

ALLEN & OVERY



Restructuring across borders

Vietnam

Corporate restructuring and
insolvency procedures | January 2022



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Introduction

On 19 June 2014, the National Assembly of Vietnam adopted Bankruptcy Law no. 51/2014/QH13 (the **Bankruptcy Law**), which became effective on 1 January 2015, governing the bankruptcy regime applicable to all enterprises and cooperative organisations established under the law of Vietnam. The Bankruptcy Law does not regulate any matters of personal bankruptcy. This factsheet does not discuss regulations applicable to regulated companies operating in regulated sectors. Regulated companies such as banks may be subject to different and/or additional procedures administered by the State Bank of Vietnam and other requirements as regulated by specialised regulations.

The above restructuring and insolvency options under bankruptcy proceedings are only available to the distressed company upon a decision for commencement of bankruptcy proceedings by a competent court accepting a legitimate petition for bankruptcy (**a Commencement Decision**). Without a Commencement Decision, a corporate borrower must duly perform its contractual payment obligations.

Secured creditors may elect to enforce their security in respect of overdue debts separately from and before the commencement of bankruptcy proceedings, as security over a

securing party's assets may be enforced without the commencement of bankruptcy proceedings against the securing party.

Where a company has sufficient cash for settlement of all outstanding debts but decides to terminate its operation, such company shall apply for dissolution procedures under the Law on Enterprises no. 59/2020/QH14 effective on 1 January 2021, rather than the bankruptcy proceedings under the Bankruptcy Law.

Where a corporate borrower in Vietnam experiences financial difficulties, the principal restructuring and insolvency options available under the Bankruptcy Law are:

- creditors' acknowledgement of solvency and termination of bankruptcy proceedings;
- rehabilitation of business; or
- bankruptcy.



Enforcement of security out of bankruptcy proceedings

When a corporate borrower faces financial difficulties, a secured lender can enforce security in accordance with contractual terms upon an event of default. This step can be implemented before the commencement of bankruptcy proceedings. If security over a securing party's assets is enforced when bankruptcy proceedings have already been commenced against the securing party, the enforcement of the security may be adversely affected.

Vietnamese law allows parties to contractually agree on the enforcement of security in accordance with the applicable legal framework¹. The parties can agree on enforcement by way of handover of the security asset or by selling it via auction or private sale². The law recognises that enforcement of security in compliance with the relevant security agreement shall not require any authorisation or consent of the securing party³. Where the enforcement of security by way of handover of the security

assets to the secured party in replacement of the performance of the secured obligations is agreed, the secured party is allowed to take over the ownership over the secured assets⁴ with necessary ownership registration procedures to be made to effect the change.

With respect to foreign lenders, the enforcement of security is further subject to satisfaction of certain requirements by law due to the nature of an offshore loan. The requirements include, among other things: (i) due registration of an offshore loan having term longer than 12 months with the State Bank of Vietnam; (ii) compliance with the limitation of foreign ownership in the event of conversion of the debt into shares; and (iii) compliance with rules on conversion of local currency to foreign currency for remittance of enforcement proceeds out of Vietnam.

The enforcement can be made consensually between the parties or with the assistance of the court⁵.

