



BANKRUPTCY LAW AND THE ENFORCEMENT OF SECURITY INTERESTS IN VIETNAM

Investors in Vietnam and those interested in the current economic situation will have noted at concurrent with the continued fast paced economic growth there have been an number of business casualties. Any observer of Vietnam's economy will have become aware of the difficulties faced by Vinashin, the state owned (originally) ship building corporation. Whilst Vinashin is perhaps not typical of most businesses in Vietnam, being much larger and perhaps subject to more non-commercial imperatives due to being a state owned corporation, interested observers will take note of its fate when taking the economic temperature of the country.

It is timely that Frasers Restructuring and Insolvency Practice Group has prepared an update to its guide to the regulatory framework relating to bankruptcy and the enforcement of security interests in Vietnam.

In this specialist section we review the law relating to bankruptcy in Vietnam and consider the typical procedures which arise during bankruptcy proceedings:

- *when is an enterprise deemed to be insolvent;*
- *bankruptcy petitions; and bankruptcy proceedings in general;*
- *the management and enforcement of assets in the case of bankruptcy subsequent to the court issuing a Commencement Decision in relation to the bankruptcy of an enterprise;*
- *establishment and operation of creditors meetings; the potential for recovery or reinstatement proceedings for an otherwise insolvent enterprise; the realisation and distribution of assets; and declarations of bankruptcy;*
- *the enforcement of security interests for secured creditors and principles for the realisation of secured assets;*
- *considers bankruptcy procedures applicable to enterprises conducting insurance, securities or other financial services activities.*

Law on Bankruptcy

The bankruptcy of an enterprise in Vietnam is governed by Law No. 21/2004/QH10 on Bankruptcy passed by the National Assembly on 15 June 2004 (**Law on Bankruptcy**) and its implementing legislation including Resolution 03/2005/NQ-HDTP (**Resolution 03**) dated 28 April 2005 of the Judges' Council of the Supreme People's Court, guiding the implementation of a number of provisions of the Law on Bankruptcy. The Law on Bankruptcy does not extend the scope of the bankruptcy legislation to individuals and households, and only applies to enterprises, cooperatives and cooperative unions established

and operating under the law.

When is an enterprise deemed to be insolvent/ falling into bankruptcy?

Under the Law on Bankruptcy, enterprises shall be deemed to be insolvent/bankrupt upon being unable to pay their due debts when required to do so by creditor(s). According to the guidance of the Judges' Council of the Supreme People's Court (**the Supreme Court**) provided in Resolution 03, enterprises shall be deemed to be bankrupt when all of the following conditions exist:

- (i) There are mature/due debts;

Mature debts must be unsecured or partially secured debts (only the unsecured amounts are counted) which have been clearly certified by the relevant parties, are accompanied by supporting papers and documents and dispute-free;

- (ii) Creditors have requested payment, but the enterprise has become insolvent;

Regarding creditors' requests for payment of mature debts, there must be evidence that creditors have made such requests, but the enterprise has failed to repay its debts (such as creditors' written requests for delayed debt payments, etc.)

Trigger of the right/obligation to file bankruptcy petitions

The insolvency of an enterprise triggers the right or obligation of the parties set out below to commence bankruptcy proceedings (bankruptcy petition) in respect of that enterprise. Where an enterprise is deemed to be insolvent, any unsecured or partly secured creditor may file a bankruptcy petition in respect of that enterprise.¹

Standard Bankruptcy proceedings²

Under the Law on Bankruptcy, bankruptcy proceedings may be filed in a district court (but only for cooperatives registered in the relevant district) or, more commonly, the provincial or municipal court where proceedings will be heard

by a panel of three judges.

