

December 2022 | Vol. 16

MHM VIETNAM

Newsletter

Key Contacts



Ha Thi Dung
 +84-24-3267-4103
 dung.ha@mhm-global.com



Nguyen Tra Linh
 +84-24-3267-4112
 linh.nguyen@mhm-global.com



Nirmalan Amirthanesan
 +84-28-3622-1630
 nirmalan.amirthanesan@mhm-global.com



Hiroki Kishi
 +84-24-3267-4102
 hiroki.kishi@mhm-global.com

CIRCULAR 12 OF THE STATE BANK OF VIETNAM ON FOREIGN EXCHANGE CONTROLS OVER BORROWING AND REPAYING FOREIGN LOANS

On 30 September 2022, the State Bank of Vietnam (“**SBV**”) issued Circular 12/2022/TT-NHNN on foreign exchange controls over borrowing and repaying foreign loans (“**Circular 12**”). This Circular took effect from 15 November 2022 and replaced Circular 03/2016/TT-NHNN of the SBV dated 26 February 2016 (as amended, “**Circular 03**”). Previously, the SBV had published an earlier draft of Circular 12 in November last year (“**Draft Circular**”) (please refer to [Volume 8](#) of our Newsletter for details of the Draft Circular), which it has modified in finalising Circular 12.

Below are some key points regarding Circular 12. Circular 03 and 12 relate to the administration and mechanics for lending by offshore lenders in Vietnam. Circular 12 introduces a number of important liberalisations of registration requirements which will reduce compliance burdens for Vietnamese borrowers. It also sets out foreign exchange requirements for remittance offshore of the proceeds of security given for foreign loans, providing greater certainty for lenders regarding enforcement of security.

1. Extension of repayment period of short-term foreign loans before SBV registration requirement is triggered

Under Vietnamese law, short-term foreign loans with a term of 12 months or less are not required to be registered with the SBV unless the term is extended beyond 12 months or the loan is not repaid within the period permitted by the SBV.

Under Circular 03, the SBV granted a period of 10 days after the anniversary of the first drawdown of the loan to make full repayment of the loan. Borrowers were required to register loans that were not repaid within this time with the SBV within 30 days from the anniversary of the first drawdown date.

Under Circular 12, the grace period for repayment of foreign loans is extended to 30 working days after the anniversary of the first drawdown (this was also the case under the Draft Circular). Where repayment is not made within the grace period, Circular 12 also extends the deadline to register short-term foreign loans to 60 working days from the anniversary of the first drawdown date (under the Draft Circular the timeline was proposed to be extended to 45 days).

2. Foreign exchange regulations in relation to enforcement of security interests

Circular 03 only stipulated foreign exchange regulations for the enforcement of guarantees given to secure foreign loans (permitting such payments to be made by the guarantor's bank). It was unclear how the proceeds from the enforcement of other types of security would be remitted offshore.

Circular 12 introduces the concept of a "bank serving secured transactions" and specifically requires that the transfer of any funds to carry out the guaranteed obligations or any proceeds from the enforcement of any secured assets must be made via the bank serving secured transactions. A bank serving secured transactions is defined under Circular 12 as a Vietnamese credit institution or foreign bank branch in Vietnam providing the service of transferring money from a guarantor in relation to guaranteed obligations and proceeds from the enforcement of other security in relation to the foreign loan. Parties would be advised to record the specific bank which will perform this role in the loan and security documentation.

The limited role of the bank serving secured transactions with respect to remittance of the proceeds of enforcing guarantees and other security appears to be the extent to which the SBV was willing to recognise the concept of security agents in Vietnam at this time. While security agent arrangements are commonly used in international project financing, the concept of "security agent" is not explicitly recognised under Vietnamese law. Under the Draft Circular, the concept of "security enforcement agent" (being a legal entity established and operating under Vietnamese law who is authorised by the borrower, the security provider and the lender to carry out the enforcement of security) was proposed to be introduced for the first time, however, this was ultimately not adopted under Circular 12.

3. Implementation of foreign loans in case of division, separation, consolidation and merger of the borrower

Circular 03 and the Draft Circular were silent on the effect on foreign loans where the borrower

is reorganised by division, separation (that is, the spin-off of a part of the borrower's business), consolidation or merger.

Circular 12 stipulates that the successor(s) to the rights and obligations in relation to the foreign loans will bear the responsibilities of the borrower. The successor(s) will be responsible for registering the foreign loan or amending the SBV registration of the foreign loan following the division, separation, consolidation or merger. In addition, the bank providing account services for the loan is responsible for supporting the successor(s) and/or their banks to maintain continuity of implementation of the loan.

Circular 12 specifically provides that where after a borrower's division and/or separation:

(i) there is only one successor to the rights and obligations in relation to the foreign loans, the lender and the newly divided entities, or the lender, borrower and any separated entities, will agree the successor in writing; and

(ii) there are multiple successors who are jointly liable for the repayment of the foreign loan following the division or separation:

- the successors authorise one successor to carry out administrative procedures and reporting obligations in writing;
- the successors will in principle open a joint account for foreign loan borrowing and repayment, although they may open separate accounts for foreign loan borrowing and repayment at the same bank as the original borrower; and
- where one successor is an enterprise with foreign direct investment, the bank where the account for foreign loan borrowing and repayment is opened does not need to be the same as the bank where its direct investment capital account is opened.

