

FRASERS
LAW COMPANY

LENDERS' ISSUES IN
PROJECT FINANCING
IN VIETNAM

21 JUNE 2022

Agenda

PART 1

15:00 - Frasers Update

PART 2

15:05 - Project financing and issues from lenders' perspective – Mark Fraser

PART 3

15:25

- Issues on cross-border loans and taking onshore security
 - Potential burdens on cross-border loans ... and opportunities for onshore lenders – Ho Thuy Ngoc Tram
-

15:45 – Case Study

PART 4

15:55 - Q&A

1. A short update on our firm...

CORE PRACTICE AREAS

- Banking and Finance
- Corporate and Commercial
- Corporate Fraud
- ESG (Environmental Social and Governance)
- Capital Markets
- Competition and Antitrust
- Dispute Resolution
- Employment
- Insurance
- Intellectual Property
- International Trade
- Investigations
- Mergers and Acquisitions
- Project Finance
- Projects and Energy
- Real Estate
- Regulatory Compliance
- Restructuring and Insolvency
- Tax
- Technology, Media and Telecommunications



PRACTICE RECOGNITION

The Legal 500 2022

Frasers Law Company is honoured to be once again recognised by The Legal 500 as being a Top Tier firm and is ranked in every possible practice area in Vietnam including:

- Banking and Finance
- Capital Markets
- Corporate M&A
- Data Protection
- Dispute Resolution
- Insurance
- Intellectual Property
- Labour and Employment
- Projects and Energy
- Real Estate and Construction
- Shipping and Aviation
- Tax
- TMT



Asialaw Profiles 2022

Frasers is also pleased to share its impressive performance in the 27th Edition of *Asialaw Profiles 2022* – The Guide to the Asia-Pacific’s Leading Law Firms.

In 2021, our firm received the award for Asialaw Client Service Excellence Law Firm of the Year Vietnam in the following practice areas:

- Banking and Finance
- Construction
- Corporate and M&A
- Energy
- Labour and Employment



Our Founding Managing Partner Mark Fraser was awarded Asialaw’s “Client Service Excellence Lawyer of the Year – Vietnam” in 2020.

PRACTICE RECOGNITION

Chambers Asia Pacific 2022

The publication has ranked Frasers Law Company in numerous practice areas, especially in the following:

- Banking and Finance
- Corporate M&A
- Dispute Resolution: International Arbitration
- Intellectual Property
- Projects, Infrastructure and Energy
- Tax



IFLR1000 2022

We are repeatedly ranked among the leading law firms in Vietnam in the IFLR1000 guide in the following practice areas:

- Banking and Finance
- Capital Markets: Debt
- Capital Markets: Equity
- Corporate M&A
- Project Development



Frasers Law is delighted to be once again ranked by The Legal 500 in every possible practice area in Vietnam including:

- Banking and Finance
- Capital Markets
- Corporate and M&A
- Data Protection
- Dispute Resolution: Arbitration
- Insurance
- Intellectual Property
- Labour and Employment
- Projects and Energy
- Real Estate and Construction
- Shipping and Aviation
- Tax
- Technology, Media and Telecommunications



**When we heard that we had made the Hall of Fame,
we thought we had signed a record deal!**

**According to Legal 500, Frasers Law Company has more
practising Hall of Fame lawyers than any other law firm in
Vietnam**



2. Project financing and issues from lenders' perspective

Mark Fraser

OVERVIEW



- **Definition**
- **Funding sources**
- **Importance of cashflow**
- **Financing contracts**
- **Offshore lenders**
- **Project contracts**
- **Project Participants**
- **General contractual structure**
- **General lenders' issues**

What is Project Finance?

- Project finance is the financing of long-term infrastructure, industrial projects, and public services using a non-recourse or limited recourse financial structure.
- Recourse primarily limited to project assets and revenues
- Limited recourse to Sponsors