The steps in the bankruptcy of an enterprise are as follows:

- filing of a bankruptcy petition at the court
- acceptance or rejection of the bankruptcy petition (if the court accepts the petition, it has 30 days in which to decide whether or not to commence bankruptcy proceedings)
- appointment by the court of an asset management/realisation team
- first creditors' meeting
- reinstatement or recovery procedures if the first creditors' meeting decides that an enterprise can recover or be reinstated
- realisation of assets if it is clear that the reinstatement procedure is not applicable or if the reinstatement procedure commences and then fails
- distribution of assets in the relevant order of priority
- declaration of bankruptcy.

Bankruptcy petitions

Any one or more of the following may file a bankruptcy petition:

- unsecured or partly unsecured creditors
- employees of the enterprise through their duly appointed representative or a trade union representative
- the enterprise itself (self-bankruptcy)
- the representative of the State capital

1. Article 13.1 of the Law on Bankruptcy.

2. Bankruptcy for special enterprises directly involved in national defence and security and enterprises and cooperatives operating in the finance, banking and insurance sectors and other sectors that regularly and directly supply essential products and services to the public are specifically provided for under certain legal documents including Decree 67/2006/ND-CP dated 11 June 2006 and Decree 114/2008/ND-CP dated 3 November 2008 and other legal documents.

contribution in a State-owned enterprise

- a single shareholder, or a group of shareholders, in a shareholding company
- a partner in a partnership.

On receipt of the bankruptcy petition and payment by the petitioner of the deposit on account of court fees, if the court does not require the petitioner to amend the petition or to supply additional information, the court will accept the petition and must send a notice of acceptance of the petition to the enterprise, which has 15 days in which to file the following with the court:

- profit and loss statement explaining what (if anything) has caused the enterprise to be unable to pay its debts
- report on measures taken by the enterprise to remedy the situation
- detailed status report about the enterprise's assets
- list of creditors comprising details of secured and unsecured debts that are now due to be paid by the enterprise and of secured and unsecured debts not yet due
- list of debtors comprising details of secured and unsecured debts that are due to be paid by those debtors and of secured and unsecured debts not yet due
- other documents required by the court.

If there is sufficient evidence that the enterprise is deemed to be insolvent, within 30 days of accepting the petition the court must issue a decision whether or not to commence bankruptcy proceedings (**Commencement Decision**).

Before issuing a Commencement Decision, the court may convene a meeting of the petitioner, the owner or legal representative of the enterprise and other relevant parties to review the evidence and check the facts. Once the Commencement Decision has been made it must be sent to the enterprise and the People's Procuracy, published

in three consecutive issues of a local newspaper, and made available to the creditors and debtors of the enterprise.

It should be noted that if an enterprise is deemed to be insolvent and should have filed for self-bankruptcy but fails to do so within three months from the date it was deemed to be insolvent, the owner or legal representative of the enterprise "becomes personally liable in accordance with the law" for the enterprise's debts.

Management of assets

Once the court issues a Commencement Decision, the enterprise may continue to conduct its business, but the enterprise's activities will be monitored and inspected by a court appointed asset management / realisation team.

Usually the existing management will remain in place. However, the court may replace some or all of the enterprise's management if requested by a creditors' meeting and if the court considers them unable to manage the enterprise or that their continued management would have an adverse effect on the assets of the enterprise.

In any event the enterprise is strictly prohibited from doing any of the following:

- concealing or disposing of any of its assets
- paying debts owing to unsecured creditors
- discharging the debts, or reducing the liabilities of debtors, of the enterprise
- giving security in respect of debts which were previously unsecured.

After a Commencement Decision has been made, the enterprise must obtain the prior written approval of the court to:

- pledge, mortgage, assign or sell any asset
- receive any asset by way of transfer
- terminate the performance of any current contract

- borrow money
- sell or convert shares or transfer the right to own its assets
- pay new debts arising from the business operations of the enterprise or pay salaries to employees of the enterprise.

