



# **PUBLIC-PRIVATE PARTNERSHIP INVESTMENT LEGISLATION**



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## INTRODUCTION

Prior to 1 January 2021 when the Law No. 64/2020/QH14 on Public-Private Partnership Investment (*the PPP Law*) came into effect, Public Private Partnership (*PPP*) investment activities had been primarily regulated by secondary legislation - Decree No. 63/2018/ND-CP (*the Old Decree*) and various other relevant laws and regulations. The overlapping and conflicting provisions across the old PPP regulatory framework gave rise to uncertainty and bankability issues from investors and financiers' perspectives. The enactment of the PPP Law and, subsequently, its implementing decree – Decree No. 35/2021/ND-CP dated 26 March 2021 detailing and guiding the Law on Public Partnership Investment (*the New Decree*) is supposedly an attempt by the Vietnam Government in enhancing the transparency and certainty in the investment procedures of PPP projects by introducing a codified and unified PPP regulatory framework. At the same time, the PPP Law and the New Decree purportedly resolve some (but not all) of the issues of bankability and risk allocation between the State of Vietnam and investors with an aim to facilitate project financing particularly for the power generation and other infrastructure sectors with intensive capital requirements.

This Legal Update discusses a number of noteworthy points of the PPP Law and the New Decree.

## 1. What are PPP projects?

PPP is an investment form on the basis of a definite term cooperation between the Vietnam State and an investor in a permitted sector by way of entering into a PPP project contract following a number of particular investment procedures.

### 1.1 Permitted sectors

The PPP Law streamlines the scope of permitted sectors by carving out what have been considered by the State as "ineffective investment areas" in the form of PPP investment such as culture, sports, tourism, agriculture and rural development as historically permitted under the Old Decree.

Of note, the Old Decree authorised the Prime Minister to approve PPP projects in exceptional sectors other than those provided under the Old Decree. The PPP Law has removed such authorisation, which means that the list of permitted sectors under the PPP Law is exhaustive.

- ✓ Transportation
- ✓ Power plants and power grids
- ✓ Water resources and irrigation, clean water supply, water drainage and wastewater treatment, waste management and disposal
- ✓ Healthcare, education and training
- ✓ Information technology infrastructure

It is believed that the streamlined scope of permitted sectors under the PPP Law would not have a significant impact on the market on the grounds that over the past years, a vast number of investors in the carved-out fields have selected the form of independent investment projects since they are less burdensome in terms of the investment procedures and regulatory frameworks as compared to investment on a PPP basis.

### 1.2 PPP investment models

The PPP Law now recognises seven PPP investment models after removing the build-transfer (**BT**) model as previously permitted under the Old Decree.

Direct fee collection	State payment	Other
Build – Operate – Transfer ( <b>BOT</b> )	Build – Transfer – Lease ( <b>BTL</b> )	Mixed contract of (i) BOT, BTO, BOO and O&M, or (ii) BTL and BLT.
Build – Transfer – Operate ( <b>BTO</b> )		
Build – Own – Operate ( <b>BOO</b> )	Build – Lease – Transfer ( <b>BLT</b> )	
Operate – Manage ( <b>O&amp;M</b> )		

### 1.3 Capital requirements and fundraising

#### (i) *Minimum investment capital*

With a view to attract private partners with profound expertise and financial capacity especially in large-scale infrastructure projects, the new PPP legislation requires a minimum investment capital for each permitted sector as follows:

- (a) Transportation: VND1,500 billion (approx. US\$65.2 million) or above;
- (b) Power: VND500 billion (approx. US\$21.73 million) for renewable energy power plants and VND1,500 billion (approx. US\$65.2 million) for coal-fired thermal power plants, gas-fired power plants (including LNG-to-power plants), nuclear power plants and power grid;
- (c) Water resources and irrigation, clean water supply, water drainage and wastewater treatment, waste management and disposal: VND200 billion (approx. US\$8.7 million) or above;
- (d) Healthcare: VND100 billion (approx. US\$4.35 million) or above;
- (e) Education – training: VND100 billion (approx. US\$4.35 million) or above;
- (f) Information technology infrastructure: VND200 billion (approx. US\$8.7 million) or above.

#### (ii) *Minimum gearing ratio*

The PPP Law has relaxed the gearing ratio condition by requiring PPP project sponsors to contribute equity at not less than 15% of the total investment capital (excluding the State capital contribution with respect to the construction of infrastructure, site compensation and clearance and construction of temporary works) as compared to the Old Decree being, (1) with respect to projects having total investment capital of up to VND1.5 trillion (approx. USD65 million), not less than 20% of the total investment capital, and (2) with respect to projects having total investment capital above VND1.5 trillion, not less than 20% of VND1.5 trillion plus at least 10% of the investment capital portion exceeding VND1.5 trillion.

