

## Global Restructuring & Insolvency Guide

### Vietnam

On 1 January 2015, Law No. 51/2014/QH13 on Bankruptcy, dated 19 June 2014, issued by the National Assembly (the “**New Bankruptcy Law**”), officially took effect and replaced Law No. 21/2004/QH11, dated 15 June 2004 (the “**Old Bankruptcy Law**”). The New Bankruptcy Law also covers aspects of bankruptcy procedures from the time of filing procedures at court, subsequent to an observation that an enterprise or cooperative has become insolvent. The procedures under the New Bankruptcy Law can be carried out only after the filing of a bankruptcy case in court.

#### Applicable Legislation

The New Bankruptcy Law governs all forms of enterprises and cooperatives established and operating pursuant to the laws of Vietnam.

The government’s Decree No. 22<sup>1</sup> provides guidance for the organization and operation of asset management officers and asset management/liquidation enterprises.

The government’s Decree No. 67/2015<sup>2</sup> regulates sanctions on administrative violations in the fields of judicial assistance, judicial administration, civil judgment enforcement, marriage and family, and enterprise and cooperative bankruptcy.

On a related note, notwithstanding that New Bankruptcy Law has been in effect for more than one year, Vietnamese authorities have not introduced documents guiding implementation of the new law. Therefore, we understand that documents (e.g. decrees, circulars, resolutions, etc.) guiding implementation of the Old Bankruptcy Law may be applicable in some cases. Therefore, the following documents remain relevant as reference material:

- The implementation guidance in Resolution No. 03 issued by the Supreme People’s Court of Vietnam.
- The government’s Decree No. 67,<sup>3</sup> which provides guidance on the process for applying the Bankruptcy Law to special enterprises and the organization and operation of asset management and liquidation teams.
- Decree No. 05, which addresses the bankruptcy of credit institutions.<sup>4</sup> This Decree applies to all credit institutions established and operating pursuant to the 1997 Law on Credit Institutions as amended in 2004,<sup>5</sup> including state-owned credit institutions, joint-stock credit institutions, cooperative credit institutions, joint venture credit institutions and 100% foreign-owned capital credit institutions. The aforementioned credit institutions (except for cooperative credit institutions) may be placed under the “special control” of the State Bank of Vietnam where such credit institutions are in danger of becoming insolvent or being unable to make payments.

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<sup>1</sup> Decree No. 22/2015/ND-CP, dated 16 February 2015, on providing detailed regulations of several articles of the New Bankruptcy Law on asset management officers and asset management and liquidation practice (“**Decree No. 22**”).

<sup>2</sup> Decree No. 67/2015/ND-CP, dated 14 August 2015, amending and supplementing some provisions of Decree No. 110/2013, dated 24 September 2013, of the Government on regulating sanctions of administrative violations in the fields of judicial assistance, judicial administration, civil judgment enforcement, marriage and family, enterprise and cooperative bankruptcy (“**Decree No. 67/2015**”).

<sup>3</sup> Decree No. 67/2006/ND-CP of the Government, dated 11 July 2006, guiding the application of Bankruptcy Law to special enterprises and the organization and operation of asset management and liquidation teams (“**Decree No. 67**”).

<sup>4</sup> Decree No. 05/2010/ND-CP of the Government, dated 18 January 2010, regulating application of the Bankruptcy Law to credit institutions (“**Decree No. 05**”).

<sup>5</sup> Law on Credit Institutions 2010, which was adopted by the National Assembly on 16 June 2010 and took effect on 1 January 2011 (the “**Law on Credit Institutions**”), has replaced the 1997 Law on Credit Institutions as amended in 2004.

- Decree No. 114, which applies to the bankruptcy of the following entities:<sup>6</sup> enterprises conducting insurance business which are established and operating in Vietnam pursuant to the Law on Insurance Business<sup>7</sup> (except for insurance brokers); securities companies, securities investment fund management companies and securities investment companies established and operating in Vietnam pursuant to the Law on Securities;<sup>8</sup> lottery companies conducting lottery business pursuant to Decree No. 30.<sup>9</sup>

For matters which Decree No. 05 and Decree No. 114 do not address, the provisions of the New Bankruptcy Law and its implementing guidelines shall apply.