Asset management/realisation team

The asset management/realisation team has the following powers and duties:

- prepare a statement recording the existing assets of the enterprise
- supervise and inspect the use of the assets
- request the court to issue a decision to take an emergency provisional measure to preserve the assets of the enterprise (as discussed below)
- prepare a list of debtors and creditors and details of debts owed by, and to, the enterprise
- recover and manage assets, documents, books of account and the seal of the enterprise
- implement a plan to distribute assets in accordance with a court order (***Distribution Plan***)
- make recommendations to the court about the recovery of assets, the value of assets or the difference between the actual value of assets and the price at which they were wrongly sold by the enterprise
- carry out a court order to auction assets
- transfer into a bank account all money collected from debtors and auction proceeds
- comply with court orders issued during the course of bankruptcy proceedings.

Unless given additional responsibilities by the court the asset management/realisation team will not have responsibility for the day to day

management of the enterprise.

Measures for preserving assets

The Law on Bankruptcy contains a three month ‘claw-back’ provision under which the following transactions conducted by an enterprise within three months of the date on which the court accepts the bankruptcy petition are to be considered null and void:

- gifts of moveable or immovable assets to other people
- liquidation of a bilateral contract where the obligations of the enterprise are expressly greater than the obligations of the other party
- payment of debts that are not yet due
- provision of security over assets by way of mortgage or pledge for debts that have previously been incurred
- other transactions that have the effect of concealing assets.

The asset management/realisation team is responsible for recovering assets where the court declares a transaction to be null and void.

Where the asset management/realisation team considers it necessary, the team can obtain an order from the court for one of the following provisional emergency measures to be applied to an enterprise to preserve its assets:

- sale of perishable goods, of goods where the use-by date will expire, or of goods where there are difficult distribution conditions
- seizure or sealing of assets of the enterprise
- freezing assets of the enterprise at a bank
- sealing, depositing, keeping and managing the books of account and other relevant documents of the enterprise
- stopping the enterprise and other relevant

individuals or organisations from conducting, or being forced to conduct, certain activities.

Creditors' meetings

An enterprise that is deemed to be insolvent by a court must prepare a complete inventory and valuation of its assets not more than 30 days from the date of the Commencement Decision and, if it does not do so, the asset management/realisation team must do so.

Creditors of the enterprise must send to the court their proofs of debt not more than 60 days from the date on which the Commencement Decision is published in the newspaper and, following the end of that period, the asset management/realisation team has 15 days in which to prepare a complete list of creditors and publish the list at the court.

The court must convene the first creditors' meeting not more than 30 days after the complete list of creditors is prepared or the date the inventory is completed, whichever is the later.

At the first creditors' meeting a report is delivered to the meeting by the head of the asset management/realisation team in respect of the performance and financial position of the enterprise, the results of the inventory and valuation of assets, the list of creditors and debtors, and other relevant information.

The owner or legal representative of the enterprise then provides comments and proposals about restructuring the business, the ability to pay debts and the time required for paying the debts.

Following discussion, the creditors may pass a resolution approving measures to restructure the enterprise's business operations and for the repayment of debts. A resolution requires 50 per cent or more of the unsecured creditors present at the meeting representing at least two thirds of the total of the unsecured debts (***Required Majority***). The first creditors' meeting can also recommend

that the court appoints someone to manage the enterprise in place of the person currently in charge of its management. Where no resolution is passed the court will commence the realisation procedures (see below for more discussion).

Reinstatement procedures

If the initial meeting of creditors passes a resolution approving measures to restructure the enterprise's business operations and plans for repayment of debts, the court can order the recovery or reinstatement procedures to apply to that enterprise.

The enterprise has 30 days from the date on which the initial meeting of creditors passes the resolution to formulate a recovery plan which must clearly indicate measures necessary for reinstating the enterprise's business operations and set out conditions, time limits and a debt payment timetable. The measures must include plans for:

- raising new capital
- changing production/business commodity items
- replacing production technology
- restructuring the management system and merging or splitting up production divisions to increase productivity and production quality
- converting debt to equity by the sale of shares to creditors
- selling or leasing out unnecessary assets
- other legal measures.