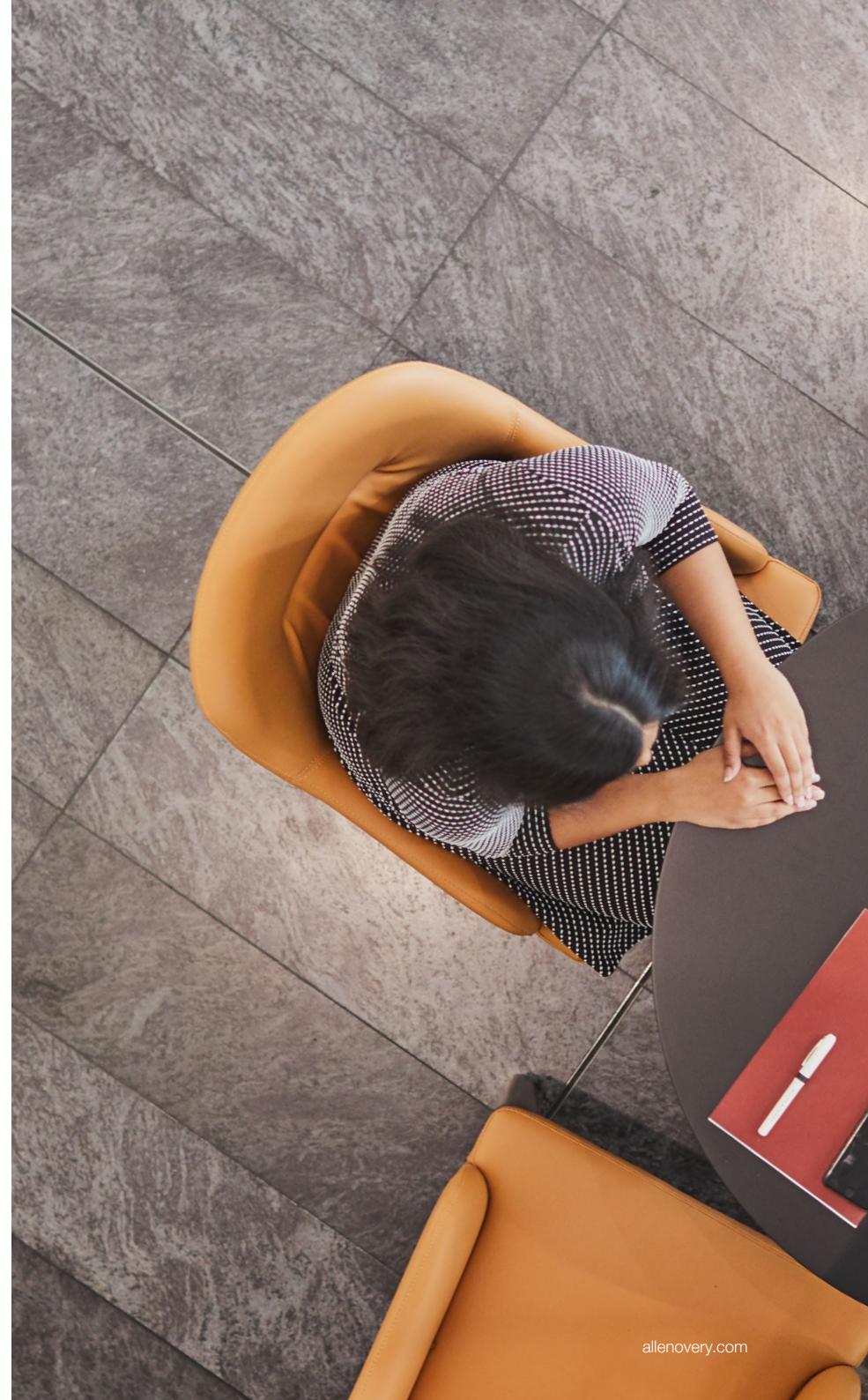
¹Article 49.1 of Decree 21/2021/ND-CP

²Article 52.1 and 52.2 of Decree 21/2021/ND-CP

³Article 49.2 of Decree 21/2021/ND-CP

⁴Article 59.1 of Decree 21/2021/ND-CP

⁵Article 52.6 of Decree 21/2021/ND-CP



Restructuring under contractual arrangements out of bankruptcy proceedings

Vietnamese law does not provide any special scheme that regulates how creditors and the distressed company should deal with the settlement of overdue debts prior to the Commencement Decision. Accordingly, the parties must comply with the signed contractual terms to settle any obligations and conflicts. Prior to the Commencement Decision, it is possible for the parties to mutually set forth a restructuring plan under an agreement either before or after the corporate borrower encounters the financial difficulties. Restructurings can be effected on a simple contractual basis and conducted out of court in this way.



