

## Law on Public - Private Partnership Investment

On 18 June 2020, the National Assembly of Vietnam promulgated the new Law No. 64/2020/QH14 on Public – Private Partnership Investment (“**Law on PPP**”). Prior to enactment as a law, investment through public-private partnerships (“**PPP**”) was recognised in Decree No. 63/2018/ND-CP (“**Decree 63**”). The Law on PPP will take effect on 01 January 2021.

Notable changes are as follows:

### 1. Amending the PPP investment sectors

The Law on PPP only permits the following sectors to be executed through PPP:

- (a) Transportation;
- (b) Power grids and power plants, except for hydroelectric plants and the cases of monopoly by the State as prescribed by the Law on Electricity;
- (c) Irrigation; clean water supply; water drainage and wastewater; waste treatment;
- (d) Healthcare and education – training;
- (e) Information technology (IT) infrastructure works.

However, it is not clear whether the following sectors, which were previously permitted in Decree 63, would be allowed under the Law on PPP (to the extent they do not fall within the sectors permitted above):

- (a) Public lighting systems; parks; housing and yards for parking cars, vehicles, machinery and equipment; cemeteries;
- (b) Vocational training; culture; sport; tourism; science and technology, hydrometeorology;
- (c) Commercial infrastructure; and infrastructure of urban zones, economic zones, industrial zones, industrial clusters, and of centralised IT zones; hi-tech technical infrastructure; and incubation establishments, technical establishments and common working areas supporting SMEs;
- (d) Agriculture and rural development; development services for connecting production with processing and sale of agricultural products; and
- (e) Other sectors as decided by the Prime Minister.

## **2. Types and standard form of PPP contracts**

The Law on PPP regulates several possible types of PPP contracts: BOT, BTO, BOO, O&M, BTL, BLT and Mixed Contract. However, the law no longer explicitly recognises BT models. All BT projects which have not yet received in-principle approval will be suspended from operation starting from 15 August 2020.

The law further confers the right on the Government to stipulate the standard form of the above type of PPP contracts. Such standard form remains to be seen, as well as the extent of amendments permitted to such form

## **3. The right of investors to propose PPP projects**

Decree 63 required all projects to be subject to tendering pursuant to the Law on Bidding, in addition to some special cases determined by the Prime Minister. However, the Law on PPP allows investors to propose a PPP project themselves.

A PPP project proposed by the investors must meet the following requirements:

- (a) Conforming to the conditions for a project to be invested through a PPP:
  - the necessity of making investment;
  - the project falls within the sectors available to PPP (except for the sector of IT infrastructure works);
  - the project meets the minimum total investment requirement;
  - the project does not duplicate another PPP project which has obtained an investment policy decision or a project approval decision; and
  - the PPP investment approach will be more beneficial compared to other investment approaches;
- (b) Ensuring that a PPP project does not duplicate with other PPP projects for which competent authorities have prepared pre-feasibility study reports or approved of other investors to prepare pre-feasibility study reports;
- (c) Conforming to the national socio-economic development strategies, plans and other relevant planning schemes in accordance with law on planning; and
- (d) Tendering and competitive negotiation for projects proposed by investors must be open and conducted according to the Law on PPP.

Regarding the procedures for preparing an investor-proposed PPP project, an investor may propose a project by preparing a pre-feasibility report and, if this report is approved, proceed to prepare a full feasibility report. If the full feasibility report is approved, the project will be put to tender.

## **4. Financing of PPP projects**

The Law on PPP supplemented several provisions on financing when implementing PPP projects as follows:

- (a) Within 12 months from the contract signing date, the investor, PPP project enterprise must complete the financial arrangement (for projects subject to investment policy decisions of the National Assembly or the Prime Minister, this time limit may be extended, but not exceeding 18 months);
- (b) Investor must contribute equity of at least 15% of total investment in a project, excluding state capital, and must contribute equity according to the schedule agreed upon in the PPP contract; and
- (c) PPP project enterprises can issue bonds as a means of financing.

#### **5. Mechanism for sharing of increased or reduced revenues**

The Law on PPP lays down a revenue sharing mechanism:

- (a) When the actual revenue is 125% higher than the revenue specified in the financial plan under a PPP project contract, the investor, the PPP project enterprise will share with the State 50% of the difference between the actual revenue and 125% of revenue in the financial plan. The increased revenue may be shared after the adjustment in the prices and costs of public products and services or in the PPP contract term and must be audited by the State Audit.
- (b) When the actual revenue is 75% lower than the revenue specified in the financial plan under a PPP project contract, the State will share with the investor or PPP project enterprise 50% of the difference between 75% of revenue in the financial plan and the actual revenue. Sharing of reduced revenues may occur if the following requirements are satisfied:
  - projects are developed and executed under BOT, BTO or BOO contracts;
  - changes in relevant planning, policies and laws result in a reduction in revenue;
  - measures to adjust prices and charges of public products and services, and PPP contract terms, according to the provisions of the Law on PPP, have been fully taken, but the minimum revenue requirement of 75% has not been met yet;
  - the reduced revenue has been audited by the State Audit.