The court is then required to review the recovery plan and, if it does not require the plan to be amended, the court will order the plan to be put to a meeting of creditors for approval. If a resolution is passed by the Required Majority at a properly convened meeting of creditors, the court

will order the plan to be implemented and the asset management/realisation team is dissolved.

The enterprise must send a performance report to the court every six months. The enterprise has three years from the date on which the court order for implementing the reinstatement plan is published in the newspaper to implement the recovery plan.

Once the recovery plan has been implemented in full, or upon a meeting of creditors passing a resolution by the Required Majority, the court will order the suspension of the reinstatement procedure in which case the enterprise is deemed to be solvent again.

The court has power to change the reinstatement procedures to realisation procedures if it is clear that the reinstatement plan will not succeed.

Realisation and distribution of assets

If the first creditors' meeting passes a resolution for reinstatement of the business and the enterprise fails to formulate a reinstatement plan; or if the creditors' meeting does not pass a resolution for reinstatement; or if the enterprise fails to implement properly, or fails to carry out, a court approved reinstatement plan, the court may order the realisation procedures to be applied to the enterprise.

The court order must set out the basis for applying the realisation procedures and a Distribution Plan in accordance with the following principles:

- (a) All debts secured by way of mortgaged or pledged assets which were established before the court accepted the bankruptcy petition will be prioritised for payment by way of realisation of those assets;
- (b) An enterprise that has applied special State measures relating to its assets to try to

reinstate its business operations, but has not been able to reinstate its business operations and therefore is required to apply the realisation procedures must return the value of those assets to the State before distributing assets in accordance with the order of priority below;

- (c) The order of priority for payment in the realisation and distribution of assets is as follows:
 - payment of bankruptcy court fees
 - unpaid wages, allowances for termination of employment, and social insurance contributions and other employee entitlements under collective labour agreements or individual labour contracts
 - unsecured debts payable to creditors named in the list of creditors: if there are sufficient assets to cover the debts, the creditors will be paid in full, otherwise, each creditor is to be paid on a pro rata basis.

If there are any assets remaining over after all the creditors have been paid in full, the balance belongs to the owner of the enterprise, or to members or shareholders of the company, or to the owner of the State-owned enterprise, as the case may be.

Declarations of bankruptcy

If a realisation plan is implemented in full, or if the enterprise does not have assets to implement a Distribution Plan, the court will issue a decision to declare the enterprise bankrupt.

The court's decision must set out the basis for making a declaration of bankruptcy and prohibit certain officers from holding certain positions for a period of time, being from one to three years.

The decision must be published and sent to the relevant business registration office for the enterprise to be de-registered.

A bankruptcy declaration decision does not exempt the owner of a private enterprise or a partner in a partnership from their asset-related obligations towards unpaid creditors. Asset-related obligations of enterprises are to be resolved in accordance with the regulations relating to civil enforcement.

Enforcement of Security Interests for secured creditors

Article 27 of the Law on Bankruptcy provides that as from the date on which a court accepts jurisdiction over a petition to commence bankruptcy procedures, the realisation of secured assets of the enterprise for a secured creditor must be temporarily suspended, except in the cases where the court so permits upon consideration of the following conditions:

- (i) assets required for realisation are security for a due debt;
- (ii) realisation of such assets will not substantially affect the business operation of the enterprise; and
- (iii) the secured creditor must lodge an application presenting the grounds for realisation and the fact that such grounds are reasonable and such realisation is vital for the secured creditor.

Principles for realisation of secured assets

If the request for realisation of secured assets of an enterprise is accepted by the court, the realisation of secured assets must be performed in accordance with the following principles and procedures:

- (a) If the secured assets are used in order to

secure the performance of a single obligation then realisation of such assets shall be conducted in accordance with the agreement of the parties; if there is no such agreement, then the assets shall be sold by auction in accordance with the law.