#### (iii) *Private placement of corporate bonds*

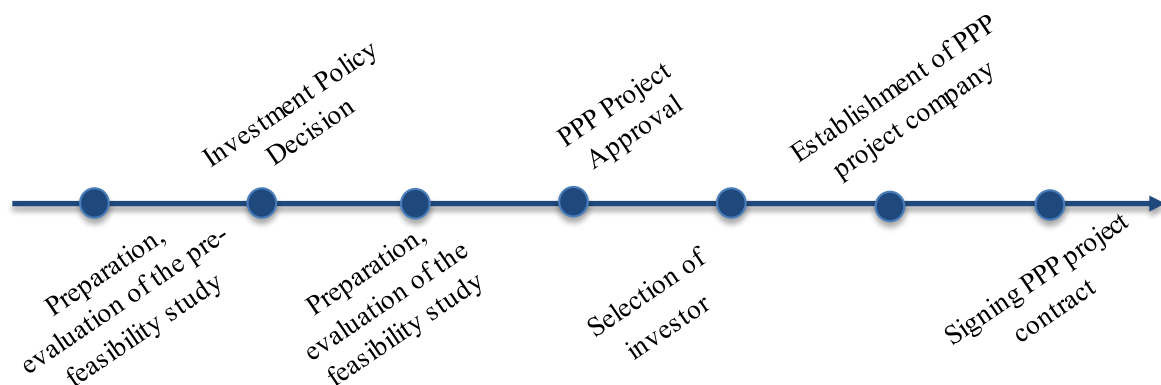
In addition to conventional project financing by means of loans and owner's equity, the PPP Law also allows PPP project companies to issue non-convertible bonds and bonds without warrants<sup>1</sup> as an alternative fundraising source, with more flexible conditions as compared to the private placement of corporate bonds by other non-PPP entities (e.g. there is no requirement of having been in operations for at least one year prior to the private placement). Notwithstanding, the proceeds generated by the private placement of bonds must be strictly used for the purposes of the implementation of the PPP project according to the PPP project contract or debt restructuring.

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<sup>1</sup> 'Bonds without warrants' means bonds without any attached rights to purchase a fixed number of ordinary shares at a fixed price within a specific period.

### 1.4 Investment procedures

The new PPP legislation essentially adopts the procedural steps similar to the Old Decree but, unlike the Old Decree which referred to the Law on Tendering for the selection of an investor, the PPP Law and the New Decree detail and simplify the tendering procedures to comprise four forms of selection namely (i) open tendering, (ii) competitive negotiation, (iii) direct appointment, and (iv) selection of investor in special cases. The PPP Law also introduces one more step in the investment procedures (i.e. PPP Project Approval), which did not exist under the Old Decree, before carrying out the tendering process for the selection of an investor.



Below is the authority matrix for granting the Investment Policy Decision and PPP Project Approval.

	Group 1 <sup>2</sup>	Group 2 <sup>3</sup>	Group 3 <sup>4</sup>	Group 4 <sup>5</sup>
Investment Policy Decision	National Assembly	Prime Minister	Minister	Provincial People's Council
PPP Project Approval	Prime Minister	Minister	Minister	Provincial People's Committee

<sup>2</sup> Group 1 means PPP projects that satisfy any of the following criteria: (a) using public investment capital from VND10 trillion (approx. USD434 million); (b) having a large impact on the environment or the potential for such large impact; (c) converting land use purpose for wet rice cultivation on two harvests in an area of 500ha or more; (d) relocating 20,000 people or more in mountainous areas, or 50,000 people or more in other areas; or (e) applying for a special mechanism or special policy subject to approval by the National Assembly.

<sup>3</sup> Group 2 means PPP projects that satisfy any of the following criteria: (a) relocating 10,000 people or more in a mountainous area or 20,000 people or more in other areas; (b) being funded by the central State budget managed by a ministry or central agency and with total investment capital equivalent to Group A project as stipulated in the Law on Public Investment, or using ODA loan capital and/or preferential loan capital of foreign donors; (c) constructing a new airport or aerodrome, runways of an airport or aerodrome, an international airport passenger terminal, an airport or aerodrome cargo terminal with an output being a minimum of one ton per annum; or (d) constructing a new seaport or port area under a special seaport, a seaport or port area under a special seaport of Grade 1 with total investment capital equivalent to a Group A project pursuant to the Law on Public Investment.

<sup>4</sup> Group 3 means PPP projects subject to the management of a minister or head of a central agency.

