

Vietnam: New bankruptcy law 2014

A new bankruptcy law was recently adopted by the National Assembly of Vietnam which will replace the bankruptcy law introduced in 2004. This briefing will outline some of the significant changes that the new law introduces in Vietnam.

New law

With effect from 1 January 2015, the new bankruptcy law ("Bankruptcy Law 2014") replaces the previous bankruptcy law of 2004 ("Bankruptcy Law 2004") introducing a number of important changes.

Insolvency status

Under the Bankruptcy Law 2004, if an enterprise failed to pay its due debts, it would be considered as being insolvent upon a creditor's request.

However, under the Bankruptcy Law 2014, an enterprise is considered as being insolvent if it fails to pay a due debt after 3 months from its due date. This means that a creditor's request is no longer required to trigger the insolvent status of an insolvent enterprise.

Bankruptcy procedures

Filing petition for bankruptcy proceedings

Under the Bankruptcy Law 2014, the following parties are entitled to file a request for bankruptcy against an insolvent entity:

1. Any unsecured or partly secured creditor to which a due debt remains unpaid for 3 months from the due date
2. The insolvent entity itself

3. The employees to which the insolvent enterprise failed to pay salaries and other debts within 3 months from the due date or the relevant trade union.

Except in item 3 above, the petitioner must advance the bankruptcy fees to the court.

Milestone in the bankruptcy procedures

The bankruptcy procedures under the Bankruptcy Law 2014 are outlined below:

- Step 1: Filing of the bankruptcy petition with the court
- Step 2: Negotiations to withdraw the petition between the petitioner and the insolvent enterprise. Based on the result of these negotiations, the court will either (i) reject the petition or (ii) accept the petition
- Step 3: Commencement of the bankruptcy proceedings by the court
- Step 4: Creditors' meeting
- Step 5: Implementation of the rehabilitation plan
- Step 6: Declaration of bankruptcy by the court
- Step 7: Liquidation (assets disposal) procedures.

Key issues

- A creditor's request is no longer required to trigger the insolvent status of an insolvent enterprise
- The court can now apply "brief procedures" to declare the insolvent entity as bankrupt
- The quorum requirement of a creditors meeting now only requires the presence of creditors representing at least 51% of the total unsecured debts
- The concept of an asset manager and liquidator for an insolvent/ bankrupt entity is introduced
- Procedures under the Bankruptcy Law shall also be applicable to credit institutions that are insolvent

Under the Bankruptcy Law 2004, the Court could only declare an insolvent entity as bankrupt if a creditors' meeting failed to be convened or if the rehabilitation plan was not properly executed by the insolvent entity. Under the Bankruptcy Law 2014, the court can apply "brief procedures" to declare the insolvent entity as bankrupt if that entity has no assets remaining (without the need to

organize a creditors' meeting and adopt a rehabilitation plan).

Competent courts

Under the Bankruptcy Law 2004, the bankruptcy procedures of companies established in Vietnam (including foreign-invested ones) were subject to the jurisdiction of the courts at provincial level. However, under the Bankruptcy Law 2014, courts at district-level (i.e. lower level) now have competence over the bankruptcy procedures, except in the following specific cases which would be dealt with by the courts at provincial level:

- The insolvent entity has assets located offshore or a party involved in its bankruptcy proceedings resides abroad
- The insolvent entity has branches located in different localities
- The insolvent entity has real estate property located in different localities; or
- Other more complicated cases which the provincial level courts decide to deal with directly.

Creditors' meeting quorum

Under the Bankruptcy Law 2004, a creditors' meeting required the presence of more than half of the unsecured creditors who together represented at least two-thirds of the total unsecured debts of the insolvent entity to form a quorum.

Under the Bankruptcy Law 2014, this quorum requirement is no longer subject to the head-count of creditors but only requires the presence of creditors representing at least 51% of the total unsecured debts.

The voting threshold to adopt resolutions at a creditors' meeting remains unchanged under the Bankruptcy Law 2014, namely the

approval by more than 50% of the unsecured creditors present at that meeting and together representing at least 65% of the total unsecured debts.