## Personal Bankruptcy

No law on personal bankruptcy is available in Vietnam.

## Corporate Insolvency and Restructuring

### Court-Based Corporate Insolvencies

#### *Jurisdiction*

- The Provincial People's Court has jurisdiction to settle bankruptcy procedures in the following cases:
- Those involving overseas assets or entities.
- Those in which the insolvent entity has branches and/or representative offices located in districts and/or cities of various provinces;
- Those in which the insolvent entity has real estate in districts and/or cities of various provinces; and
- Those in which the Provincial People's Court takes the bankruptcy cases under the management of the District People's Court due to their complexity.

The District People's Court has the competence in bankruptcy settlement for enterprises and cooperatives whose headquarters are located in the district and for cases which do not fall under the jurisdiction of the provincial court.

#### *Initiation and Filing*

Proceedings may (and in some cases are obliged to) be instigated by any of the following parties upon observation that an enterprise or cooperative has become insolvent: unsecured or partly secured creditors, employees, internal trade unions (or the superior trade union if the internal trade union is not established), the legal representative of an enterprise or cooperative, the owner of a private enterprise/one-member limited liability company, chairman of the board of management of a joint-stock company, chairman of the members' council of a multi-member limited liability company, general partner of any partnership; and shareholder or any group of shareholders owning at least 20% of ordinary shares for at least six consecutive months, except when otherwise provided by the company's charter.

A petition to commence bankruptcy proceedings typically includes the following information:

<sup>6</sup> Decree No. 114/2008/ND-CP of the Government dated 3 November 2008 providing guidance on the Bankruptcy Law with regard to enterprises in insurance, securities, and other financial sectors ("**Decree No. 114**").

<sup>7</sup> Law No. 24/2000/QH10 on Insurance Business, issued by the National Assembly on 9 December 2000 as amended in 2010 ("**Law on Insurance Business**").

<sup>8</sup> Law No. 70/2006/QH10 on Securities, issued by the National Assembly on 29 June 2006 as amended in 2010 ("**Law on Securities**").

<sup>9</sup> Decree No. 30/2007/ND-CP of the Government, dated 1 March 2007, on lottery businesses ("**Decree No. 30**"), as amended by Decree No. 78/2012/ND-CP of the Government, dated 5 October 2012, which took effect on 1 December 2012.

- Name and address of the petitioner;
- Name of the People's Court in charge of the bankruptcy settlement;
- Name and address of the enterprise or cooperative that has become insolvent;
- Grounds for the request to commence bankruptcy procedures together with supporting documents proving debts have been due for over three months (e.g., receipts, agreement, invoices, etc.); and
- Appointment of an asset management officer or asset management liquidation enterprise (if any).

However, if the petitioner is the legal representative of an enterprise or cooperative or the owner of any private enterprise or the President of the Board of Directors of a joint-stock company or Chairperson of the Board of Members of a multi-member limited liability company or the owner of a single limited liability company or general partner of a partnership or shareholders as mentioned above, they must enclose with the petition the following supporting documents:

- Financial statements of the insolvent enterprise or cooperative for the three most recent years;
- An explanation of the cause(s) resulting in insolvency;
- A report on the results of unsuccessful measures which have been taken to recover the enterprise or cooperative;
- Details and locations of the assets of the enterprise or cooperative;
- A list of creditors and debtors containing their names, addresses, debts, types of loans (secured, unsecured or partly-secured loans) which have become due or have not yet become due;
- The establishment certification and charter of the insolvent enterprise or cooperative; and
- Results of a price appraisal and valuation of remaining assets (if any).