Key milestones of bankruptcy proceedings

The Bankruptcy Law is engaged once a bankruptcy petition is filed with a competent court by an eligible party. The petition can be filed if the distressed company fails to pay an overdue debt within three (3) months from its due date. A bankruptcy petition can be initiated by parties that are allowed to do so by law, such as the legal representative of the distressed company, unsecured creditors or an employee.

Bankruptcy proceedings can be a lengthy process with multiple stages. The key milestones can be summarised as set out below.

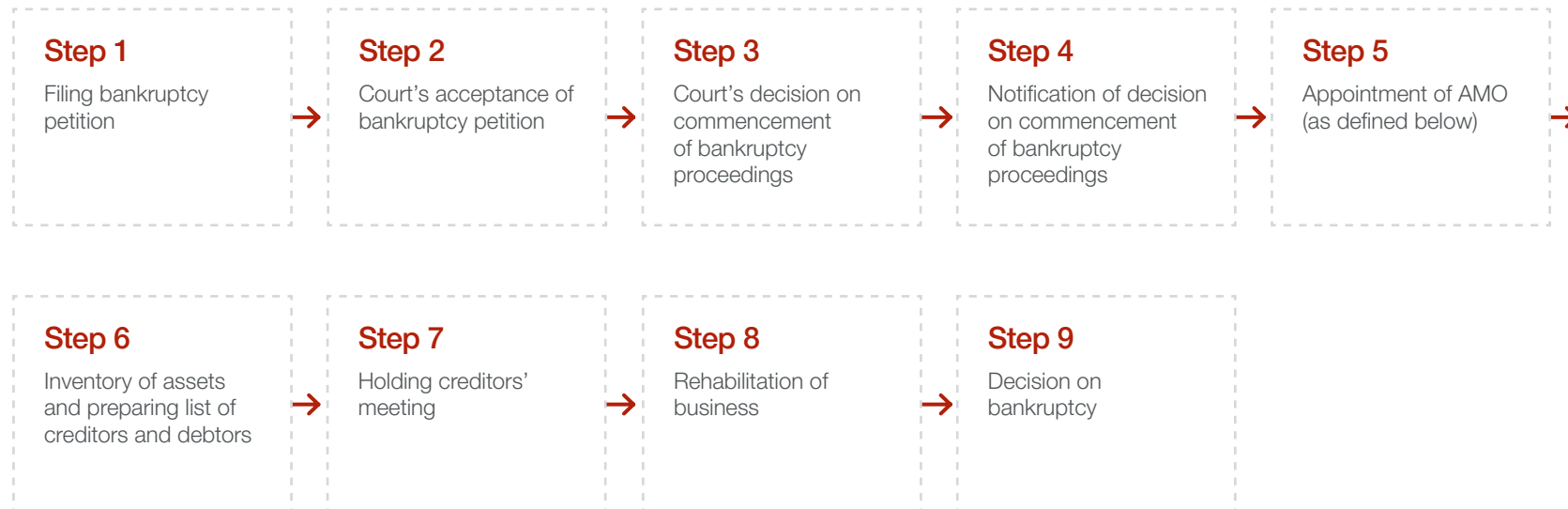
After the Commencement Decision, the distressed company shall carry out its business operation under the supervision of a competent judge and an asset management officer or an asset management liquidation company (an **AMO**).

The distressed company is however prohibited from carrying out the following activities:⁶

- concealing, disposing of or donating any assets;
- paying any unsecured debts except for unsecured debts arising after the commencement of bankruptcy proceedings and paying wages to employees of the distressed company;

- abandoning any right to claim a debt; and
- converting unsecured debts into debts secured or partly secured by the assets of the insolvent company.

During the bankruptcy proceedings, the distressed company can be entitled to certain special treatments offered to it, as set out below.



⁶Article 48 of the Bankruptcy Law

Key milestones of bankruptcy proceedings (cont.)