- (b) With respect to secured creditors under the Law on Bankruptcy, where the judge issues a decision to commence liquidation procedures against an enterprise, debts which were secured by assets mortgaged or pledged prior to the court accepting jurisdiction over a petition to commence bankruptcy proceedings shall be entitled to priority payments by for such assets; if the value of the mortgaged or pledged property is insufficient to pay the amount of the debt, the outstanding part of the debt shall be unsecured and shall be payable during the liquidation process of the assets of the enterprise; and if the value of the mortgaged or pledged property is greater than the amount of the debt, the difference shall be included in the value of the remaining assets of the enterprise.
- (c) The realisation of secured assets must be conducted objectively, publicly and transparently, and must ensure the lawful rights and interests of the parties to the secured transaction and of related individuals and organisations.
- (d) Persons realising secured assets (*Realisor*) shall be the secured party or the person authorised by the secured party, except in the circumstance where the parties to the secured transaction have some other agreement.
- (e) Realisation of secured assets in order to recover a debt shall not be deemed to be a part of the licensed activities of the secured party.

Notice of realisation of secured assets in the case of security for performance of several obligations

Prior to carrying out the realisation of secured assets, the Realisor must provide written notice of realisation of the secured assets to other jointly secured parties at the addresses recorded at the secured transactions registration centre (**Registration Centre**) or must register the notice of realisation of the assets in accordance with the following procedures:

a. Lodging application for registration of a notice on realisation of secured assets:

An application requesting registration of a notice on realisation of secured assets shall be submitted in one of the following ways:

- (i) By submitting it directly in person at the Registration Centre;
- (ii) By sending it via the post office;
- (iii) By sending it via facsimile (but only in the case of regular clients of a Registration Centre);

An application document must be lodged by one of the above ways but may also be accompanied by an electronic version.

The Realisor must pay nominal registration fees.

b. Time-limit for resolving registration:

The Registration Centre shall be responsible for processing the registration immediately following receipt of an application or within the same working day; if an application is received after 3 p.m., it must be completely resolved within the next business day; and if it is necessary to extend this time-limit, it must not exceed three business days from the date of receipt of a valid application.

Within the time-limit for completing registration,

the registrar shall hand over/send by registered mail to the Realisor, a copy of the application requesting registration of a notice on realisation of secured assets with certification by the Registration Centre.

Subsequently, the Registration Centre shall notify realisation of the secured assets to any other relevant parties at their addresses archived in its database, namely: a jointly secured party by the assets of the securing party; a seller of the assets in installments or by deferred payment; a lessor who leased the assets to the securing party; a financial lessor of the assets to the securing party; and/or any assignee from the securing party of the right to claim the debt.

Time for realisation of secured property

The secured assets shall be realised within a time-limit agreed by the parties; if there is no such agreement, then the Realisor shall be entitled to make a decision on the time for realisation which shall not be earlier than seven days in respect of moveable property and fifteen days in respect of immoveable property, calculated from the date of notice of realisation of the secured assets.

In certain cases: when the secured assets are in danger diminishing in value; in the case of the right to reclaim a debt; and in the case of valuable papers, savings deposit cards and bills of lading, the Realisor is entitled to realise such assets immediately and shall notify the other secured parties about the realisation of the assets at the same time.

Enforcement of Secured Assets

The party holding secured assets must deliver it to the Realisor pursuant to the notice of the Realisor. If at the expiry of the time specified in the notice, the party holding the secured assets fails to deliver them to the Realisor, then the Realisor is entitled to seize the secured assets in order to realise it or shall be entitled to petition a court to resolve the

matter.

The Realisor shall have the following responsibilities when seizing the secured assets:

- (i) to provide reasonable advance notice to the person holding the assets regarding application of the method of seizure of the secured assets. The written advance notice must specify the reason for the seizure, the time when seizure of the secured assets will take place, and the rights and obligations of the parties;
- (ii) not to apply any measures in breach of the law or in breach of social morals during the process of seizure of the secured assets.

