

# Vietnam cross-border lending guide

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Vietnam continues to be an attractive destination for foreign investors. As well as equity investment, both Vietnamese and foreign-invested enterprises constantly require debt capital from overseas lenders to establish and grow their businesses.

In this guide, we set out an overview of the basic principles of cross-border lending into Vietnam and address some issues frequently encountered by foreign lenders and domestic borrowers in their transactions.

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# Overview of cross-border lending

## FOREIGN LENDERS

Any non-resident lender may lend to a Vietnamese borrower (a **foreign loan**) without having to be a licensed credit institution in its home jurisdiction or obtain any banking license from the Vietnamese authority.

## DOMESTIC BORROWERS

Any Vietnamese organisation may borrow a foreign loan, subject to the prohibitions or conditions in its charter and any applicable borrowing limits.

Although the law allows a Vietnamese individual to obtain foreign loans, such loans are uncommon in practice due to the lack of relevant implementing regulations.



## KEY FEATURES OF A FOREIGN LOAN

### Loan term

A foreign loan can be made for a term of 12 months or less (**short-term loan**) or more than 12 months (**medium- or long-term loan**), starting from the date of first drawdown to repayment of all outstanding amounts.

A short-term loan is not required to be registered with the State Bank of Vietnam (**SBV**) for the purposes of disbursement and repayment. In contrast, a medium- or long-term loan must be registered with the SBV before it can be disbursed or repaid.

### Loan currency

A foreign loan can be made in any foreign currency.

Foreign loans can also be made in Vietnamese Dong (**VND**) but only in the following limited circumstances:

- if the borrower is a micro-finance institution;
- if the borrower is borrowing a shareholder loan derived from the shareholder's profits generated in Vietnam; or
- if the borrower drawdowns and repays the loan in a foreign currency but the debt repayment obligation is determined in VND.

### Lending forms

Most foreign loans are made in the form of a straight loan agreement. Other less common forms include entrustment lending, finance leasing, accounts receivable<sup>1</sup> or issuance of debt instruments such as international bonds.

<sup>1</sup> Accounts receivable arising from services/products importation agreement with deferred payment period of more than 12 months are no longer required to be registered with the SBV. Lending in such form will also not be subject to the borrowing conditions set out in this guidance, including, among others, loan currency, borrowing limits, borrowing purposes.

# Limitations

## LIMITATION ON USE OF FOREIGN LOANS

Use of foreign loans is subject to the following limitations:

- borrowers can only borrow short-term loans to
  - pay its short-term payables (as determined in accordance with the applicable accounting rules)<sup>2</sup>, or
  - restructuring/refinancing its other existing foreign loans<sup>3</sup>; and
- borrowers can only borrow medium- or long-term loans for the following purposes:
  - restructuring/refinancing its other existing foreign loans;
  - financing the borrower's licensed investment projects; or
  - financing the borrower's business plans or other projects<sup>4</sup>.

<sup>2</sup> These are payables with the due date which is within the tenor of the short-term loan (ie up to 12 months), including such as payables for the seller/supplier, salary, taxes or fees payable to the State, etc. (but excluding onshore debts) and will be determined in accordance with the accounting rules.

<sup>3</sup> The current regulation generally refers to 'foreign debt' of the borrower and it is unclear whether a short-term loan can be taken out to repay all types of the borrower's foreign loans (including either short-term loan or medium- or long-term loans) and their related fees and expenses, so this point should be further clarified with the SBV.

<sup>4</sup> This applies to Vietnamese owned companies which do not (is not required to) obtain investment registration certificate/license for their investment projects.

## REFINANCING

Further, foreign loans can be refinanced or used to refinance existing loans of borrowers in different scenarios, subject to certain conditions and restrictions:

REFINANCING SCENARIOS	CONDITIONS/RESTRICTIONS
Borrow a new <b>foreign</b> loan to refinance an existing <b>domestic</b> loan	Not permitted.
Borrow a new <b>domestic</b> loan from Vietnamese credit institution(s) to refinance an existing <b>foreign</b> loan	<ul style="list-style-type: none"> <li>• the term of the refinancing loan does not exceed the residual term of the refinanced loan; and</li> <li>• the repayment term of the refinanced loan has not yet been restructured (eg has not been extended previously).</li> </ul>
<b>Borrow a new foreign loan to refinance an existing foreign loan.</b>	<ul style="list-style-type: none"> <li>• the principal of the new foreign loan must not exceed (i) the outstanding principal, interest, fees of the refinanced loan and (ii) fees of the new foreign loan, at the time of refinancing.</li> <li>• if the refinancing loan and refinanced loan are both medium- or long term loan, borrower must use the proceeds of the refinancing loan to repay the existing refinanced loan within 5 working days from the disbursement date of the refinancing loan.</li> </ul>