Suspension or termination of performance of effective contracts

Within five (5) business days after the court accepts the bankruptcy petition, the distressed company has the right to request the court to issue a decision to temporarily suspend the performance of certain contracts where the performance of such contracts has or may have an adverse effect to the distressed company, except for settlement of secured loans⁷.

If the court decides not to commence the bankruptcy proceedings, such temporary suspensions shall be lifted. If the court does decide to commence the bankruptcy proceedings, within five (5) business days from the date of Commencement Decision, the court must review the temporarily suspended contracts to decide whether to: (i) continue the performance of such contracts if such continuation does not adversely affect the distressed company; or (ii) terminate such contracts⁸.

The suspension or termination of contractual performance is a statutory relief measure to allow the distressed company to halt its performance of any obligation causing adverse effects. If the counterparty suffers any losses due to the suspension or termination of contractual performance by the distressed company, such party can become an unsecured creditor, whose interest shall be settled in accordance with the bankruptcy proceedings⁹.

Clawback

An AMO is responsible for reviewing the distressed company's transactions conducted within the six (6) months (or 18 months, where entered into with "related persons") preceding the Commencement Decision to request the court to invalidate them if the transaction relates to¹⁰:

- the transfer of assets not at market price;

- conversion of an unsecured debt into a debt secured or partly secured by the assets of the distressed company;
- payment or setoff which benefits a creditor in respect of a debt that has not yet become due or with a sum that is larger than a debt which has become due;
- donation of the assets;
- a matter that is outside the purpose of the business operation of the distressed company; or
- other transactions for the purpose of disposing of the assets of the distressed company.

Upon the declaration of a null and void transaction, the parties to such transaction shall return what it has received to the other party. If it is impossible to return in kind, the parties shall return the equivalent monetary value instead¹¹.

It is not clear whether, in the event that the distressed company is unable to return what it received either in cash or in kind to the relevant counterparty, such party is still obliged to return what such party received to the distressed company. It is likely that the relevant counterparty shall perform its part independently and thus, it will become an unsecured creditor of the bankruptcy proceedings where the distressed company is unable to return what it received from the null and void transaction.

⁷ Article 61.1 of the Bankruptcy Law

⁸ Article 61.4 of the Bankruptcy Law

⁹ Article 62.2 of the Bankruptcy Law

¹⁰ Article 59 of the Bankruptcy Law

¹¹ Article 131.2 of the Civil Code



Key milestones of bankruptcy proceedings (cont.)

Set-off and netting

The distressed company is allowed to offset its contractual obligations under contracts concluded before the Commencement Decision provided that such set-off is agreed by the AMO, who is then required to report that to the court¹².

There are however specific provisions relating to bankruptcy which could limit the operation of a netting or a set-off in certain limited circumstances. A netting or a set-off in the event of insolvency could be regarded as “settlement of reciprocal obligations”¹³. In case the distressed company has greater obligations in a netting or a set-off, the counterparty shall become an unsecured creditor of the bankruptcy proceedings in respect of the remaining obligations.

Following the court’s decision on bankruptcy declaration, an account bank of the distressed company cannot settle the distressed company’s debts with the available monies therein without an approval in writing of the court or the civil judgement enforcement authority¹⁴.

Liability for guarantees provided by the distressed company as a guarantor

If an obligation guaranteed by the distressed company is not due yet, unless the guaranteed party is also insolvent, by law the guaranteed party shall replace the guarantee with new security unless the secured party and the guaranteed party agree otherwise¹⁵. If both the distressed company as a guarantor and the guaranteed party are insolvent, the distressed company must comply with its guarantee obligation¹⁶.

If the guaranteed obligation is due, the distressed company as a guarantor shall perform its obligation to the extent of its financial capacity and the guaranteed party shall pay the remaining liabilities¹⁷.

Practically, as the guarantor is insolvent, the secured party would become a creditor. The settlement of any overdue debt by the distressed company as a guarantor will be in line with the bankruptcy proceedings.