<sup>5</sup> Group 4 means PPP projects subject to the locality management of a provincial People's Council.

## 1.5 Termination of PPP projects

There is no particular procedure for an investor to exit a PPP project prior to the entry into a PPP project contract with the authorised State body. The PPP Law only contemplates an exit after the entry into a PPP project contract by way of transferring the investor's equity interests in the PPP project company to a consortium investor or a third party investor subject to certain conditions and restrictions.

In particular, the PPP Law allows a transfer of equity interests in the PPP project company to a consortium investor provided that the lead investor and each remaining investor must hold at least 30% and 15% respectively in the total capital contribution of the PPP project. Further, the PPP Law also restricts a transfer of equity interests to a third party investor until the construction phase has been completed. Any failure to comply with the procedures on transferring equity interests in PPP projects may subject the PPP investors to a prohibition from participating in PPP projects for a period of one to three years.

As a common practice, PPP project investment is structured in such manner that the PPP investor is a special purpose vehicle (i.e. a holding company), preferably located outside Vietnam, jointly owned by a number of PPP sponsors. From a plain interpretation, the PPP Law purportedly targets the transfer of equity interests in the PPP project companies rather than the transfer of equity interests at the holding company level whether or not such holding company is incorporated in Vietnam. This gap in the legislation may give rise to uncertainty in respect of M&A transactions for PPP projects.

## 2. Investment incentives and guarantees

### 2.1 Investment incentives

The PPP Law refers to the investment incentives which are available to PPP projects in accordance with the laws on tax, land, investment and other relevant laws. By way of example, depending on the location of the investment project and the business sectors, the project company may be entitled to:

- (a) Corporate income tax rate of 10% for 15 years, as compared to 20% at the standard rate;
- (b) Possible tax exemption of up to 4 years starting from the first profitable year;
- (c) Possible tax reduction of 50% for up to 9 years commencing at the end of the exemption period;
- (d) Land rent exemption (if payable) for a period from three (3) years up until the lifetime of the project;
- (e) Import duty exemption on goods imported in order to form the fixed assets of the project.

## 2.2 Investment guarantees

Similar to the Old Decree, under the PPP Law, PPP investors and project companies are entitled to guarantees, in addition to those available under the Law on Investment, in respect of the right to access land, land use rights, other public assets; the provision of public services; the right to mortgage assets, land use rights and the right to commercially operate the works or infrastructure system in favour of lenders; and the provision of foreign currency. In particular, only "significant PPP projects"<sup>6</sup> are entitled to a guarantee for the conversion of not more than 30% of the net revenue in Vietnam Dong (i.e. after deducting VND operational costs) into foreign currency. Although this foreign currency guarantee was not uncommon in recent BOT projects prior to the enactment of the PPP Law, the codification of such foreign currency guarantee in the PPP Law is a further assurance for the bankability of PPP projects.

## 2.3 Risk allocation

For the first time, the PPP Law introduces a risk allocation regime between the PPP investors / project companies with the State of Vietnam in the event of any revenue surplus or shortfall. Accordingly, when the actual revenue of a PPP project reaches more than 125% of the base case revenue as set out in the PPP project contract, the PPP investor and project company will share with the State half of the revenue exceeding the 125% threshold; when the actual revenue of a PPP project falls below 75% of the base case revenue, the State shall make up half of the revenue shortfall below the 75% threshold in favour of the PPP project company or investor.<sup>7</sup>

The shortfall sharing regime looks similar to the compensation by the State in the event of a change of law, however, in the form of a guarantee. It is noteworthy that PPP investors and project companies shall not be entitled to such risk allocation regime unless it is set out in the Investment Policy Decision for the project, subject to the financial capacity of the State budget from time to time.

## 3. PPP project contracts

### 3.1 Standard form of PPP project contracts

The PPP Law sets out a number of fundamental provisions of PPP project contracts and assigns the Government to provide standard forms of PPP project contracts for each PPP model (i.e. BOT, BTO, BOO, O&M, BTL, BLT and mixed contracts). Nonetheless, the New Decree does not provide a model contract for each PPP model but a guidance on how to construct a model PPP contract for all types of PPP project contracts (*the PPP Contract Guidance*). The PPP Contract Guidance only sets out very fundamental heads of terms for the parties to negotiate and elaborate further. Notwithstanding, it is still not clear as to whether it is permissible under the law and practically acceptable to the

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<sup>6</sup> "Significant PPP projects" means projects of which the Investment Policy Decisions are approved by the National Assembly and the Prime Minister.