Funding Sources

Senior
Debt

Subordinated
(mezzanine)
Debt

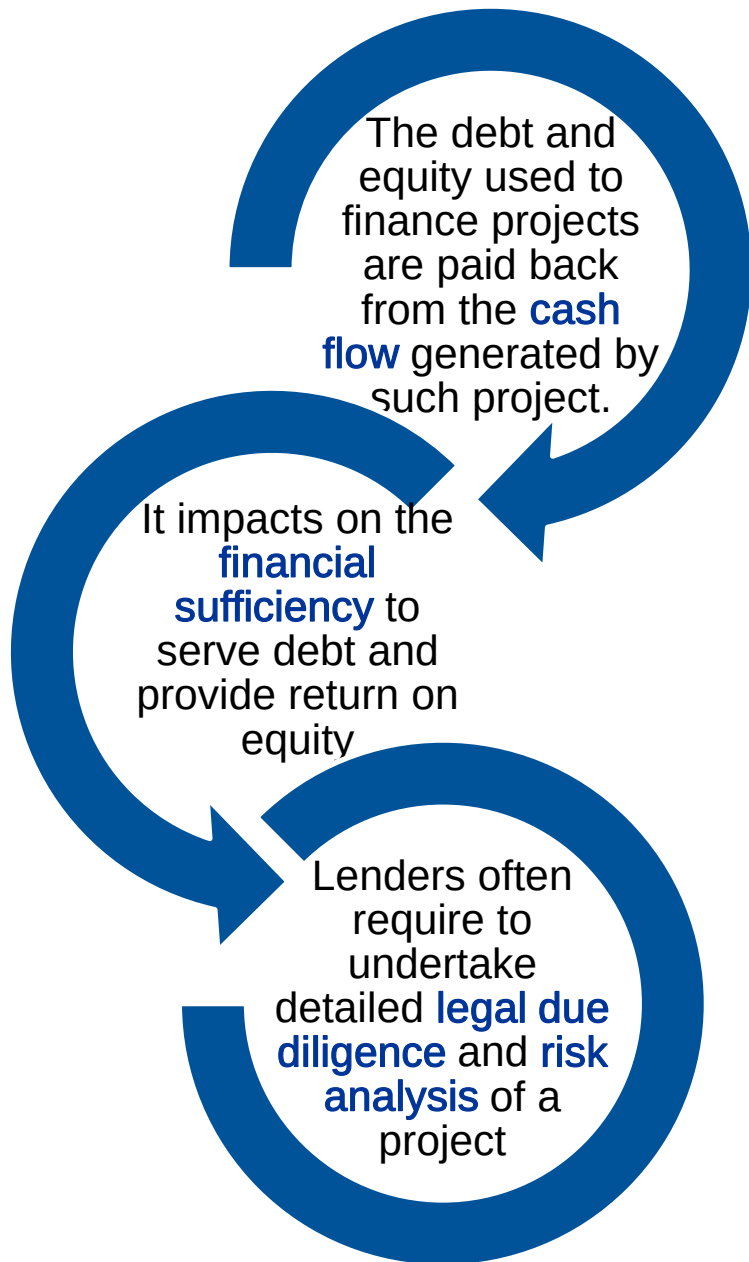
Equity bridge
facilities

Sponsor equity



Importance of cashflow

Cash is King (or Queen)



Financing Contracts

- Facility Agreement
- Intercreditor Agreement
- Security Agreements
- Direct Agreements
- Equity Support Agreement/Sponsors Support Agreement
- Accounts Agreement
- Hedging Agreement



Offshore Lenders



**Commercial
banks**

**Export credit
agencies
(ECAs)**

e.g. K-EXIM

**Multilateral
lending agencies
(MLAs) and
bilateral lending
agencies (BLAs)**

- e.g. IFC, ADB, MIGA, NEXI, JBIC

Relevant Contracts

Concession
Contract (e.g.
BOT Contract)

Government
Guarantee

Shareholders'
Agreement

Supply Contract
(e.g. Coal
supply
agreement)

Off-take Contract
(e.g. PPA)

(EPC)
Construction
Contract

O&M Contract

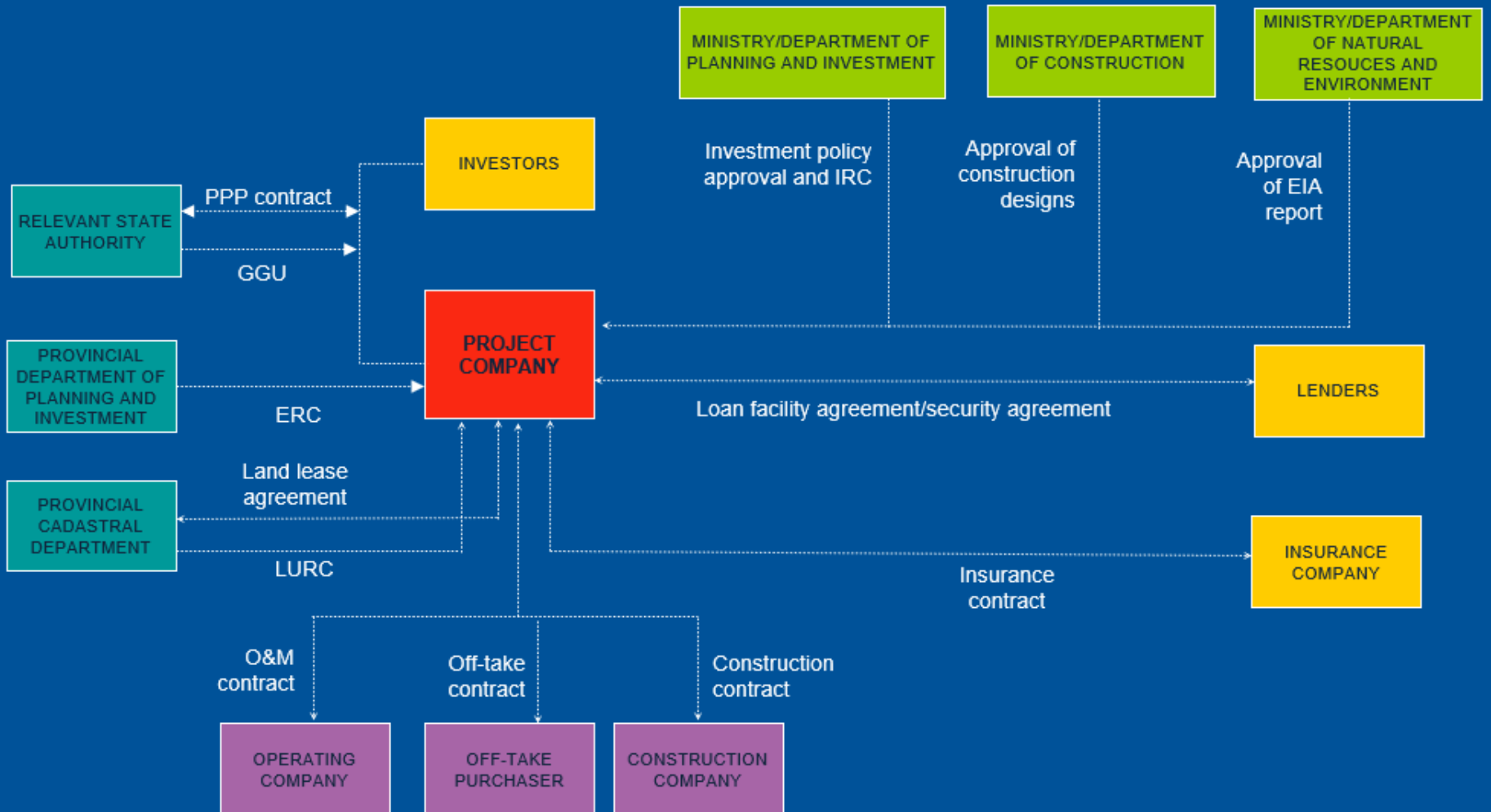
Insurance
Policies

Land Lease
Agreement

Technical
Services
Agreement;