Foreclosure of secured assets

The enforcement of security granted by the distressed company must be suspended within five (5) business days from the date the relevant court accepts the bankruptcy petition¹⁸. Following the issuance of the Commencement Decision, the court may, at its own discretion, allow the enforcement of security to be resumed, provided that (i) the secured assets will not be used for the rehabilitation purpose or (ii) in the event the secured assets are used for the rehabilitation purpose, the enforcement shall be specified in the rehabilitation plan which shall be approved by the secured creditors¹⁹.

Vietnamese law is silent on how long the suspension will last and it seems that the competent court will determine this issue on a case by case basis. However, the enforcement of security may be permitted by the court if there is a risk that the secured assets will be destroyed or the value of the secured assets will be materially reduced²⁰.

We note that at all times after the commencement of the bankruptcy procedures, secured creditors will remain secured and be ranked in priority in payment to any unsecured creditors.

¹² Article 63.2 of the Bankruptcy Law

¹³ Article 63.3(c) of the Bankruptcy Law

¹⁴ Article 73 of the Bankruptcy Law.

¹⁵ Article 55.2(b) of the Bankruptcy Law

¹⁶ Article 55.3 of the Bankruptcy Law

¹⁷ Article 55.2(a) of the Bankruptcy Law

¹⁸ Article 41 of the Bankruptcy Law

¹⁹ Article 53 of the Bankruptcy Law

²⁰ Article 53.2 of the Bankruptcy Law



Creditors' acknowledgement of solvency and termination of bankruptcy proceedings

The meeting of creditors is an important step of the bankruptcy proceedings. Attendants of the meeting of creditors include (i) the person who filed the bankruptcy petition, (ii) the legal representative of the distressed company, (iii) creditors identified in the list of creditors, (iv) the representative of the employees, and (v) guarantors who implemented any guarantee obligations in favour of the distressed company but are yet to collect the guaranteed amount from the distressed company²¹. Persons specified in (i) and (ii) must be present at the meeting of creditors, whereas the attendance of other persons are not compulsory subject to the quorum of creditors' meeting as discussed below.

A meeting of creditors shall make a decision to request the court for (i) termination the bankruptcy procedures if the distressed company is considered still

solvent, or (ii) rehabilitation of business of the distressed company, or (iii) declaration of the distressed company's bankruptcy²².

At this stage, it is up to creditors to decide whether they believe the distressed company is solvent or not. Practically, the distressed company would be required to provide necessary information to convince creditors. If the meeting of creditors decides that the distressed company is not insolvent, creditors can issue a decision to request the court to terminate of bankruptcy proceedings. Once the court issues a decision on termination of bankruptcy proceedings, the distressed company shall resume its normal operation and the regulations under the Bankruptcy Law shall not apply to the distressed company any more. As a result, the distressed company must duly perform its contractual obligations.

The quorum of the meeting of creditors is creditors representing at least 51% of the total value of unsecured debts of the distressed company and the AMO²³. A decision of the meeting of creditors shall be passed when more than half of the unsecured creditors (by number) attending the meeting and representing at least 65% of the total value of unsecured debts approve the decision²⁴.

²¹ Articles 77 and 78 of the Bankruptcy Law

²² Article 83.1 of the Bankruptcy Law

²³ Article 79 of the Bankruptcy Law

²⁴ Articles 79 and 81.2 of the Bankruptcy Law



Rehabilitation of business

If the meeting of creditors requests the rehabilitation of business, the distressed company must within 30 days from the meeting of creditors, establish a plan for rehabilitation of its business (**the Rehabilitation Plan**) and send such plan to the court, creditors and the AMO to seek their opinion²⁵.

The creditors and the AMO shall give responses to the distressed company and the distressed company then finalises the Rehabilitation Plan to resubmit to the AMO and creditors who will then submit to the court for final review before the Rehabilitation Plan can be presented at the meeting of creditors. The next meeting of creditors will consider whether the proposed Rehabilitation Plan is passed or not. If the creditors do not approve the Rehabilitation Plan, the court shall declare the distressed company bankrupt²⁶.

