of the finance transactions are offshore loans from overseas banks and financial institutions. However, there is also a small portion of the loans from domestic banks.

Most of the loans are secured by the projects' assets and are guaranteed by the project companies' parent companies (the shareholders). Loan agreements are typically expressed to be governed by foreign law (except for purely domestic transactions).

The Government of the Lao PDR has already imposed measures aimed at prevention of the spread of COVID-19. The Bank of the Lao PDR issued the Decision No. 238/BOL inviting domestic banks and financial institutions to restructure the existing loans by extending the deadline for repayment and reducing the interest rates and grant new loans to the existing borrowers and new borrowers with the purpose to enable all business operators in the country to continue operations during the COVID-19 pandemic. The Decision is not mandatory, and it is up to the bank whether to take actions described therein. The Bank of the Lao PDR will grant certain exemptions to the banks that comply with its instruction, such as an exemption from implementation of the Bank of the Lao PDR's Decision No. 512/BOL dated 29 June 2018 on Classification of Debt Tiers and Provisions (on the aspects relating to classification of bad debts and the permitted number of restructurings per borrower).

Implications on loan documentation and possible developments

Standard of documentation. Most of loan agreements between Lao borrowers and offshore lenders were executed based on relevant templates followed by the offshore lenders in their practice. These are predominantly based on English-law forms. Changes, to the extent agreed by the parties, would need to be documented by relevant amendment agreements.

Amendments; regulatory approvals and formalities. In the Lao PDR, the Bank of the Lao PDR is the regulatory body that manages the inflow and outflow of foreign currencies

at macro level. Therefore, every time that the parties to an offshore loan agreement amend the interest rate and/or the loan repayment schedule, the Lao borrower must notify the Bank of the Lao PDR by providing it with a copy of the amendment/memorandum. Moreover, if the amendment increases the interest rate and/or extends the loan tenure, the Lao borrower must apply for a new authorization from the Bank of the Lao PDR.

The existing loan agreement and any of its amendment should be translated into Lao language and then submitted to the Notary Public Office for notarization. The cost of notarization is however not substantial.

Lenders would typically require such notarization of a loan agreement and its amendments. Otherwise they may be not admitted by the Lao courts as evidence when the matter or a foreign court's judgement in respect of the matter is submitted to the Lao courts for adjudication or review before enforcement in the Lao PDR.

Notarization of a loan agreement and its amendment requires cooperation of the Lao borrower. The Lao borrower or its attorney must be present at the Notary Public Office to confirm its execution of the loan agreement and the amendment. From lender's perspective, notarization should be procured upon signing of the loan agreement or an amendment agreement without delays.

Security. There is usually no need to revise registration records relating to the security for the loan, if only the interest rate and the loan repayment schedule have been revised, and if there are no changes in the security itself.

It should be noted, that registration of a lender's security interests in movable assets is valid for five years only and must be renewed at least three months prior to its expiry.

Registration of a lender's security interests in movable assets can be done on paper, online, or both. If the initial registration was done online, renewal can be done online too.

Registration of security interests over immovable assets is done at:

1. the Land Department of the Ministry of Natural Resources and Environment, if the security party is a concession project company, or
2. the office of the Natural Resources and Environment of the province where the immovable asset is located, if the security party is not a concession project company.

Unlike the registration of security interests in movable assets, the registration of security interests in immovable assets cannot be done online, and requires paper submissions. Therefore, the procedure often takes longer time and is more difficult than the registration of security interests over movable assets. Such registration of security interests is valid until the security is discharged.



Current status

Volumes of both international and local lending transactions have been increasing over the last several years. A lot of borrowers are companies in the energy and infrastructure sectors, telecom and manufacturing. In addition, particularly active are microfinance institutions that primarily borrow to expand their operations and areas of coverage.

The pool of lenders is very diverse and includes Myanmar banks and several large commercial banks (primarily from various jurisdictions in Asia). A very substantial share is also represented by development finance institutions and funds from essentially all over the world.

Implications and possible developments

As is common in turbulent times, implications on the existing loan transactions will depend on the degree of impact that the ongoing situation will have on particular borrower's cash flows and financial model.

Standard of documentation. Myanmar lending market has been developing very rapidly recently. International lending only started in 2012, with the Foreign Exchange Management Law allowing offshore loans on a case by case basis, to be approved by the Central Bank of Myanmar. Development lenders (including IFC, ADB and FMO) were the first to move. Documentation in most cross-border financings was based on amended versions of the APLMA templates or standard templates of the development lenders. The first limited-recourse project loans related to the financing telecom infrastructure in 2014. From 2015, particularly after the first offshore banks were allowed to receive branch licenses, foreign commercial banks also started financing corporates in Myanmar.

Both in international deals and large local transactions, loan documentation is now mainly following LMA/APLMA-consistent templates. Accordingly, the usual default triggers and their implications need to be considered by the parties.