Converting Bank
Agreement

General Contractual Structure (PPP)



Project Participants

- Project Company
- Sponsors
- Grantor (Authorised State body)
- Construction contractor
- O&M contractor
- Major suppliers (e.g. fuel)

Financing model

International financing

- Non-recourse, recourse or limited recourse project finance (with or without ECA/MLA/BLA-backing)
- Bankability issues (PPP contracts, PPAs)
- Limitation on security availability in favour of foreign lenders
- Uncertainty in enforcement of security
- Registration with the State Bank of Vietnam
- Experienced in financing large-scale infrastructure projects

Local financing

- Limited financing
- Less considerations relating to bankability issues
- More possible security interests
- More certainty in enforcement of security
- Registration with the State Bank of Vietnam not required

Private placement of bonds

- New development under the PPP Law and Decree No. 153/2020/ND-CP
- PPP project company operating less than 1 year is entitled to issue bonds and exempt from providing the audited FS for the preceding year
- Privately placed convertible bonds or privately placed bonds with warrants are not available for PPP project companies
- Denominated in VND (onshore bonds)

Lenders Issues

- Cashflows, Financial Ratios and Financial Covenants
- Reputation, creditworthiness and operational experience of Sponsor and other project participants
- Risk analysis and allocation
- Bankability issues
- Lender Protection, Step-In, Direct Agreement and Taking Security
- Other issues (e.g. risk assurance, hedging, foreign loan usages, loan cap, offshore guarantee, refinancing issues and dispute resolution)

Financial Ratios and Financial Covenants

- **Debt-to-Equity (D/E) Ratio**
- **Loan Life Cover Ratio (LLCR)**
- **Debt Service Cover Ratio (DSCR)**
- **Rate of Return (ROR)**

Risk analysis and allocation

- Political risk
- Availability of supply risk
- Appraisal risk
- Foreign exchange risk
- Inflation risk & Interest rate risk
- Project cost overrun risk
- Completion (construction) risk
- Operating performance risk
- Price of product (market) risk
- Enforceability of contract for products
- Refinancing risk
- Competition risk
- Environmental risk
- Regulatory risk
- Force majeure risk
- Credit risk (project participants)
- Insolvency risk