<sup>7</sup> Sharing revenue shortfall shall only apply to BOT, BTO or BOO projects provided that (i) there is a change in master planning, policies or laws which result in the revenue shortfall, (ii) PPP investors and project companies have taken all measures to remedy the shortfall including adjustment of costs of products or public service fees, amendment to the PPP project contract, and (iii) the shortfall has been audited by the State Audit Office.

Vietnam State contracting party to introduce additional provisions which are not provided under those heads of terms (e.g. State immunity clause, lenders' step-in rights).

It is relatively common in practice for other standard forms of contracts between an authorised State body or State owned enterprise and investors or project companies (e.g. power purchase agreements) that the authorised State bodies or State owned enterprises are not willing to deviate from the provisions of the standard forms of such agreements.

### **3.2 Performance bond**

The requirement to provide security for the performance of PPP project contracts by the PPP investor was stipulated under the Old Decree. However, the Old Decree referred to the Law on Tendering with respect to the form, value and effective term of such security. According to the Law on Tendering, PPP investors would be required to provide a performance bond with a value of between two to ten per cent of the total value of the awarded project (which appears to be the total investment capital) and with effect from the effective date of the [PPP project] contract until the parties fulfil all of the contractual obligations therein. Practically speaking, such performance bonds as regulated under the Law on Tendering are more appropriate with procurement contracts, rather than PPP project contracts which usually have a longer term and more complex terms.

The PPP Law has drawn a clear delineation between PPP projects with other non-PPP projects subject to the Law on Tendering. Accordingly, a PPP project company (and not a PPP investor) is obliged to provide a performance bond before the effective date of the PPP project contract as follows:

- (i) PPP projects having a total investment capital of not more than VND300 billion (approx. USD13 million): 1.5% to 3% of the total investment capital;
- (ii) PPP project having a total investment capital of more than VND300 billion: 1% to 1.5% of the total investment capital.

The performance bond will take effect as from the effective date of the underlying PPP project contract until, with respect to an O&M contract, the obligations of the PPP investor under the O&M contract have been fulfilled or, with respect to other types of PPP contracts, the construction of the infrastructure of the project has been accomplished.

### **3.3 Assignment of contractual rights and obligations**

PPP investors, under the old PPP framework, are entitled to assign their rights and obligations under the PPP project contracts to lenders or any third party investor provided that the construction phase has been completed or the project has been in operation (in case there is no construction phase). In the event that such assignment of contractual rights and obligations results in a change of enterprise registration information of the project company, the project company shall register such change according to the Law on Enterprises. In other words, there was no concept of a transfer of equity interests in the PPP project company under the old PPP framework, but only the assignment of contractual rights and obligations under the PPP project contract was contemplated, which caused confusion to PPP investors who wished to exit the PPP projects and to lenders who wished to exercise their step-in rights under the finance documents.



Unlike the Old Decree, the PPP Law does not specifically regulate the assignment of rights and obligations of PPP investors. Instead, the law treats an exit of the PPP investors from PPP projects as a transfer of equity interests in the project companies. The new investors shall undertake to continue to perform the rights and obligations of the exiting investor under the PPP project contract. From a regulatory perspective, this provision provides a clearer picture and guidance to PPP investors when they wish to exit the PPP projects. However, from a lenders' perspective, it is uncertain under the PPP Law as to whether the PPP investors and/or PPP project companies may assign their contractual rights and obligations under the PPP project contracts to lenders or a third party designated by lenders.

### **3.4 Termination of PPP project contracts**

The PPP Law only permits a termination of PPP project contracts in exceptional cases such as force majeure events, national defence or security reasons, insolvency of the PPP project companies, material breach by the State contracting party, a fundamental change in circumstances that renders an inability to perform the PPP project contract, which are supposedly set forth in the PPP project contracts. The law is also silent as to whether it is possible for the PPP investors and project companies to terminate the PPP project contracts without cause.

In the event that a PPP project is terminated prior to its expiry due to a material breach of contractual performance by the Vietnam State contracting party, the PPP investor will be entitled to damages subject to a pre-agreed mechanism for compensation under the PPP project contract and the Law on Public Investment including the possibility of the Vietnam State purchasing the PPP project from the investor.

### **3.5 Rights of lenders**

Although the PPP Law upholds the rights of lenders under the finance documents and PPP project contracts and other relevant laws and regulations, it does not explicitly recognise the step-in rights of lenders as with the Old Decree. There is also no further guidance from the PPP Contract Guidance in this regard.

Step-in rights of lenders are considered as relatively common and conventional according to the international standards of the project finance market. Given the absence of step-in rights language under the PPP Law, lenders may have reasonable grounds to be concerned with the enforceability of their step-in rights in practice in the event such rights are agreed to by the parties under the finance documents (but not expressly recognised at law).

