



VIETNAM

ECONOMIC TIMES

A PUBLICATION OF VIETNAM ECONOMIC ASSOCIATION

ISSN 2734 - 9683

Issue 330 | May 2022



The test of time

Sustainability and the promise of a 'green Vietnam'

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Overarching legal instrument

Vietnam's new law on PPPs brings the entire industry under one coherent, self-contained framework.

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Vietnam took the interesting step in 2020 of enacting a new consolidated law on public-private partnerships (PPPs), which came into effect on January 1, 2021. This was followed by various implementing regulations, designed to give shape and structure to the concepts embodied in the new law.

There has been much commentary on the law, and understandably so in the context of such huge demand and appetite for building out Vietnam's infrastructure. Estimates are that Vietnam will need some \$230 billion to achieve its Sustainable Development Goals by 2030, and indeed, in transport alone, its transport ministry

said in April 2021 that its master plan involves a cost of between \$43 and \$65 billion to 2030.

The enactment of the PPP law recognizes the significant role a well-structured regulatory framework for private sector participation and the involvement of international capital can play in helping a country achieve its ambitions for economic growth.

The question that could be asked, though, is whether this law gives with one hand and takes with the other.

Before answering that question, it is worth understanding why a country would enact a specific PPP law in the first place. There can be a number of reasons. It might

be to create a clear and coordinated framework. It might also act as a unifying, umbrella strategy to ensure that PPP is given priority over sector-specific initiatives. And perhaps most often in countries on the cusp of transformational growth, it allows for a sweeping reform of potential gaps in the existing legal framework. In effect, it can create a supra-legal regime sitting above existing laws dealing with the likes of procurement, construction, and financing, etc.

In Vietnam's case, it already had in place a set of PPP regulations (such as Decree No. 63 from 2018), which while providing a useful starting point were generally perceived as containing a number of shortcomings, including potential conflict with other laws. There is no doubt then that the right thing to do was to issue an overarching new law on PPP. Among other things, this new law brings the entire PPP industry in Vietnam into one coherent, self-contained framework. No longer will there be a need to cross-refer to other laws that may possibly have a bearing on the topic.

This is especially important in the context of bidding. The PPP law requires all key information and bidding data to be shared on the National Bidding Network System. This will go a long way towards ensuring the transparency that investors look for when committing time and effort to complex projects of this nature.



PHOTO: VIET TUAN

The new law has reduced the sectors in which PPP can be implemented as a matter of course to five: transportation; healthcare and education; water; power; and IT infrastructure. Whereas previous regulations permitted the Prime Minister to approve a wider range of projects, the PPP law removes this discretion. This may be seen as a retrograde step, and it is noteworthy that sectors like housing, for instance, are no longer included (despite this being a common area for PPP structuring in other parts of the world). Perhaps, though, concentrating on these priority sectors, which are in most need of alternative sources of funding, will give the PPP law the best prospects for uptake and success.

The law sets specific parameters for concepts such as revenue sharing and foreign currency guarantees. When it comes to revenue sharing, it provides that project revenue greater than 125 per cent of forecasted revenue in the project model must be shared 50 per cent with the State. At the same time, it offers the concession that where revenues are less than 75 per cent of modelled revenue, the State will make up 50 per cent of that hit. On the one hand, some investors may say that the risk-sharing on revenue is precisely where the negotiation should take place in arriving at an optimal deal. On the other hand, others would point

to the fact that these fixed rules apply only after the 25 per cent mark is breached either way, which is already a relatively unlikely scenario for a properly-modelled project. Considering that this is the first time that a law has permitted the State to commit to revenue sharing, this should be seen as a positive step.

When it comes to a foreign currency guarantee, this is capped at 30 per cent of revenue. This mirrors the approach taken in build-operate-transfer (BOT) power projects immediately predating the PPP law, although it is a lower threshold than under previous PPP regulations.

Perhaps the two most controversial elements of the new law in the eyes of international investors will be: (1) the reworked provisions around government guarantees; and (2) the requirement to accept Vietnamese law as the governing law.

It was possible under the previous regime for the parties concerned to agree upon a foreign law as the governing law of the contract. Although it is not entirely unusual for States to require the application of their own law, it does present potential challenges when a country is seeking to attract greater international investment and where its domestic law is still being tested for its suitability in the context of complex infrastructure projects. This is often where the application of a more globally-recognized set of laws (such as English law, which also benefits from its active and evolving system of case law precedent) would offer a greater degree of certainty and comfort for both private sector investors and funders, especially when it comes to implementing well-established principles like liquidated damages for delay. The uncertainties around a domestic law will often have to be priced in as a risk factor, making the overall bid less attractive. This is even more acute when the funding for such projects is commonly governed by a recognized law such as English law, creating a potential mismatch with project documents.

In the case of the PPP law, it provides that a foreign law may only be incorporated in the contract to cover specific terms and conditions that have not been regulated by Vietnamese law and even then must not contradict the “basic principles of Vietnamese law”. To be frank, this opens up a considerable degree of uncertainty and it will be interesting to see how this challenge is navigated as the first PPP projects under the new law are taken forward. If it is not possible, for instance, to have recourse to international arbitration, investors will watch very carefully to see how disputes on existing projects play out in Vietnamese courts.

When it comes to government guarantees, the PPP law sets out various examples

of how the State will support individual projects, ranging from the likes of payment for land clearance and compulsory acquisition to providing tax incentives and granting land rights. The major departure from the previous regulations is the conspicuous absence of any express reference to government guarantees for the performance of State counterparties. This is likely to cause considerable concern for international investors. We understand regulations are being looked at to permit the Prime Minister to authorize such guarantees on a case-by-case basis for the most important projects.

The new law also anticipates the creation of standard-form templates for different types of PPP contracts, such as BOT, build-lease-transfer (BLT), and build-transfer-operate (BTO). We expect that this will offer a considerable degree of certainty for investors and we assume it will also ensure that a standardized approach is taken to PPPs across the various sectors affected by it. It is a little like the approach taken by governments in more traditional procurement scenarios, such as civil engineering and the construction of housing, where international models like FIDIC often provided a universally-recognized base from which to negotiate individual projects. Some States would then tailor those international forms to create their own bespoke standard templates.

In conclusion, the PPP law has helped offer a degree of clarity and standardization where investors were previously forced to navigate the interplay between many different laws and regulations applying to various industry sectors. There are features within this new law, however, that could be seen as a missed opportunity to create a truly all-encompassing and attractive ecosystem for PPP. We expect though that with the passing of targeted regulations to tackle issues that are identified as the new law is tested on major new projects, especially in the transport space, that the overall result will be positive and provide international investors with a greater degree of confidence to participate in Vietnam’s booming economy. ■

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