For the submission of the petition, the court will accept jurisdiction over a bankruptcy case from the date on which the petitioner presents a receipt for payment of the bankruptcy fee and a receipt for advance payment of bankruptcy costs.

If the petition for initiation of bankruptcy procedures was filed by creditors, then within three working days from the date of the court's receipt of the petition, the insolvent enterprise or cooperative may commence negotiations with the creditors for the withdrawal of the petition. The duration of negotiation will be determined by the court, but shall not exceed 20 days from the date of receipt of the petition.

If the petition is not withdrawn, then within 30 days of the date of accepting jurisdiction over a petition for proceeding with bankruptcy procedures, the court must issue a decision to commence (or not to commence) bankruptcy procedures, based on grounds proving (or disproving) that the enterprise or cooperative has become insolvent within the meaning of the New Bankruptcy Law.

Under the New Bankruptcy Law, any enterprise or cooperative that is unable to pay its due debts over a period of three months shall be deemed to have become insolvent. As such, an enterprise or cooperative shall be considered as insolvent if it fails to repay due debts over the course of three months without having evidence that creditors have demanded payment of due debts and that the enterprise or cooperative has failed to repay as required by the Old Bankruptcy Law. Also, within this definition, we understand that the New Bankruptcy Law extends the payment term for enterprises and cooperatives.

Parties to the case can apply for emergency measures at the same time as an application is filed, in order to prevent the loss or disposal of assets.<sup>10</sup> Such measures include the sale of perishable goods and the freezing of funds or other property of the insolvent enterprise or cooperative.<sup>11</sup>

### ***Payment of Fees***

Bankruptcy fees are used to fund the bankruptcy procedures. Under the New Bankruptcy Law, insolvency processing costs mainly include: (i) bankruptcy fees: VND 1 million; and (ii) bankruptcy costs consisting of costs for liquidators, costs for audit and public announcements and other expenses which will be calculated by the court. The court will calculate the costs for liquidators under Decree No. 22.

In the event that the petitioner for commencement of bankruptcy procedures is an employee or the grassroots trade union, bankruptcy fees shall be waived.

### ***Notice***

The New Bankruptcy Law crystallises the requirement of the court to issue notification as to whether the court decides to commence bankruptcy procedures or not.

For a decision to commence proceedings, the court shall give a notice, to be published in two consecutive issues of a local newspaper of the area in which the enterprise or cooperative is incorporated. This notice must also be communicated to the person filling the petition, creditors and debtors of the insolvent enterprise or cooperative, the people's procuracy at the same level, the civil judicial enforcement office, the taxation authority and the business registration authority of the area in which the head office of the enterprise or cooperative is incorporated.

For a decision not to commence proceedings, the court shall send a notice to the person filling the petition, creditors and debtors of the insolvent enterprise or cooperative, and the people's procuracy at the same level.

The time limitation for sending notification of the court's decision is three working days from the date of issuance of its decision to commence or not to commence proceedings.

### ***Request for Payment of Debts***

Being different from the Old Bankruptcy Law, the New Bankruptcy Law states that, within 30 days from the date of the decision of the court to commence bankruptcy procedures, creditors must submit a notice requesting payment of debts to the asset management officer or asset management and liquidation enterprise. The notice must include substantiating evidence of those debts.

Under the New Bankruptcy Law, it is unclear what the legal consequences will be if the notice is not filed prior to the deadline.

### ***Management of Proceedings***

The asset management officer or asset management and liquidation enterprise is responsible for: (i) verifying, collecting and managing the documents and evidence relevant to the operation of the enterprise or cooperative; (ii) preparing the asset inventory, and list of creditors and debtors; (iii) supervising and inspecting the assets held and preservation thereof; (iv) the recovery, management and distribution of assets; (v) planning for the recovery of assets illegally disposed of; (vi) the depositing of funds received; (vii) and reporting the status of assets, debts and operation of the enterprise or cooperative to the court. Further, it is also to become the representative for the insolvent enterprise or cooperative if the entity has no legal representative.