#### **6. Early Termination**

Decree 63 stipulated that parties of a PPP contract will negotiate the conditions for terminating the project contract and measures to handle any issue that may arise during the contract termination.

However, under the Law on PPP, the conditions for terminating the PPP contract have been significantly limited. Accordingly, the parties are not allowed to freely negotiate the termination of the contract and must comply with the fixed conditions under the provision of the Law on PPP. The PPP project contract may only be terminated in the following cases:

- (a) the project is affected by a force majeure event and despite all remedial actions taken by parties, the continued execution of the PPP contract will not be ensured;

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- (b) early termination for the State's interests; to meet the requirements concerning national defence, security and state secrets;
- (c) the PPP project enterprise loses its solvency in accordance with the law on bankruptcy;
- (d) either party seriously defaults on contractual obligations; or
- (e) other cases due to substantial changes in circumstances in accordance with the civil laws in which the contracting parties agree to terminate the contract.

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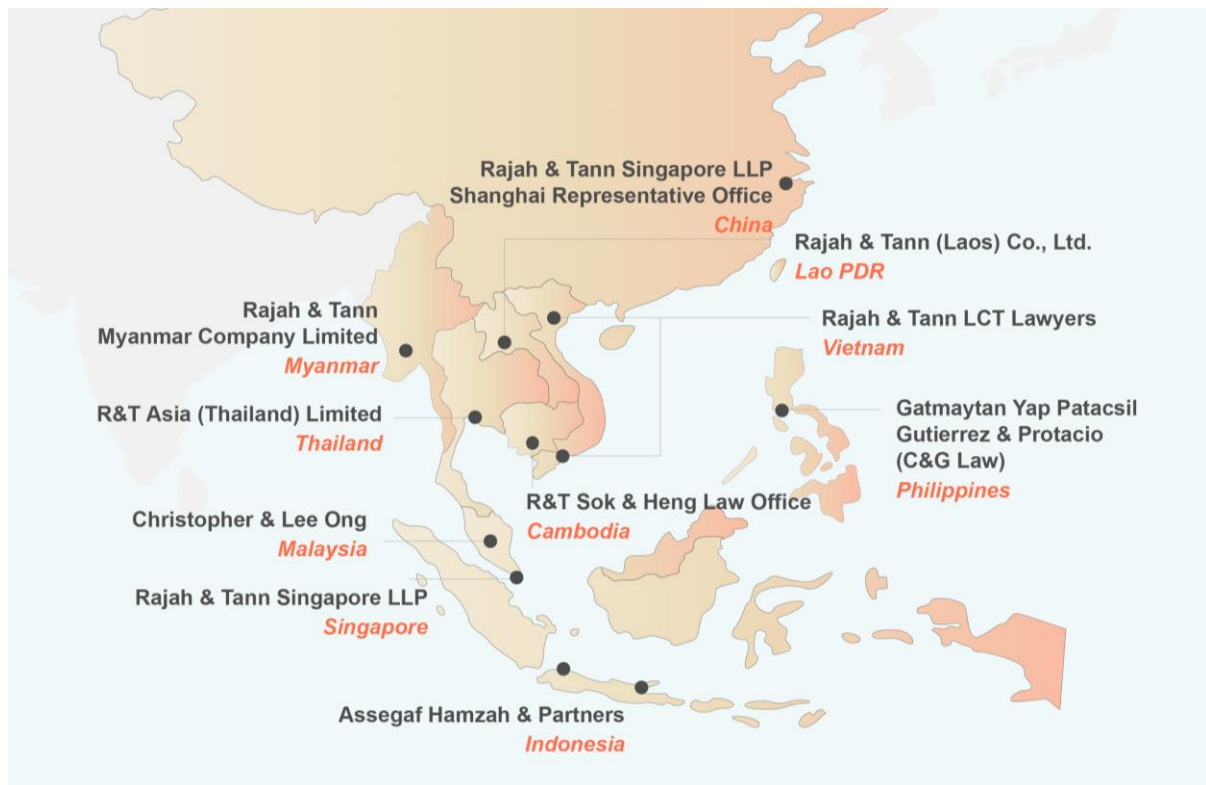
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