Lender Protection

Warranties, Undertakings and Representations

**Typical borrower undertakings
include:**

- Positive undertakings
- Negative undertakings

**Repeat certain warranties and
representations with each
drawdown and periodically
throughout the life of the loan**

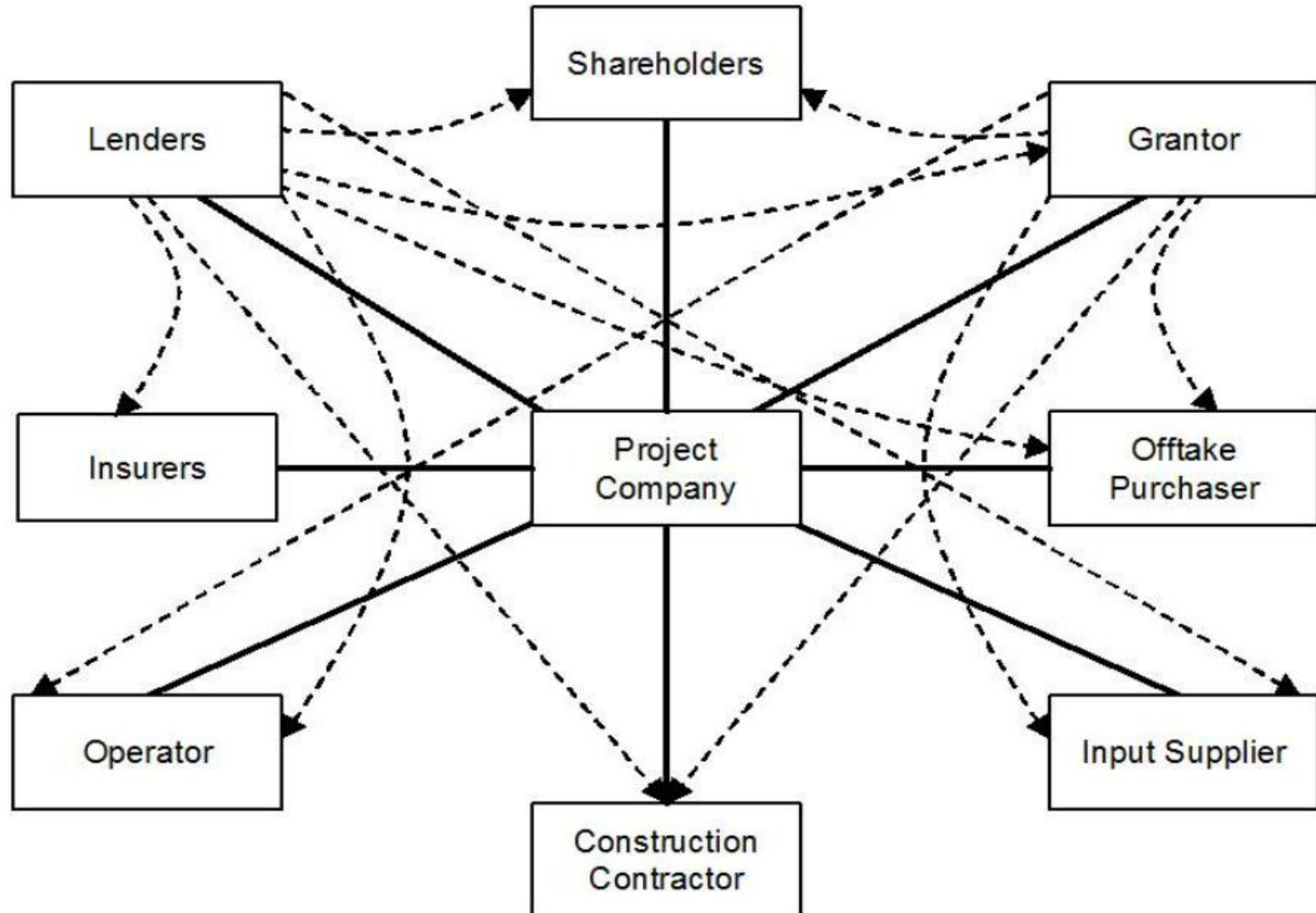
Step-In Rights

Cure rights

Step-in rights

Novation

Direct Agreements



Taking Security

- Equity mortgage in the project company
- Security over all (or substantially all) of the project assets and project agreements
- Security over contractual rights and receivables
- Security over bank accounts
- Sponsor support undertakings
- Guarantees from parent companies for their subsidiaries
- Government guarantees;
- Default, cross-default and step-in rights so as to give the lenders maximum control
- Termination, and cure, of any default related to any of the project documents; and
- Comprehensive insurance



RISK ASSURANCE

Insurance

- Only project companies having more than 49% of equity owned by foreign investors can obtain relevant project insurance from an offshore insurer.

Reinsurance

- Retention requirement applicable to the onshore insurer in the context of reinsurance
- The maximum level of liability that may be transferred by an onshore insurer to reinsurers upon the request(s) of a customer is 90% of the primary insurer's coverage.
- Lenders' requirement on credit rating of the insurers/reinsurers

Other risks

- Social and Ethical issues
- Environmental risks



HEDGING

Onshore hedging:

Only hedging transactions between domestic credit institutions and corporate borrowers are regulated.

Offshore hedging:

Not regulated.
Ad hoc approval from the SBV should be sought.

DISPUTE RESOLUTION FORUM AND ENFORCEABILITY

Foreign court judgement

- Limited treaties on recognition and enforcement
- Reciprocal basis
- Very few judgements recognised and enforced in Vietnam

Foreign arbitral award

- 1958 New York Convention
- Subject to not being contrary to the basic principles of Vietnamese law

3. Issues on cross-border loans and taking onshore security

Ho Thuy Ngoc Tram

Foreign loan usage

Two permitted loan use purposes:

- Restructuring of an existing cross-border loan; and
- Implementing (A) a business and production plan or (B) an investment project.

If the borrower mobilizes capital for **residential housing projects** with a foreign loan, a cross-border loan is not permitted.

Foreign loan cap



- The current annual aggregate limit for foreign loans (for mid and long term loans) for 2022 is **USD7.3 billion**



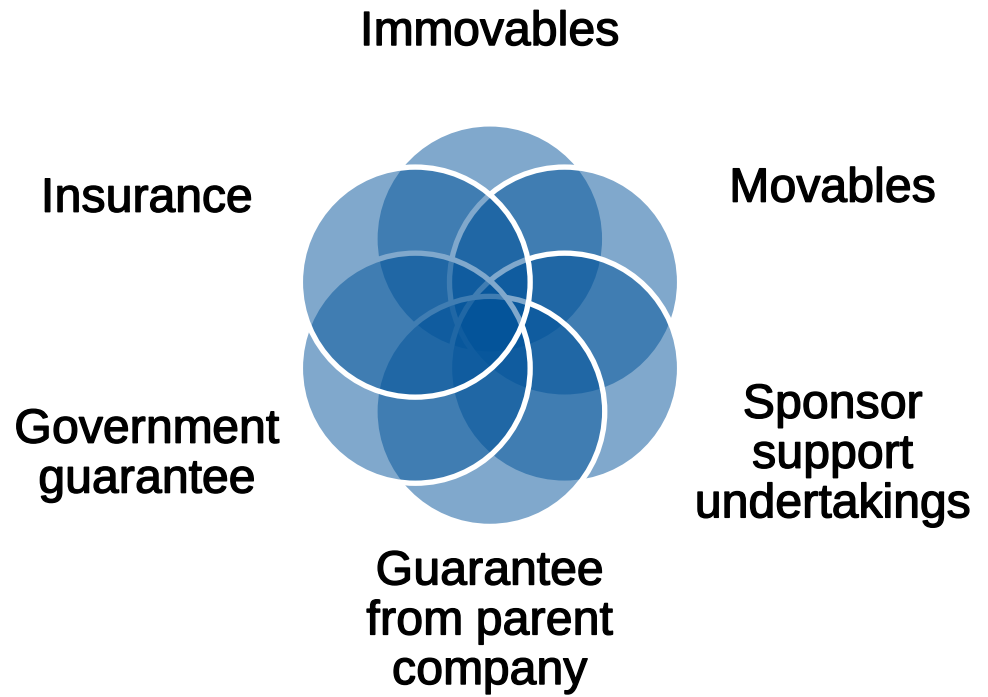
OFFSHORE GUARANTEE

- Onshore entity is not permitted to grant a guarantee of an offshore obligor's obligations (unless approved by the PM).
- Whether or not an onshore entity can grant security to secure the obligations of an offshore obligor?