Other issues

Voidable transactions

Under the Bankruptcy Law 2004, the following transactions were deemed invalid if they were conducted by the insolvent entity within 3 months prior to the date when the court accepted the bankruptcy petition:

- Donation of moveable or immoveable property to another person
- Settlement of contracts in which the obligations of that insolvent entity are clearly greater than those of the other contracting party
- Payment of undue debts
- Creating a mortgage or pledge of assets in respect of its debts
- Other transactions for the purpose of dispersing assets.

Under the Bankruptcy Law 2014, the following transactions shall be deemed invalid if they were conducted by the insolvent entity within 6 months (or 18 months if transacted with their related parties) prior to the date when the court decides to commence bankruptcy proceedings against that entity:

- Transfer of assets not based on their market price
- Converting unsecured debts into debts (partly) secured by the assets of that insolvent entity
- Payment of undue debts
- Other transactions for the purpose of dispersing assets or not for the business purpose of that entity.

Order of assets distribution

Under the Bankruptcy Law 2014, the assets of an entity declared as bankrupt by the court will be distributed in the following order:

- Bankruptcy fees
- Unpaid salaries, severance allowances, social insurance and other benefits of the employees
- Debts arising after the commencement of bankruptcy proceedings; and
- Financial obligations owed to the Government and unsecured debts.

Guaranteed obligations

Under the Bankruptcy Law 2004, if the guarantor became bankrupt, the obligor had to fulfil its obligations towards the obligee. The obligees then effectively become an unsecured creditor of the obligor.

This has been rectified under the Bankruptcy Law 2014. Accordingly, if the guarantor becomes bankrupt but the guaranteed obligations have not yet become due and enforceable, the obligor must provide other security interest(s) in favour of the obligee (in place of the existing guarantee). Otherwise if the guaranteed obligations are due and enforceable and the guarantor becomes bankrupt, the obligee shall be entitled to demand payment directly from the guarantor.

New terms of "Trustee" and "Enterprise" to manage and liquidate assets"

The Bankruptcy Law 2014 introduces a new concept of asset manager and liquidator for an insolvent/ bankrupt entity. The asset manager and liquidator can be either an individual (the Trustee) or an enterprise. Once

appointed by the court, the Trustee or enterprise specialising in asset management and liquidation may take charge of the management and liquidation of assets of the insolvent entity during the bankruptcy proceedings.

The Trustee may be a lawyer, auditor; or person having a bachelor's degree in law, economics, accounting, finance, banking and five years of work experience in any of the above sectors.

An enterprise specialising in asset management and liquidation must be established in the form of either a partnership company or a private company, of which the director must be a licensed Trustee.

Bankruptcy procedures applicable to credit institutions

The Bankruptcy Law 2004 stated that the Government will provide guidelines for implementing the provisions of the Bankruptcy Law 2004 in the case of the bankruptcy of credit institutions. However, so far no such guidelines have been issued by the Government.

The Bankruptcy Law 2014 clearly provides that the bankruptcy procedures stipulated in that law shall also be applicable to credit institutions that are insolvent and are not (or no

longer) subject to the special control regime of the State Bank of Vietnam.

If you have any questions in relation to the issues raised in this briefing please contact the authors below.

Note: On 19 June 2014, the National Assembly of Vietnam adopted Bankruptcy Law No. 51/2014/QH13, which will replace Bankruptcy Law No. 21/2004/QH11 dated 15 June 2004 as from 1 January 2015.

Contacts

VILAF

Phong, Tran Tuan
Managing Partner

E: phong@vilaf.com.vn

Duyen, Vo Ha
Managing Partner

E: duyen@vilaf.com.vn

Hung, Nguyen Quang
Partner

E: hung@vilaf.com.vn

Clifford Chance

Fergus Evans
Partner

E: fergus.evans@cliffordchance.com

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Clifford Chance, Sindhorn Building Tower 3, 21st Floor, 130-132 Wireless Road, Pathumwan, Bangkok 10330, Thailand

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