Need for amendment; regulatory approvals and formalities.

It may not be excluded that some loan agreements would need to be amended with respect to repayment schedules, financial covenants or other terms. There are several local regulatory requirements that would be relevant when implementing such type of amendments.

The important one is the coordination with the Central Bank of Myanmar and, in some cases depending on the industry in which the borrower operates, other governmental authorities, such as Myanmar Investment Commission (for holders of MIC investment permits) and Financial Regulatory Department (for microfinance institutions).

Borrowers would need to arrange for stamping of the amendment documentation, however, so far the practice of the authorities has been not to require substantial duties for amendment agreements.

In practice, applications for sign-offs or approvals from regulators often represent a time consuming exercise, requiring paper filing and sometimes even in-person meetings and presentations. As more regulations have been implemented in the country prescribing various social distancing measures, the possibilities of making such filings and having meetings with officials have sometimes become more complicated. However, there have been already some signs of authorities switching more into online filings procedures, and hopefully this practice will develop further.

Security. There have been substantial improvements in terms of procedures to complete perfection steps with respect to most of the types of security in Myanmar. Major filings can now be done online with the "Myco" digital platform. Chargors would also typically be required to make a record of security in their internal books.

However, with respect to some forms of security over land, registration with local ORDs (office of registration of deeds) still presents a substantial practical challenge, in particular for complex cross-border transactions. It is likely that in the current circumstances availability of this registration route will become even further restricted. The industry has in practice mostly sought secured interests that do not immediately require individual registration with land authorities due to the logistical complexities. In practice, parties often encounter uncertainties and questions about the need to re-register secured interests in the case of refinancing and changes to the terms or the lender group, due to unclear laws and regulations.

Enforcement and dispute resolution. Most if not all international loans in Myanmar provide in foreign arbitration. Myanmar is a signatory to the New York Convention on Recognition and Enforcement of Arbitral Awards, and it has introduced a new UNCITRAL Model Law-type act in 2016. But in practice parties continue to encounter problems with obtaining a stay of proceedings based on an arbitration clause, for a variety of reasons. The requests for enforcing foreign awards are presently pending before the Myanmar courts, and these proceedings are not yet completed at this time.

Complicated scenarios. Myanmar has just (in spring 2020) adopted a modern insolvency law that was developed with the support of best international experts. However obviously there is literally no practice of its testing by any market participants and, more importantly, by courts. The pool of qualified administrators and their expertise are yet to be formed also. In these circumstances, it can be expected that parties would more likely aim to reach consensual solutions through amendments and possibly extensions of the existing terms.



Current Status

Particular focus has been recently made in Vietnam on investments in the energy and infrastructure sectors. These are traditionally financed through various official development assistance (ODA) programs from other countries.

However, given the financing needs, more projects have been structured with participation of foreign investors and on the basis of public-private partnership (PPP) models, including the build-operate-transfer (BOT), build-transfer-operate (BTO) and build-transfer (BT) investment forms.

Over 2017 – 2020 legal framework for projects in solar energy has been upgraded substantially, and this sector gets particular attention from investors and financiers.

A lot of offshore loans from foreign lenders have also been granted to borrowers in the manufacturing, real estate development, telecommunication and media sectors.

There is also (albeit comparably smaller) share of domestic financings provided by local banks.

For certain industries (such as aviation, telecom, mining) government guarantee on loan obligations were provided. However, the majority of the loans are secured by the projects' assets, and/or guaranteed by the project companies' shareholders.

So far foreign lenders have not been allowed to take a security interest in land use right and other immovable assets. Mortgages over the land use rights and other immovable assets could only be provided to credit institutions licensed to operate in Vietnam.

Implications and possible developments

According to the updated data as published by the State Bank of Vietnam on 18th March 2020, prior to 4th March 2020, there were 23 credit institutions reporting to the State Bank of Vietnam (SBV), and estimated VND 926 trillion of outstanding loans affected by Covid-19 epidemic, accounting for 14.27% of the total outstanding loans of these 23 credit institutions. The industries indicated as likely to be significantly influenced were agriculture, forestry & fisheries, businesses with import and export activities, hospitality industry, food

and catering services, beverages, transportation, garment & textiles, footwear, electronics, refrigeration, oil and gas, travel and education.

In this regard, in order to support those borrowers affected by Covid-19 epidemic, the Governor of the State Bank of Vietnam (SBV) issued Circular No. 01/2020/TT-NHNN dated March 13, 2020 (Circular 01), directing the credit institutions, the foreign bank branches to restructure the repayment periods, waive and reduce the interest and fees, maintain the debt classifications. However, the Circular 01 appears to be applicable to onshore loans only.

The credit institutions and the foreign bank branches were allowed to maintain the classified debt groups in accordance with the provisions of the SBV at the closest time to January 23, 2020 with regard to the debt balances subject to loan repayment rescheduling, interest & fee waiver and reduction.