SECURITY ISSUES

- **Types of security interests**
- **Land use rights and assets attached to land as collateral**
- **Enforcement of security over equity interests**
- **Other security enforcement issues in Vietnam**

Types of Security Interests



- ❖ Movables may include bank accounts; receivables and contractual rights; equipment and machinery; and other types

Land use rights and assets attached to land as collaterals

- Land use rights and assets attached to the land (*Immovables*) can be mortgaged in favour of credit institutions which are licensed to operate in Vietnam only.
- ▶ Whether foreign bank branch licensed to operate in Vietnam is entitled to take a mortgage over Immovables?
- ▶ Security agent and trust
 - ▶ Trust is not generally recognised under Vietnamese laws;
 - ▶ Security agent concept is regulated in syndicated loan;

Land use rights and assets attached to land as collaterals

Mortgage of land is not available for:

- Leased land with payment of annual rent.
- Leased land with one-off payment of land rent for the entire lease term/allocated land, which is **exempted from land rent/land use fees.**

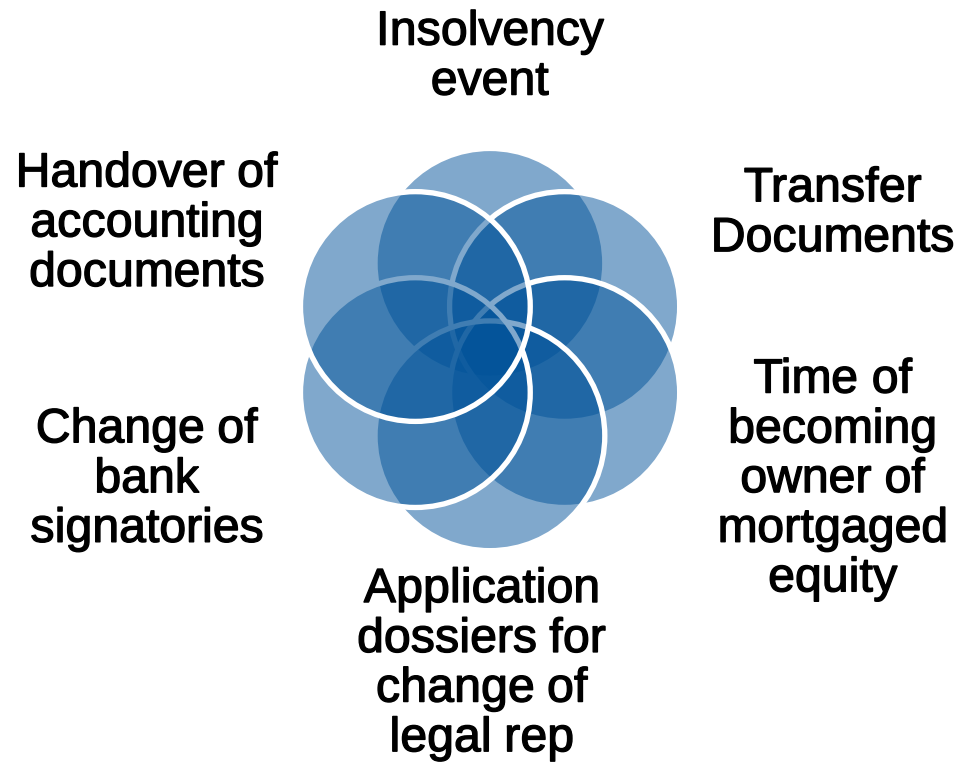
Enforcement of Security over equity interests

Transfer of equity interests upon the completion of the construction phase/upon the transition to the operation phase of PPP projects.

Signatures of the transferors are still required in various steps of enforcement.

- Change of shareholders' register/change of ERC
- Change of legal representative
- Change of board members

Other issues



Recommendations

Security documents should be well drafted

- Carve out certain statutory requirements (e.g. valuation process, bidding, and waiting period);
- Pre-agree on valuation method and any form of transfer upon enforcement.

All supporting documents for enforcement being duly pre-signed and delivered

- (undated) transfer agreement
- POA (with broad and detailed scope, irrevocable)
- Proxy (for convening, attending and voting);
- Standing instructions

Retaining all titles documents, invoices and relevant documents of secured assets.

For immovables which cannot be mortgaged

- Utilising mortgage over contractual rights;
- Commitment to supplement the assets to be formed in the future

4. New burdens on cross-border loans

Draft Circular replacing Circular No. 12/2014/TT-NHNN

General conditions

- Imposing a cap of loan expenses (i.e. interest plus all applicable fees) which shall not exceed reference interest rate (e.g. 6-month SOFR Term) plus 8%;
- Mandatory FX hedging applicable to short term loan of more than US\$500,000 or medium/long term loan having any instalment of more than US\$500,000;
- Mandatory involvement of onshore security agent if there are any secured assets based in Vietnam (save limited exceptions);

Draft Circular replacing Circular No. 12/2014/TT-NHNN

Specific conditions - Loan usage purposes

borrower not being credit institutions:

Short-term loan: limited to be used to pay short-term debts that are due within 12 months, and expressly excludes:

repayment of onshore debt,

acquiring any project, equity, securities or real property;

Medium/long term loan: limited to be used to fund only:

Projects approved

Supplement to borrowers' capital

Restructuring other foreign loans

borrower being credit institutions and foreign bank branches

A borrower is allowed to use foreign loans to:

supplement capital for its legitimate businesses;

restructure its existing foreign loans,

Such loan usage purpose must be specified in a business plan for usage of foreign loan proceeds approved by relevant corporate body of the borrower.