Nevertheless, the new PPP legislation provides that lenders will have the right to cooperate with the Vietnam State contracting party with respect to the appointment of another investor in the case of early termination of the PPP project contract by the existing investor. However, nothing indicates under the new PPP legislation that the new investor must undertake to abide by the finance documents which were entered into between the existing investor and the lender.

### **3.6 Government Guarantee and Undertaking**

Under the Old Decree, the Government may grant guarantees as security for the performance of obligations by State owned enterprises with respect to the supply of

materials, product consumption, and the sale of fuel or raw materials in favour of PPP investors, project companies or other third parties (collectively, *the GGU*). The GGU has become popular for large scale power generation projects undertaken on a BOT basis and considered as an important project document for the purposes of project bankability.

The PPP Law, however, does not contain any express provision relating to the GGU like the Old Decree. It may be unequivocally inferred from the language of the fundamental provisions of the PPP Contract Guidance that the authorised Vietnam body and the PPP investor may agree on non-Government third party guarantees as security for the performance of the obligations of the contracting State authority such as guarantees issued by credit institutions, foreign bank branches, insurance enterprises, and insurance enterprise branches legally operating in Vietnam.

### 3.7 Governing law

One of the major bankability issues of the PPP project contracts is that the PPP Law compels PPP project contracts and other project documents which are entered into by and between PPP investors and/or a PPP project company on one side and Vietnam State authorities on the other side, to be governed by the laws of Vietnam.<sup>8</sup> Even though the PPP Law provides some flexibility for the parties to reach agreement on any issues that are not regulated by the laws of Vietnam in PPP project contracts (but not expressly including other project documents) provided that such agreement does not violate the fundamental principles of the laws of Vietnam, it may be seen as an uncertainty from the perspectives of foreign investors and lenders to the extent that the fundamental principles of Vietnam law could be broadly interpreted by Vietnam authorities and courts in practice (as we have seen with respect to the challenges relating to the enforcement of foreign arbitral awards in Vietnam that cannot be enforced or they are contrary to the fundamental principles of Vietnam law).

Whilst it has been a longstanding practice in infrastructure and power generation sectors in which BOT contracts and other project documents such as GGU, Acknowledgement and Consent are governed by the laws of well developed regulatory frameworks such as English law as permitted under the Old Decree, this new requirement under the PPP Law potentially raises concerns to both PPP foreign investors and financiers as regards to the conceptual gaps and enforcement risks between Vietnam law and common law.

### 3.8 Dispute resolution

Whilst the Old Decree contemplates that any dispute arising out of the PPP contract between a foreign investor and the contracting State body may be settled by international arbitration and it has been a common practice for the parties to BOT contracts in infrastructure and power generation sectors to agree on the settlement of dispute by foreign arbitration centres such as the Singapore International Arbitration Centre, under the New Decree any dispute arising between a foreign investor or the PPP project company on one side and the contracting State body on the other side will be settled by domestic arbitration and the courts of Vietnam unless the PPP project contract or any treaties to which Vietnam is a party otherwise provides. In practice, the contracting State

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<sup>8</sup> Article 55 of the PPP Law.

body may not be willing to agree to international or foreign arbitration. Of course, the large size scale of a PPP project may require limited recourse financing to be undertaken to an international standard and therefore the international developers and lenders will no doubt insist upon international arbitration.

Although domestic arbitral awards are enforceable immediately without being subject to the procedures of recognition at the relevant court of Vietnam, potential concerns include lack of transparency and predictability in the processes of domestic arbitral awards as compared to international arbitration.

## KEY CONTACTS

Please contact us if you have any questions relating to this Legal Update.



**Mark Fraser**  
**Managing Partner**

*T: +84 28 3824 2733*

*E: mark.fraser@frasersvn.com*



**Nguyen Mai Phuong**  
**Senior Associate**

*T: +84 28 3824 2733*

*E: mai-phuong.nguyen@frasersvn.com*

### Ho Chi Minh City

Unit 19.01, 19th Floor, Deutsches Haus  
33 Le Duan Boulevard, District 1  
Ho Chi Minh City, Vietnam  
Tel: +84 28 3824 2733

Email: [legalenquiries@frasersvn.com](mailto:legalenquiries@frasersvn.com)

### Hanoi

Unit 1205, 12th Floor, Pacific Place  
83B Ly Thuong Kiet Street, Hoan Kiem District  
Hanoi, Vietnam  
Tel: +84 24 3946 1203

Website: [www.frasersvn.com](http://www.frasersvn.com)

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