## **BORROWING LIMITS**

### **Overall limit**

The total amount of all foreign loans in Vietnam is subject to an annual limit approved by the Prime Minister (approx. USD7,500 million/year)<sup>5</sup>, with separate limits applying to government-guaranteed and non-government-guaranteed foreign loans.

In practice, the overall limit does not raise practical issues for private borrowers, except for large-scale loans drawn in the last months of the years when the limit may have been reached.

### **Loan headroom limit**

A borrower that is issued an investment certificate/ investment registration certificate or documents approving the investment policy (**Investment Approval**) for its investment project (eg a foreign invested enterprise) may only borrow money to implement such project up to an amount that is the difference between the borrower's contributed capital in the project and the total investment capital specified in its Investment Approval. All existing onshore and offshore long-term loans of the borrower will be counted towards this borrowing limit.

Any borrower without an Investment Approval is allowed to borrow foreign loans to the limit specified under its business plan/loan use plan for the relevant project approved by its decision-making body (eg board of management).

### **Vietnamese credit institution as borrowers**

For borrowers being Vietnamese credit institutions, the applicable limit on short-term foreign borrowing is the ratio of the borrower's total outstanding short-term foreign borrowing

to its standalone equity. Such limit for a commercial bank is 30%, and for a foreign bank branch or other types of credit institutions is 150%.

A borrower that is a Vietnamese credit institution is also subject to separate prudential ratios operating as borrowing limits for short-,medium- and long-term loans set by SBV from time to time.

### **State-owned enterprises**

There is no general formula for borrowing limits applicable to an entity wholly owned by the States and their subsidiaries. Rather, they are subject to additional approvals from competent authorities and more stringent financial conditions (eg debt and equity ratio requirement).

A State owned company can only provide a guarantee for a loan of its subsidiary where it holds more than a 50% stake and in proportion to its shareholding in such subsidiary.

## **THIN CAPITALISATION**

A non-State owned borrower using project land (eg land leased from the State to develop and lease/resale) is subject to an equity to total investment capital ratio of 20% for project land having an area of less than 20 hectares and 15% for land area of 20 hectares or more.

## **RESTRICTION ON ACQUISITION FINANCING**

SBV tends to disapprove registration of a medium- or long-term loan to fund a share acquisition if the borrower is not an investment fund or an organisation whose main business is share trading (eg securities trading companies). There are, however, a few exceptions approved by SBV if the acquisition to be financed is part of borrower's plan to expand its business.

## **RESTRICTION ON FUNDING RESIDENTIAL HOUSING PROJECTS**

Residential real estate projects cannot be financed by foreign loans<sup>6</sup>.

Arguably, raising funds via an issuance of VND bonds to finance residential real estate projects may be permitted. In practice, it is not uncommon for Vietnam real estate groups to issue VND bonds to fund their project companies to develop residential housing projects.

## **CAPS ON INTEREST AND FEES**

Generally, Vietnamese law does not impose any cap on a foreign loan interest rate. Although SBV has the power to fix or impose caps on interest rates and fees of foreign loans, no such cap has ever been set.

In practice, the following issues may arise:

- an interest rate that exceeds 20%/year (which is a cap on interest rates under Vietnamese Civil Code) or an unreasonably high interest rate may be challenged by the Vietnamese remitting bank (as commercial banks have an obligation to prevent money laundering activities, they are cautious about the remitting amount); and
- SBV may also be reluctant to approve foreign loans required to be registered if the interest rate is considered to be too high compared to 'standard' loans in the Vietnamese market.

<sup>5</sup> The number is valid for the year 2023 and until new limit for the next year is issued by the Prime Minister.

<sup>6</sup> Permissible funding sources include: (i) the developer's own capital; (ii) capital contributions or investment cooperation; (iii) a purchaser's advanced payments for the purchase/lease of residential houses; and (iv) domestic loans from credit and financial institutions in Vietnam.