Draft Circular replacing Circular No. 12/2014/TT-NHNN

Specific conditions for borrower not being credit institutions:

Loan cap:



Project approved

Not exceeding the “loan capital” approved under investment licence



Supplement to borrower's capital

All medium/long term debts must not exceed 3 times the amount of equity capital



Restructuring cross-border loans

Loan amount must not exceed outstanding debt of such cross-border loan

Draft Circular replacing Circular No. 12/2014/TT-NHNN

Specific conditions for borrowers being credit institutions and foreign bank branches:

short-term foreign loans

- Maximum ratio of the total outstanding loans to borrower's core capital:
 - In 2023: 25% for credit institutions and 100% for foreign bank branches;
 - From 2024 onwards: 20% for credit institutions and 80% for foreign bank branches.

medium and long-term foreign loans

- the ratio of (A) total net withdrawal to (B) the borrower's core capital shall not exceed:
 - 10% for the borrower being a commercial bank;
 - 50% for the borrower being a non-bank credit institution (i.e. foreign bank branch, cooperative bank, or policy bank).

Prudential ratios

- comply with statutory prudential ratios

Case Study



SUMMARY OF CASE STUDY

- A Vietnamese company (*Opco*) owns and develops a solar power project (*Project*) and has an existing onshore debt facility in place for \$150m (*Onshore Loan*).
- From a project perspective:
 - Such project proposes to reach COD by end of 2022;
 - Transmission lines have not yet been completely constructed;
 - Land rental is exempted, assets attached to such land have not yet been completely constructed.
- An offshore investor (*Investor*) intends to acquire (directly or indirectly) 100% equity interest of Opco through an offshore SPV (*Holdco*).
- The Investor proposes to arrange a long-term project finance loan (in USD and with a more favourable interest rate) (*Offshore Loan*) granted by an offshore bank (*Offshore Lender*) to fund the remaining part of the Project and repay the Onshore Loan.
- For granting such Offshore Loan, the Offshore Lender is keen to take security over “all assets” of Opco (including real estate).
- The Offshore Loan would amortise and be serviced via revenue Opco receives under its solar PPA.