The Rehabilitation Plan may include measures of capital mobilisation, debt reduction, debt waiver, rescheduling payment of debts, change in production or products portfolio, renovation of

production technology, reorganisation of management team, merger or demerger of production department, issuance of shares to creditors and others, sales or lease of property, or other measures allowed by law²⁷.

The quorum of the meeting of creditors is creditors representing at least 51% of the total value of unsecured debts of the distressed company and the AMO²⁸ and a decision of the meeting of creditors shall be passed when more than half of unsecured creditors (by number) attending the meeting and representing at least 65% of the total value of unsecured debts approve the decision²⁹. The decision of the meeting of creditors shall be binding on all creditors³⁰.

The duration of the Rehabilitation Plan shall be decided by the meeting of creditors. If the meeting of creditors does not decide this matter, a 3-year period from the date of passing the Rehabilitation Plan shall be applied³¹. During the Rehabilitation Plan, the AMO and creditors shall supervise the business

activities of the distressed company. Every six months, the distressed company shall report on the implementation status to the AMO, which shall in turn report to the judge and creditors³². Any changes to the Rehabilitation Plan during its implementation shall be approved by the creditors at the same approval threshold applied at the meeting of creditors³³.

If the distressed company fulfils the Rehabilitation Plan and it is no longer insolvent, the court shall terminate the implementation of rehabilitation proceedings³⁴.

²⁵ Articles 87.1 of the Bankruptcy Law

²⁶ Article 91.6 of the Bankruptcy Law

²⁷ Article 88.2 of the Bankruptcy Law

²⁸ Article 90.1 of the Bankruptcy Law

²⁹ Article 91.4 of the Bankruptcy Law

³⁰ Article 91.5 of the Bankruptcy Law

³¹ Article 89 of the Bankruptcy Law

³² Article 93 of the Bankruptcy Law

³³ Article 94 of the Bankruptcy Law

³⁴ Article 96.1 of the Bankruptcy Law



Bankruptcy

If (i) the meeting of creditors fails to be convened³⁵, or (ii) the meeting of creditors decides to request that the court declare the distressed company bankrupt³⁶, or (iii) the distressed company fails to implement the Rehabilitation Plan, or (iv) the distressed company remains insolvent after the expiry of the term of the Rehabilitation Plan, the court shall issue a decision declaring the distressed company bankrupt³⁷.

After the court issues a decision on bankruptcy declaration, if the distressed company has no assets to be liquidated and distributed, the proceedings end. Otherwise, the assets of the distressed company shall be distributed in the following waterfall payment³⁸:

- costs of the bankruptcy;
- unpaid wages, severance allowances, social insurance and health insurance of the employees and other benefits in accordance with the executed labour contracts and collective labour agreement;

- debts arising subsequent to the commencement of the bankruptcy procedure which serve the purpose of business recovery of the distressed company; and
- financial obligations to the State (e.g., taxes and duties); unsecured debts payable to the creditors named in the list of creditors; secured debts which remain unpaid due to the value of the assets being insufficient to repay them.

Where the value of assets does not suffice to distribute to all parties listed above, the payment to the parties in the same priority ranking will be *pro rata* to their debt claims³⁹. If there is residual value of the assets of the distressed company after full payment of the above items, such value shall be returned to shareholders⁴⁰.

³⁵ Article 80.3 of the Bankruptcy Law

³⁶ Article 83.1(c) of the Bankruptcy Law

³⁷ Article 96.2 of the Bankruptcy Law

³⁸ Article 54.1 of the Bankruptcy Law

³⁹ Article 54.3 of the Bankruptcy Law

⁴⁰ Article 54.2 of the Bankruptcy Law



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Further information

Developed by Allen & Overy's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please [click here](#).

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