# Documentation and registration

## LOAN REGISTRATION

<b>Applicability</b>	<p>The following must be registered with the SBV:</p> <ul style="list-style-type: none"><li>• medium- and long-term loans;</li><li>• short-term loans being extended to last longer than 12 months from first drawdown;</li><li>• non-extended short-term loans with an outstanding balance that lasts more than 12 months (plus 30-working day window) from first drawdown; and</li><li>• any amendments to the terms of a registered loan eg principal, interest, or repayment schedules except payments being made in the 30-working day window around the registered dates.</li></ul>
<b>What need to be registered</b>	<p>Basic information of a loan such as principal, interest, fees, drawdown and repayment schedule, and security package/guarantee will need to be registered with the SBV</p>
<b>Deadline</b>	<p>Within 30 working days of the execution of:</p> <ul style="list-style-type: none"><li>• the loan agreement; or</li><li>• the agreement to extend the loan beyond 12 months (if such extension is executed before 12-month maturity date of the loan),</li></ul> <p>Within 60 working days from first anniversary of the first drawdown date of:</p> <ul style="list-style-type: none"><li>• a loan being extended beyond 12 months if its extension agreement is executed after one year from the first drawdown; or</li><li>• a non-extended short-term loan with an outstanding balance that lasts more than 12 months (plus 30-working day window) from first drawdown.</li></ul>
<b>Application method</b>	<p>Online or through physical submission to:</p> <ul style="list-style-type: none"><li>• the central SBV in Hanoi (for loans valued at more than US\$10 million); or</li><li>• SBV local branch (for loans valued at US\$10 million or less).</li></ul>
<b>Timeline</b>	<p>The law requires SBV registration to be processed within 15 working days (or 12 working days for an online submission). This may take longer in practice (noting that the process is usually straightforward and should not be materially extended).</p>

## DOCUMENTATION

The following sets out typical provisions of a foreign loan agreement.

<b>Form</b>	<ul style="list-style-type: none"><li>• The loan agreement is not subject to any requirement regarding a specific statutory form in order to be effective and enforceable in Vietnam. Normal contractual principles apply to form a loan contract.</li></ul>
<b>Content</b>	<ul style="list-style-type: none"><li>• Bilateral loans and syndicated loans by offshore lenders are not subject to any requirement. An international form/template (eg ALPMA) is commonly used on the market.</li><li>• Syndicated loans between onshore lenders and offshore lenders (which is not common in practice) must contain certain statutory content.</li></ul>
<b>Governing law</b>	<ul style="list-style-type: none"><li>• The choice of foreign law is permitted, provided that its application is not contrary to the ‘fundamental principles’ of Vietnamese laws. Such ‘fundamental principles’ are not clearly defined and have been, in certain cases, construed by Vietnamese courts to require compliance with the substantive laws of Vietnam.</li><li>• It is a common practice that English or foreign law is chosen as governing law of the foreign loan agreement while the onshore security documents in respect of security over Vietnamese assets will be governed by Vietnamese law.</li></ul>
<b>Dispute resolutions</b>	<ul style="list-style-type: none"><li>• The parties can choose a foreign dispute resolution forum, being foreign courts or arbitration forums. It is a common practice for the choice of Singapore International Arbitration Centre throughout all finance and security documents but in some cases, Vietnam International Arbitration Centre is chosen as dispute resolution forum in the onshore security documents to facilitate enforcement of Vietnamese secured assets.</li><li>• There is no mechanism to enforce foreign court judgments in Vietnam (except in very limited circumstances on a reciprocal basis, which has not been seen in the context of a foreign loan dispute).</li><li>• Foreign arbitral awards are enforceable in Vietnam under the New York Convention but must be approved/recognised by Vietnamese courts for enforcement and must not be contrary to the ‘fundamental principles’ of Vietnamese laws.</li></ul>
<b>Language</b>	<ul style="list-style-type: none"><li>• A loan agreement can be made in any foreign language, with a Vietnamese translation required for SBV registration purposes.</li><li>• A language clause is typically included to ensure that the English version prevails. However, Vietnamese courts will likely consult the Vietnamese language version.</li></ul>

# How can a foreign loan be disbursed and repaid?

Generally, drawdown and repayment of foreign loans must be made via:

- a 'direct investment capital account' (*DICA*) of the borrower being a direct foreign invested enterprise<sup>7</sup>; or
- a 'foreign loan account' of the borrower being a Vietnamese enterprise.