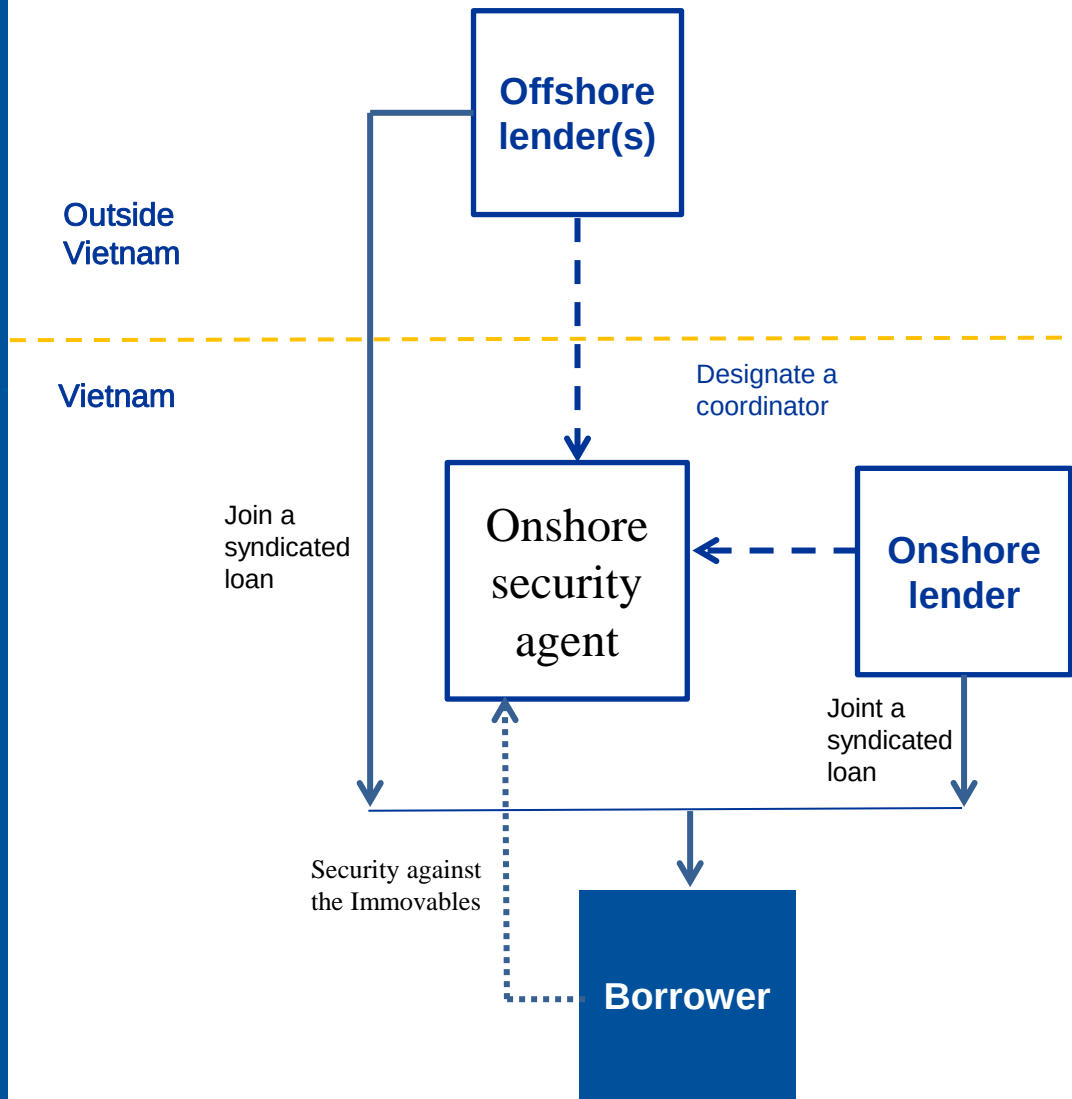
ISSUES

- A cross-border loan is prohibited from being used for, among others, restructuring of any onshore loan.
- Offshore lenders cannot take mortgage over immovables;
- Onshore entity (i.e. Opco) cannot guarantee any obligations of offshore obligor (i.e. Holdco, if the Offshore Loan were to be granted by the Offshore Lender to Holdco);
- In practice, land title is usually not granted for transmission lines' land. Instead, civil agreements (e.g. easement agreement, compensation agreement) will be entered into with land users, which are not bankable.
- Land (with land rental exempted) cannot be mortgaged in favour of onshore banks. There are certain requirements for an onshore bank to take a mortgage over assets to be formed in the future;
- Assets attached to land cannot be mortgaged until completely constructed;
- It is unclear under the laws of Vietnam as to whether solar panels can be considered as movables or immovables