The insolvent enterprise is responsible for co-ordinating with the Realisor in order to conduct seizure of the secured property in cases where the person holding such property is a third party.

The insolvent enterprise or the third party holding the secured property must bear all reasonable and necessary expenses for seizure of the secured assets and must pay compensation if they fail to deliver the assets for realisation or if they act in hindrance of a legal seizure of the secured assets resulting in loss to the secured party.

Bankruptcy procedures applicable to enterprises conducting insurance, securities or other financial services activities

Unlike other enterprises, when an enterprise conducting insurance, securities or other financial services activities considers it is in danger of becoming insolvent, it must on its own initiative take measures to recover solvency and to strengthen its organisation and operation. Moreover, it must immediately provide written notification to the State administrative body and the owner about the financial status of the

enterprise, the reasons resulting in the potential danger to its solvency, and the plan of the enterprise to remedy the situation in accordance with the law.

If the insurance, securities or other financial services enterprise is unable to take measures to remedy its inability to pay its due debts, then the following bankruptcy procedures shall apply to such insurance, securities or other financial services enterprise which has become insolvent:

- (a) filing a petition and commencement of bankruptcy procedures;
- (b) recovery of the business operation;
- (c) liquidation of assets and debts; and
- (d) declaration that the enterprise is bankrupt.

Subsequent to a decision to commence bankruptcy procedures, every business activity of the insurance, securities or other financial services enterprise shall continue to be conducted as usual, but shall be subject to supervision and inspection by the judge and the committee for management and liquidation of assets (*the Liquidation Committee*).

In addition, as from the date on which the insurance, securities or other financial services enterprise receives the decision to commence bankruptcy procedures, it shall be strictly prohibited from carrying out the following activities:

- (a) to conceal or dispose of assets;
- (b) to pay any unsecured debts;
- (c) to abandon or reduce any right to claim a debt;
- (d) to convert unsecured debts into debts secured by assets of the enterprise;
- (e) to receive orders to open securities trading accounts from clients, or to conduct any securities broking activities; and

- (e) to conduct any investment activities or other activities relevant to the monetary and securities accounts of clients of the enterprise.

Moreover, the following activities for insurance, securities or other financial services enterprise may only be undertaken with the prior written consent of the judge after receipt of the decision to commence bankruptcy procedures:

- (a) Pledge, mortgage, assignment, sale, donation or lease of any asset;
- (b) Receipt of assets from a contract assigning them;
- (c) Termination of performance of an effective contract;
- (d) Borrowing a loan;
- (e) Sale or conversion of shares or transfer of

ownership rights to any assets; and

- (f) Payment of any debt arising from the business operation of the enterprise and payment of wages to employees of the enterprise.

Insurance, securities or other financial services enterprises comprise: (i) enterprises conducting insurance business established and operating in Vietnam pursuant to the Law on Insurance Business (except for insurance brokering companies); (ii) securities companies, securities investment fund management companies and securities investment companies established and operating in Vietnam pursuant to the Law on Securities; and (iii) lotteries companies conducting lotteries business pursuant to Decree 30/2007/ND-CP of the Government dated 1 March 2007 on lotteries business.

Frasers Restructuring and Insolvency Practice Group continues to advise numerous lenders, borrowers and other interested parties on restructuring and insolvency matters in Vietnam.

Please do not hesitate to contact any of the senior members (as per their details below) of our Restructuring and Insolvency Practice Group to discuss further.

Ho Chi Minh City

Mark Fraser
Phung Thi Thanh Thao

15th Floor
The Metropolitan
235 Dong Khoi Street
District 1
Ho Chi Minh City

Tel: +848 3824 2733
Fax: +848 3824 2736
Email: newsletter@frasersvn.com

Hanoi

Pham Ba Linh
Nguyen Viet Ha

Unit 1205
Pacific Place
83B Ly Thuong Kiet Street
Hoan Kiem District
Hanoi

Tel: +844 3946 1203
Fax: +844 39461214