Regulatory approvals and formalities. In Vietnam, the SBV is the regulatory body that manages the inflow and outflow of foreign currencies at macro level.

Vietnamese law allows foreign lenders to extend foreign loans to companies incorporated in Vietnam subject to certain conditions and requirements, including that:

1. The loan shall be used for implementation of a “business and production plan” or “investment project”; or
2. The loan is for restructuring of the foreign loan debt of the borrower without increasing the costs of borrowing.

Medium- or long-term loans for projects that are licensed under an investment certificate or investment registration certificate (IRC), the balance of the foreign loan, together with all other outstanding medium- and long-term foreign and domestic loans, must not exceed the difference between the total investment capital and the equity capital recorded in the relevant IRC.

In case, there is an excess of the total investment capital compared to those registered under the IRC, the borrower must first go through the amendment of the IRC to increase the total investment capital before loan registration process. The process takes approximately 2-3 weeks. The submission package includes business plan, latest financial position and supporting documents for the new investment capital.

A medium- or long-term foreign loan must be registered with the SBV prior to drawdown and the registration is essentially an approval process. Short-term loans are, however, not subject to this registration requirement.

If the parties decide to introduce changes to the details of the loans recorded in the foreign loan registration certificate issued by the SBV, such changes will have to be re-registered by the borrower with the SBV, and SBV (if approval is granted) would issue a certificate evidencing the changes.

The existing loan agreement and any of its amendment should be translated into Vietnamese for submission.

Other project agreements generally do not need to be registered or filed with any government authority, and do not need to comply with any local formality in order to be valid or enforceable, except for specifically regulated instruments. For example, power purchase agreements in particular sectors (e.g, a solar or wind power project) need to comply with certain prescribed templates.

Security. Security agreements with respect to certain kinds of secured assets (e.g, land use rights and immovable assets, aircraft, or seagoing vessels) must be notarized or registered, or both, in order to be enforceable. Registration helps establishing priority based on the time of registration.

There is usually no need to revise registration records relating to the security for the loan, if only the interest rate and the loan repayment schedule have been revised, and if there are no changes in the security itself.

Registration of lender's security interests in movable assets can be done through a paper submission or an online submission. Registration of security interests over immovable assets (land use right and assets associated on land) is done at the respective Land Use Right Registration Office in the locality, and cannot be done online.

CONCLUSIONS AND POSSIBLE STEPS FORWARD

Complicated situations, like the one currently unfolding, cast extra light on the existing bottlenecks in the procedures that are complex or are not fully up-to-speed with modern business realities.

Approvals, filings and other formalities. As a practical matter it would help immensely to the struggling companies if the number of formalities or perfection steps (in particular that can long be regarded as outdated) is reduced by regulators. This includes uncapped stamping duties on originals of agreements, which could perhaps be cancelled or reduced to nominal and capped amounts that can be easily paid online without the need for individual assessment following in-person meeting with a tax officers.

Generally speaking, the cases where transactions require individual assessments (or even meetings or presentations) should be quickly reduced by setting substantial materiality thresholds. Case-by-case governmental approvals for individual loans could be gradually cancelled or replaced with notification obligations so that monetary authorities could continue to have visibility on cross-border cashflows.

Practice of in-person submission of security documents for registration (such as, for example, registration of immovables mortgages in some of the countries in the region) should be changed in favour of only online security filing.

Dialogue between borrowers and lenders. For existing transactions, it is typically important for borrowers to

remain pro-active in day-to-day assessment of the rapidly developing situation and its implications on compliance with loan covenants. Lenders may similarly expect their obligors to be pro-active in informing about any material developments and offering ways to mitigate. Advance supply of information would be particularly relevant to multi-lender transactions, where decision making on the side of creditors would require additional time.

Infrastructure needs. Many countries in the region require substantial investments into infrastructure: power, roads, ports and other facilities. Due to inevitable delays during 2020, the demand for financing in this sector will likely even further increase as the situation will stabilise. Overall this would require increased efforts in cooperation between project sponsors, lenders and public sector and readiness for finding compromise solutions in complicated times.

Particular challenge in the region would relate to the capacity of the public stakeholders to consider and process huge volume of applications, requests and drafts of agreements. Private sector and international participants would likely be required to invest even more efforts into assisting in explaining international practices and standards to their project partners in relevant jurisdictions. Public side may be required to refer more to independent contractors and advisors to assist them in handling multiple workstreams.

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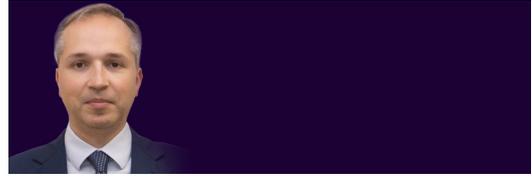
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