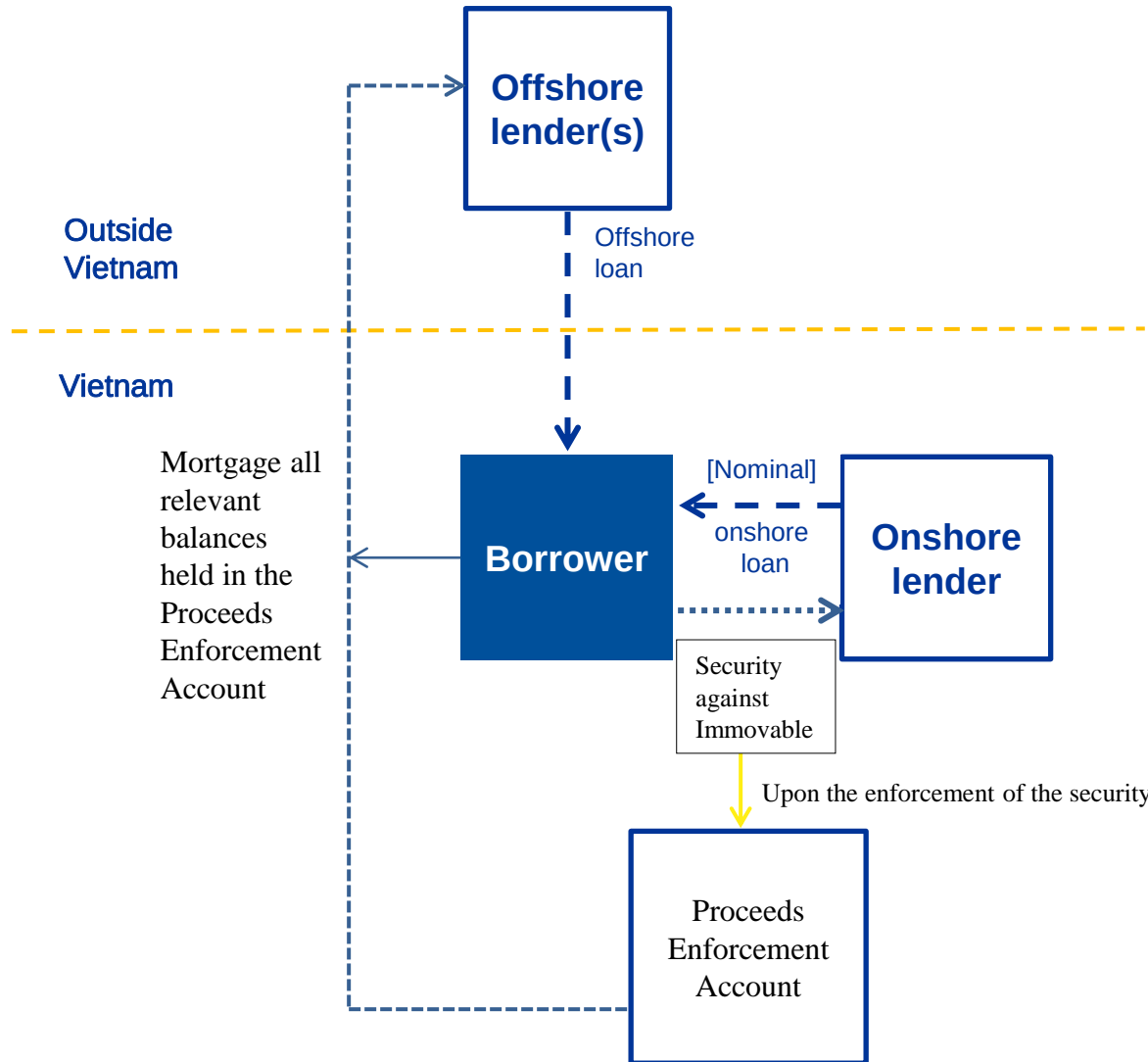
Option A

Alternative options for taking mortgage over immovables



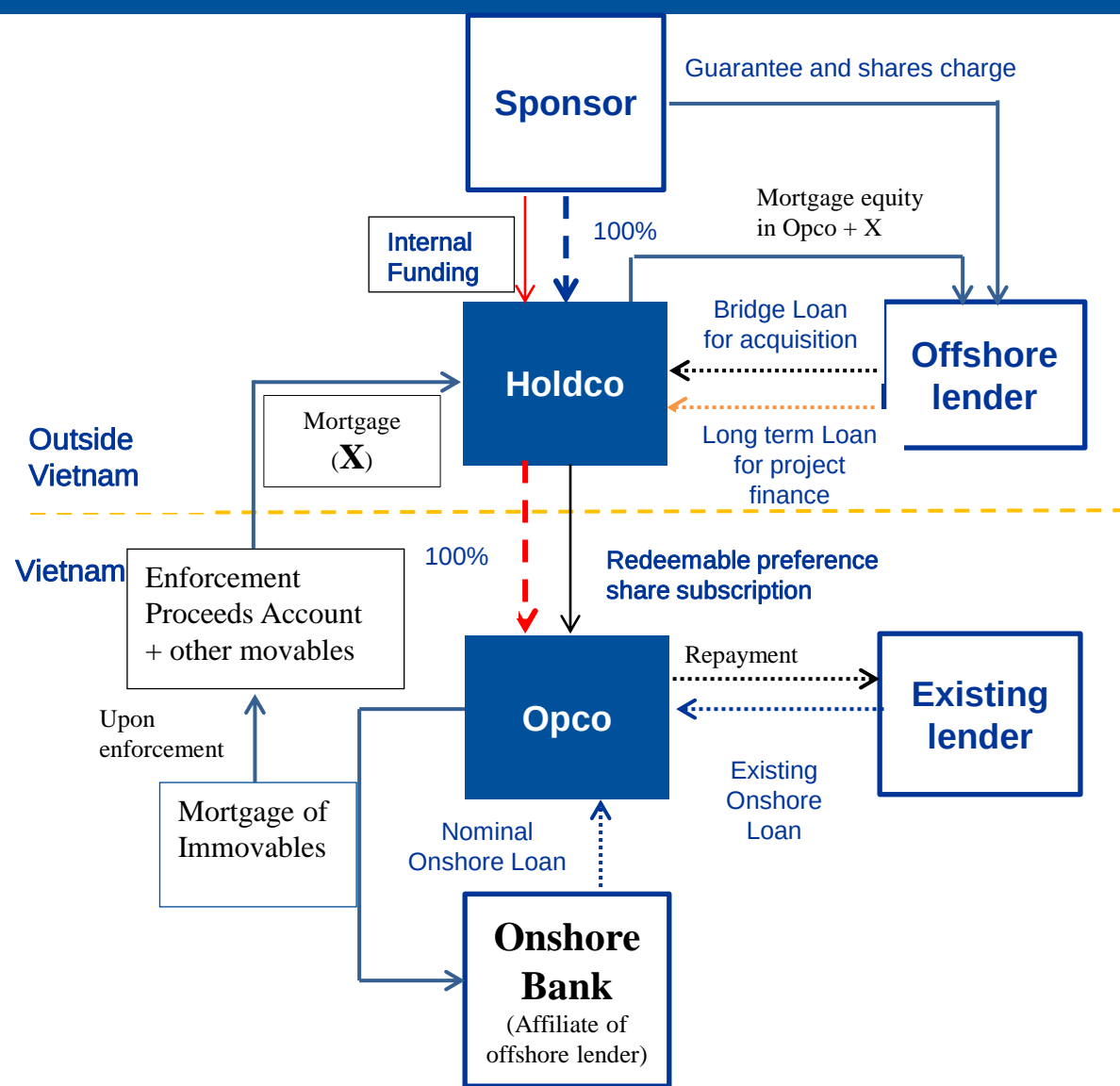
Alternative options for taking mortgage over immovables

Option B



SUGGESTED STRUCTURE

Refinancing issues



SECURITY

- Opco uses the following assets to mortgage in favour of Onshore Bank to secure the obligations under Nominal Onshore Loans (*Mortgage of Immovables*):
 - i. Completely built assets attached to land;
 - ii. Assets attached to land to be formed in the future;
 - iii. Contractual rights of all civil agreements relating to transmission lines.
- Opco opens an onshore account at Onshore Bank, named “Enforcement Proceeds Account”, in order to receive the proceeds arising from the enforcement of the Mortgage of Immovables (*Enforcement Proceeds*)



SECURITY

- Opco uses the following assets to mortgage in favour of Holdco (*Holdco Security Documents*) to secure the obligations of Opco to ensure the redemption of all redeemable preference shares to Holdco:
 - i. the excess amount of the Enforcement Proceeds arising from the enforcement of the Mortgage of Immovables after application of the proceeds for repayment in full of the Nominal Onshore Loan owed to Onshore Bank by Opco;
 - ii. all movables;
 - iii. all onshore accounts; and
 - iv. all receivables and contractual rights, etc.



SECURITY

- Lender of the Long-Term Loan takes security over the following assets:
 - i. all equity held by Holdco in Opco;
 - ii. all offshore accounts of Holdco;
 - iii. all receivables and contractual rights of Holdco under Holdco Security Documents; and
 - iv. all other assets owned by Holdco.
- An event of default under the Long-Term Loan would also trigger a redemption event for the redeemable preference shares which shall then trigger an event of default under the Onshore Loan.



A group of four people (three women and one man) are seated around a wooden table in a meeting. They are looking at a laptop screen. There are coffee cups and a tablet on the table. The background is a brick wall. The image has a blue overlay.

Q&A

FRASERS

L A W C O M P A N Y

Ho Chi Minh City Office

Unit 19.01, 19th Floor, Deutsches Haus
33 Le Duan Boulevard,
District 1, Ho Chi Minh City
Phone +84 28 3824 2733
Fax +84 28 3824 2736

Hanoi Office

Unit 1205, 12th Floor, Pacific Place
83B Ly Thuong Kiet Street
Hoan Kiem District , Hanoi
Phone +84 24 3946 1203
Fax +84 24 3946 1214

E-mail: legalenquiries@frasersvn.com

www.frasersvn.com