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<sup>10</sup> Law No. 24/2004/QH11 Civil Procedures Code, issued by the National Assembly on 15 June 2004 (“**Civil Procedure Code**”), Article 117, as amended by the Law No. 65/2011/QH12 which took legal effect on 1 January 2012.

<sup>11</sup> Civil Procedure Code, Article 102.

The asset management officer or asset management and liquidation enterprise shall be appointed in the petition by the petitioner. If the petitioner does not assign, the court conducting the bankruptcy procedures will be responsible for doing so. As such, under the New Bankruptcy Law, the asset management officer or asset management and liquidation enterprise must join in bankruptcy proceedings from the date of issuing the decision to commence the bankruptcy procedures.

The asset management officer must hold a practising certificate as an asset management officer and may be a lawyer, auditor or person having a bachelor degree in law, economics, accounting, finance or banking and five or more years of experience in the field in which he has trained.

Partnerships and private enterprises may play the role of asset management and liquidation enterprise.

### ***List of Creditors***

Within 15 days from the date of expiry for submission of notices by creditors requesting payment of debts, the asset management officer or asset management and liquidation enterprise must prepare a list of creditors. The asset management officer or asset management and liquidation enterprise must post the list at the head office of the court conducting the bankruptcy procedures and the headquarters of the insolvent enterprise or cooperative and send the same to the creditors for their review. The time limit for the posting is 10 working days. And the creditors, the insolvent enterprise or cooperative may request the court to review the list of creditors within five working days from the date of expiry for posting.

The court shall have three working days from the date of receipt of the complaint to consider the complaint and amend the list of creditors, should it see fit to do so.

### ***Meeting of Creditors***

Within 20 days from the date of finalisation of the list of creditors or of completion of the inventory of assets, whichever is earlier, the court will convene a meeting of the creditors. The purpose of the meeting is to discuss the financial obligations of the enterprise or cooperative and pass a resolution agreeing to a restructuring plan for payment of debts.

Any creditor (or its proxy) on the list of creditors may attend such a meeting. The meeting will be valid only if: (i) more than half the unsecured creditors are in attendance; and (ii) the asset management officer or asset management and liquidation enterprise assigned to resolve the petition for commencement of bankruptcy procedures is in attendance.

The meeting of creditors will pass a resolution. The resolution must be in writing and be approved by more than half of the total number of the unsecured creditors who are in attendance, representing at least 65% of the value of unsecured debts.

### ***Corporate Restructuring or Recovery of Business Operations***

Thirty days after the above-mentioned meeting of creditors, following the passing of the resolution by that meeting, the enterprise or cooperative must formulate a plan for recovery and submit such plan to the court, creditors and asset management officer or asset management and liquidation enterprise for their opinions.

Within 10 working days from the date of receipt of the plan for recovery of business operations of the enterprise or cooperative, the creditors and the asset management officer or asset management and liquidation enterprise will provide their opinions for the purpose of the enterprise or cooperative's finalisation. This plan will then be submitted to the asset management officer or asset management and liquidation enterprise for its report to the court.

Within 15 days from the date of receipt of the plan for recovery of business operations of the enterprise or cooperative, the judge settling bankruptcy procedures will review the plan before submission to the meeting of creditors for its consideration and approval.

The plan specifies essential measures for recovery (including the raising of new capital; changes in lines of production, business or technology; restructuring of management; selling of shares or assets and other measures which are not contrary to law) as well the payment of debts.

Within 10 days from the date of deciding to submit the plan to the meeting of creditors, the judge must convene the second meeting. The plan will be approved if it is agreed to by over half of the unsecured creditors present, representing at least 65% of the value of unsecured debts. The court then shall issue a decision to recognise the resolution, and this decision binds all parties.