Nevertheless, foreign loans may be drawn in other ways in limited circumstances. For instance, foreign loans can be disbursed directly to the borrower's non-resident beneficiary to pay for imported goods and services or to an offshore account of the borrower opened overseas for which a special SBV approval has been obtained. Likewise, repayment of foreign loans can be made in other ways in limited circumstances, such as in the form of issuing shares to the lender.

When the borrower uses the loan proceeds to make payments in the territory of Vietnam, that proceeds need to be converted into VND and credited to a VND-denominated current account of the borrower before payment. On the other hand, the repayment amount need to be credited to the foreign loan account (which will be denominated in the same currency as the loan) of the borrower before it makes payments to offshore entities.

Payment of a guarantee amount can be made directly to the lender's account by the guarantors. Once the guarantee has been performed, the borrowers are obliged to reimburse the guarantors for such guarantee amount, payment of which shall be made via its DICA or a foreign loan account in the case of offshore guarantor and via its current account in the case of onshore guarantor.

<sup>7</sup> A direct foreign invested enterprise include: (1) an newly established enterprise having foreign members or shareholders and having been issued an IRC; (2) a domestic enterprise having foreign investors holding 51% or more stake; or (3) project enterprises established by foreign investors to implement PPP projects.

# Security package and enforcement

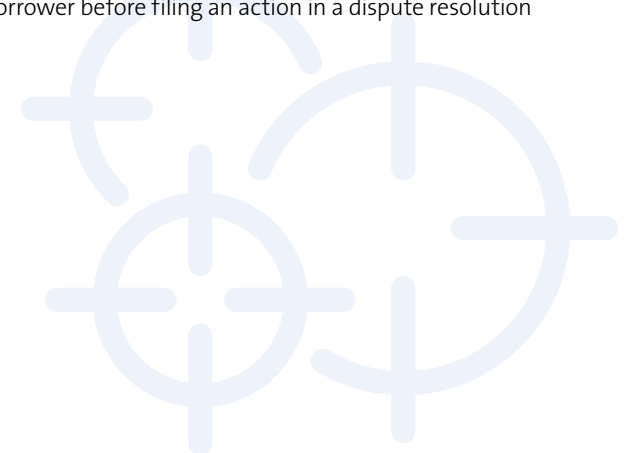
## GENERAL OVERVIEW OF SECURITY MEASURES

Vietnamese laws recognise typical forms of security familiar to international lenders, such as mortgages, pledges and guarantees. Likewise, the laws provide that security may be taken over a range of assets, including moveable assets such as shares, capital contributions, accounts, machinery and inventory and contractual rights, and immovable assets such as land use rights, ships, aircrafts and more.

Further, assets to be formed in the future (eg future receivables or residences to be constructed in the future) may also be taken as security.

## COMMON SECURITY PACKAGES AND ENFORCEMENT ISSUES

Enforcement of security by foreign lenders is generally challenging and not a straightforward process in Vietnam, particularly compared to developed common law jurisdictions. Foreign lenders may need to rely on the cooperation of the securing party to a certain extent for an efficient enforcement process. If the securing party is not co-operative and repossession of the collateral is necessary for enforcement purposes, the secured party will, in most cases, have to resort to the agreed dispute resolution forum, which could involve significant time and expense. Given this, in practice, lenders would often use their security as leverage to negotiate a settlement and/or restructuring with the borrower before filing an action in a dispute resolution forum.



The following highlights key enforcement issues in relation to common security in the Vietnam market:

COLLATERAL	LEGAL AND PRACTICAL ISSUES
<b>Real property</b>	<ul style="list-style-type: none"> <li>Foreign lenders cannot take security over real property (including land and assets attached to land).</li> </ul>
<b>Shares</b>	<ul style="list-style-type: none"> <li>A mortgage of shares is commonly taken out by foreign lenders. Nevertheless, the enforcement of a share security may be subject to foreign ownership limits in Vietnamese companies and regulatory approvals (such as M&amp;A approval).</li> <li>Normally, a foreign lender should prioritise enforcement of the security package at a holding company or the sponsor level offshore outside of Vietnam, with enforcement of a shares mortgage in Vietnam being a last resort.</li> <li>Besides normal forms of accounts, foreign lenders may consider taking security over the indirect investment capital account (IICA) of the borrower to facilitate an enforcement of security on shares and avoid leakage of cash dividends distributed on the shares during the term of the security. Issues on security over bank accounts below apply.</li> </ul>
<b>Debt service reserve account (DSRA)</b>	<ul style="list-style-type: none"> <li>Foreign lenders may require debt service (with a required balance) reserved in an offshore DSRA in a jurisdiction where the lenders could have immediate recourse to such amount upon the borrower's default. However, this arrangement is not common in practice as the opening of the offshore account is subject to SBV's approval.</li> <li>An onshore DSRA is more commonly implemented, noting that a foreign currency-denominated onshore DSRA may be used only if the borrower has its own foreign currency sources or is permitted by lenders to use the loan proceeds to fund the DSRA.</li> </ul>
<b>Bank account</b>	<ul style="list-style-type: none"> <li>An account mortgage does not automatically prevent the borrower from debiting any funds in the mortgaged accounts.</li> <li>Given that, in practice, foreign lenders will usually require the borrower to procure an account control agreement or acknowledgement from the account bank such that: (1) withdrawals or transfers from the mortgaged accounts exceeding the agreed thresholds are subject to the foreign lenders' approval; and (2) the handling of the mortgaged accounts upon default is subject to the instruction of the foreign lenders.</li> </ul>

COLLATERAL	LEGAL AND PRACTICAL ISSUES
<b>Contractual rights</b>	<ul style="list-style-type: none"> <li>An assignment of contractual rights in the underlying agreements upon enforcement may require an assignment of obligations if the assigned rights could not be exercised without the performance of the corresponding obligations by the counterparty. Accordingly, under the law, such assignment of obligations would require prior consent of the counterparty. Further, the assignment of rights may be subject to specific terms and conditions under the underlying agreements that may restrict such assignments or require other consents/approvals.</li> <li>In practice, foreign lenders usually require the borrower to notify the counterparties to the underlying agreements of the mortgage and to make reasonable efforts to obtain acknowledgement from such counterparties to assist the lenders with the enforcement of the mortgaged rights upon the borrower's default.</li> </ul>
<b>Guarantee</b>	<ul style="list-style-type: none"> <li><b>Corporate guarantee for offshore lending:</b> A company in Vietnam cannot provide a security or guarantee to a foreign lender in respect of an offshore loan to a foreign borrower, without prior approval of the Prime Minister of Vietnam. This approval is not often granted in practice and is limited to SOEs investing overseas in line with government policies.</li> <li><b>Government guarantee:</b> Subject to certain requirements, foreign loans to finance certain projects can obtain a guarantee from the Vietnamese government (typically large infrastructure projects of national importance). The government guarantee is limited to 70% of the total investment capital of the projects.</li> <li><b>Local guarantee:</b> <ul style="list-style-type: none"> <li>A bank in Vietnam can provide a guarantee to a foreign lender in respect of borrower's obligations under the foreign loan. Such guarantee for any customer is limited to 15% (or 25% with respect to a single customer and its related persons) of the bank's allocated capital. In monetary terms, such limits can be low, particularly for registered branches of foreign banks.</li> <li>Individuals and organisation in Vietnam (eg major shareholders, parent company, or subsidiaries of the borrower) can provide a guarantee to a foreign lender in respect of onshore borrower's obligations under the foreign loan. There are, however, certain restrictions if the guarantor is a public company (eg a public company is not permitted to provide a guarantee to its shareholders and/or their related persons).</li> </ul> </li> </ul>

## SECURITY CREATION AND PERFECTION

Generally, security transactions are effective from the time they are lawfully entered into or at a time specified in the security agreement, except for secured transactions required to be registered (which are effective from the time of registration).

Specifically, the creation of security over certain assets (eg security over land use rights, ships, aircrafts and other immovable assets) must be registered at the appropriate registry (eg registration of security over land is carried out with the relevant Department of Natural Resources and Environment) in order to be legally binding and effective. In addition, prior to registration, mortgages over land use rights and real property, including future property, must be notarised at a public notary in order to be effective.

It is not necessary to register security over other assets for them to be effective and enforceable. Registration of security in the form of a pledge is not necessary (and there is no such registration procedure in law) as the lender has taken possession over the pledge assets. Registration of security in the form of a mortgage with the relevant registration agency (which is the Vietnam Securities Depository and Clearing Corporation (*VSDCC*) if the secured assets are listed shares, and at the National Registration Agency for Security Transactions (*NRAST*), if the secured assets are other type of movable assets) is recommended since it gives the lenders priority over unregistered security interests and subsequently registered security interests in respect of the same assets.