4. Exceptions where amendment of SBV registration is not required

Under Circular 03, all amendments to the terms of a foreign loan that differ from the SBV registration must be made if there is any change to the contents of the foreign loans recorded under the SBV registration, except for limited circumstances (described in (i)-(iv) below).

Circular 12 provides for additional exceptions where amendment of SBV registration is not required. In particular, only notification to the SBV is required in the following cases:

(i) changes of the times for withdrawals of loan proceeds or repayments of the principal of less than 10 business days compared to the plan previously approved by the SBV (this exception applied under Circular 03, although the borrower was required to notify the bank providing account services);

(ii) changes of the borrower's address other than to the city or province of the borrower's head office is located (this exception applied under Circular 03);

(iii) change of the lenders, information of the lenders in a syndicated loan having a representative of the lenders except where a lender is also the representative and changes of such lender also changed the representative of the lenders (this exception applied under Circular 03);

(iv) change of the commercial trading name of the bank providing account services (this exception applied under Circular 03 also) or the bank serving secured transactions;

(v) changes to the payment plan for interests and fees as compared to the plan previously approved by the SBV which do not involve any change to the method for calculating the interest and fees (this exception was first proposed in the Draft Circular);

(vi) change (increase or decrease) of the withdrawal or repayment amount of principal, interest and fees within 100 units of the currency of the foreign loan as compared to the amount stated in the SBV registration; and

(vii) decrease in the actual withdrawal or repayment amount of principal as compared to the amount stated in the SBV registration.

5. Reporting obligations

Under Circular 03, borrowers were required to submit quarterly reports on the implementation status of foreign loans to the SBV either physically, or online via the official website of the SBV. Circular 12 now requires borrowers to report on a monthly basis, and the only possible method of submission the official website of the SBV.

If you have any questions or would like further details regarding this issue, please contact our lawyers listed in the left-hand column.

PUBLICATIONS

- Article "Asian Real Estate Development - Overview of Exit Options for Real Estate Projects and Points to Consider Regarding Exit to REITs and S-REITs in Various Countries from Legal and Tax Perspectives"
- Publication ASSOCIATION FOR REAL ESTATE SECURITIZATION Vol.69
- Author Ryutaro Kawamura, Makoto Sakai, Susumu Hanawa, Masahito Saeki

NEWS

➤ Le Thi Hai Duong joins Mori Hamada & Matsumoto

Message from Ms. Le Thi Hai Duong

I am honored to be joining Mori Hamada & Matsumoto.

I have been practising law in Vietnam for nearly a decade now. My majors include general corporate, M&A transactions and I also have extensive experiences in merger control regulations in Vietnam. I am eager to join the team and look forward to a fruitful cooperation with MHM Vietnam.

October 2022

Le Thi Hai Duong, Attorney-at-Law

➤ Mori Hamada Matsumoto to start strategic business alliance with ATD Law in Jakarta from January 2023

Mori Hamada & Matsumoto is pleased to announce a business alliance with ATD Law in Jakarta, a newly established Indonesian firm, starting from January 2023. ATD Law begins its operations today as an independent Indonesian law firm.

Indonesia is the country with the largest population among ASEAN countries, and interest among foreign companies and investors, including Japanese companies, continues to be high. In addition to its importance as an overseas manufacturing base, in recent years there has been a diversification of investment targets, such as investments in the industries of financial, technology, medical care, logistics, and transportation services. Going forward, the diversification and deepening of various industries are expected to be underpinned by the large consumer market.

Previously, the Firm had been involved in various pioneering projects related to Indonesia. Recently, cross-border visits have been revived, and investment projects in Indonesia are expected to increase further. At this time, we decided to open an office in Jakarta through a business alliance with ATD Law in order to strengthen our organization for providing legal services in Indonesia.

ATD Law is an Indonesian local law firm represented by Abadi Abi Tisnadisastra, an Indonesia qualified lawyer. Abi is a lawyer with over 20 years of experience and has a very strong reputation in the local legal market in Indonesia. He has a substantial experience in M&A, Corporate, Finance, Telecommunications and Technology for local and international clients including Japanese corporate clients.

In addition, Tetsu Takeuchi, a Singapore office partner who handles many corporate and M&A projects in Indonesia, and a Japanese law qualified associate will be based in Jakarta.

➤ **Notice of Nagoya Office Relocation**

With effect from December 12, 2022, we will relocate our Nagoya Office from the 23rd Floor to the 29th Floor of the Dai Nagoya Building.

Address / Contact

29th Floor, Dai Nagoya Building

3-28-12 Meieki, Nakamura-ku

Nagoya, Aichi 450-0002, Japan

TEL: +81-52-446-8660 / FAX: +81-52-446-8661

*Telephone and fax numbers will remain the same.

Contact Us

Public Relations
mhm_info@mhm-global.com
+81-3-6212-8330
www.mhmjapan.com