Following consideration and approval by the judge and meeting of creditors, respectively, the plan shall be implemented and supervised by the asset management officer or asset management and liquidation enterprise. The enterprise or cooperative must report on the status of the plan's implementation to the asset management officer or asset management and liquidation enterprise in six-month intervals. Following this, the asset management officer or asset management and liquidation enterprise will be responsible for reporting to the judge and notifying creditors.

Upon the report of the asset management officer or asset management and liquidation enterprise and/or the substantial conditions, a judge may issue a decision to suspend the implementation of the recovery plan if: (i) the insolvent entity has completed the recovery plan; (ii) the insolvent entity cannot implement the recovery plan; or (iii) the time-limit for implementing the recovery plan has expired. Otherwise the procedures will be carried out to commence procedures for liquidation of assets (see "Liquidation" below).

Note that in special cases involving state-owned enterprises or those involved in defence or service of the public interest, the debtor organization may receive funding for recovery from the state to ensure its on-going solvency.<sup>12</sup> Furthermore, credit institutions in danger of becoming insolvent may be placed under "special control", a method of direct supervision, by the State Bank of Vietnam.<sup>13</sup> Termination of such special control by the State Bank of Vietnam will allow such credit institutions, by a court's decision, to be liquidated and declared bankrupt, without being subject to the business operation recovery procedures.<sup>14</sup>

### ***Preservation of Assets***

Under the New Bankruptcy Law, transactions conducted by an enterprise or cooperative that has become insolvent may be deemed to be invalid where such transactions: (i) occur within six months prior to the date the People's Court issues a decision to commence bankruptcy procedures; and (ii) either (a) comprise the donation, settlement, payment or transfer of assets or debts not due or (b) *unduly* remove the assets of the enterprise or cooperative.

Further, the New Bankruptcy Law also indicates that transactions of an insolvent enterprise or cooperative which are conducted with related persons within 18 months prior to the date when the People's Court issued a decision to commence the bankruptcy procedures, may be deemed to be invalid.

Where, at the request of the asset management officer or asset management and liquidation enterprise or any participants in the bankruptcy procedures, the court considers and declares such transactions invalid, any recovered assets are to be included amongst the assets of the enterprise or cooperative within 10 working days.

### ***Restrictions on Activities***

The business of the enterprise or cooperative continues normally after a decision to commence bankruptcy procedures, but it is subject to the supervision and inspection of the judge and the asset management officer or asset management and liquidation enterprise.

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<sup>12</sup> Decree No. 67, Articles 8 and 9.

<sup>13</sup> Law on Credit Institutions, Article 146.

<sup>14</sup> Decree No. 05, Article 2.2 and New Bankruptcy Law, Article 99 and 104.

As of the date of commencement of bankruptcy procedures, the insolvent enterprise or cooperative shall be prohibited from undertaking the following activities:

- Concealing or disposing of assets;
- Paying unsecured debts, except for the unsecured debts arising subsequent to the commencement of bankruptcy procedures and paying wages to employees;
- Abandoning or reducing rights to claim debts; and
- Converting unsecured debts into debts secured by the assets of the enterprise or cooperative.

Any transactions as set out above shall be invalid and declared so by the court.

### **Declaration of Bankruptcy**

Should the meeting of creditors fail to reach a resolution or should the implemented recovery plan fail, a decision declaring that the enterprise or cooperative is bankrupt (the “**Decision**”) shall be made by the court.

Within 10 working days from the issuance of the Decision, the court must notify the following parties: person(s) filling the petition, creditors, debtors of the insolvent enterprise or cooperative, the people's procuracy at the same level, the civil judicial enforcement office, the taxation authority and the business registration authority of the area in which the head office of the enterprise or cooperative is incorporated.

This Decision does not exempt the owner of a private enterprise or partner(s) in a partnership from their asset obligations owed to an unpaid creditor, unless otherwise agreed or provided by law.