Registration with the *NRAST* is a simple process and can be completed within a day. If only the lender executes the *NRAST* registration form without the security provider, the security document must be filed with *NRAST*. Registration with *VSDCC* will be conducted by the custodian of the mortgage.

## ENFORCEMENT PROCESS

Vietnamese laws allow the parties to agree upon the specific security enforcement procedure. In the absence of such agreement, enforcement shall be done by way of public auction.

A typical security enforcement procedure is as follows:

- **Delivery of an enforcement notice:** Upon the occurrence of an enforcement event (eg upon default of borrower), the secured party or its security agent shall deliver an enforcement notice to the securing party (and other registered secured parties, if any, within a reasonable period agreed by the parties in the security agreement. While the failure to deliver such notice will not affect the secured party's enforcement right, it provides a basis for the securing party to seek compensation for any loss therefrom.  
  
In case there are multiple secured parties taking security over an asset, the secured party may elect to register the enforcement notice with the relevant registry authority (eg *NRAST*) instead of delivering the notice to each other secured party.
- **Approvals:** The secured party will need to coordinate with the borrower and securing party to obtain necessary approvals for enforcement (eg M&A approval for the taking over or sale of shares being used as collateral to foreign purchasers which must be obtained via the target company).
- **Exercise of enforcement rights:** Upon the expiry of the reasonable period as specified in the security agreement, the security will become enforceable. The secured party or its security agent may realise the collateral using the enforcement methods agreed in the security agreement (eg public auction or private sale of secured assets, taking over the secured assets or instructing account bank to debit the mortgaged account per secured party's instruction).

- **Completion of post-enforcement procedures:** Post-enforcement steps include conducting necessary procedures to update the corporate or ownership documents (eg the enterprise registration certificate or ownership certificate of moveable or immoveable assets) to record the secured party as the new owner/shareholder.
- **Security deregistration:** A registered security shall be deregistered.

## REMITTANCE OF ENFORCEMENT PROCEEDS

- Remittance of proceeds received after enforcement of security assets in Vietnam to the foreign lender or the lenders' agent must be conducted via a VND account (in the name of the lender/agent) opened at a licensed bank appointed by the lender as the '*security transaction servicing bank*'. Remittance of the enforcement proceeds would not need to be routed via the foreign loan account of the borrower, and the security transaction servicing bank and the loan servicing bank (where borrower's foreign loan account is opened) do not need to be the same bank.
- In practice, the lender may appoint the account bank of the borrower where the relevant accounts (eg the foreign loan account, mortgaged account) are maintained as the security transaction servicing bank to facilitate remittance of enforcement proceeds.

## SECURITY AGENTS

Although the role of a security agent is recognised under Vietnamese law in the context of syndicated loans which involve Vietnamese banks as onshore lender(s), there is no guidance on whether a security agent can enter into security documents and enforce the secured assets on behalf of foreign lenders. As Vietnam does not recognise the trust concept, whilst the agent can still perform administrative functions on a contractual basis, they can only be viewed as an authorized agent of the lenders. In practice, a security agent may not be able to successfully pursue enforcement proceedings without the lender bringing (or joining in with) their own claim.



# Taxes and fees applicable to foreign loans and security

## WITHHOLDING TAX

Income from loan interest and fees received by a foreign lender is subject to corporate income tax which a Vietnamese borrower must withhold, currently at a rate of 5%. This can be addressed through appropriate gross-up clauses in the loan agreement.

## DOCUMENTARY TAXES

There are currently no relevant documentary taxes, such as stamp duty, in Vietnam.

## REGISTRATION FEES

SBV registration for foreign loans is free of charge.

Registration fees for security interest are nominal. For security over most assets (excluding aircraft), registration fees are currently VND 64,000 (approximately US\$2.84). Registration fees in respect of security over aircraft range from VND 1,440,000 to VND 14,400,000 (approximately US\$64.00 to US\$640.00), depending on the value of the secured transaction.<sup>8</sup>

## NOTARIAL FEES

These depend on the value of the property being used as collateral, or the value of the transaction (depending on the details contained in the contract being notarised) and are on a sliding scale.

<sup>8</sup> These fees may be subject to change from 01 January 2024 following the expiry of Circular 44/2023/TT-BTC.

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