### **Enforcement**

Enforcement occurs where the court's decision to declare an enterprise or cooperative insolvent is proactively executed by the civil enforcement agency within five working days from the issuance of a decision declaring bankruptcy.<sup>15</sup>

### **Appeal**

An appeal against the Decision may be made within 15 days from the receipt of the court's announcement by the parties who are notified the announcement. A council of three judges of the immediately superior court shall consider and resolve complaints or protests arising from the Decision within 20 days after receipt of such complaint or protest. The decision of the superior court shall be final in these cases.

### **Consequences of Violating the Law**

Any party which commits a breach of the law during the conduct of bankruptcy procedures may be subject to discipline, administrative penalty or criminal prosecution, along with liability for damage caused.

With regard to administrative penalties, the maximum fine for a breach of bankruptcy law is VND 40 million.<sup>16</sup> In addition, the offender is subject to measures for remedying consequences, such as compulsory compliance with the obligations provided by the bankruptcy law or compulsory return to the status quo which was changed by the breach of bankruptcy law. The court or the head of the provincial-level People's Committee has the authority to impose administrative sanctions against the offenders.

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<sup>15</sup> Law No. 26/2008/QH12 on Enforcement of Civil Judgments issued by the National assembly, effective 1 September 2009, Article 30.1.

<sup>16</sup> Decree No. 110/2013/ND-CP, dated 24 September 2013, of the Government on sanction of administrative violation in the field of judicial assistance, judicial administration, marriage and family, civil judgment enforcement, enterprise and cooperative bankruptcy, effective 11 November 2013, amended and supplemented by Decree No. 67/2015.

In addition to the above penalties, owners, partners, directors and those holding managerial positions in the bankrupt enterprise or cooperative are not permitted to establish an enterprise or cooperative or hold the above-mentioned positions during the three years following the date the enterprise or cooperative is declared bankrupt.

### **Liquidation**

Should the meeting of creditors fail to reach a resolution or should the implemented recovery plan fail, a decision declaring that the enterprise or cooperative is bankrupt shall be made by the court. Then, within five working days from the issuance of a decision declaring bankruptcy, the civil judgment enforcement office shall be responsible for issuing a decision or assigning an enforcement officer to enforce the decision declaring bankruptcy. Within two working days after receipt of the decision of the civil judgment enforcement office, the enforcement officer must send a written request to the asset management officer or asset management and liquidation enterprise to conduct a liquidation of assets

Under the New Bankruptcy Law, assets may, but need not, be sold at an auction. However, if the assets are either moveable property valued at at least VND 10 million or immovable property, then the sale will be conducted according to the law on the auction of assets.

### **Priority of Payments**

When the judge conducting the bankruptcy procedures issues the Decision on the declaration of bankruptcy, the assets of the insolvent entity shall be redistributed in the following order:

- Cost of bankruptcy;
- Unpaid salaries, severance pay, social insurance and health insurance to employees, other benefits according to the labour contracts and collective bargaining agreements;
- Debts incurred after the initiation of bankruptcy which are used for resuming business operations; and
- Financial obligations to the government; unsecured debts payable to the creditors on the list of creditors; secured debts which are not paid because the value of collateral is not enough to cover such debts.

If funds remain, they will be owned by the shareholders, partners, and/or owners of the cooperative or private enterprises/one-member limited liability company.

### **Out-of-Court Mechanisms**

There is no codified procedure under Vietnamese law regarding measures available prior to the commencement of formal procedures. However, informal measures may be taken to avoid filing proceedings, including the extension of terms of debts or negotiation with creditors.

### **Conclusions and Additional Observations**

Under the New Bankruptcy Law, it seems that bankruptcy procedures are shorter than those outlined in the Old Bankruptcy Law. This points to a positive development in the innovation of administrative procedures in Vietnam. However, until now, the Vietnamese authorities have not introduced guiding documents, which results in gaps and/or difficulties regarding application.

Bankruptcy procedures are very time-consuming, depending on the complexity of the case and the workload of the court, with recorded proceedings lasting an average of five years. As a matter of practice, bankruptcy procedures in Vietnam usually take longer than what is provided by law.



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