

FRASERS NEWSLETTER – NOVEMBER 2017

In this edition of our newsletter we report on:

- i) New Circular on factoring activities of credit institutions and foreign branches;
- ii) New Circular on bank guarantees amending some provisions on guarantees for future housing projects;
- iii) New Circular guiding Decree 71/2017ND-CP on corporate governance of public companies;
- iv) New Decree on wine and liquor business; and
- v) Law on management of foreign trade.

We trust that you find this edition of our newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Our address for comments is legalenquiries@frasersvn.com.

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you feel that you require further information on any of the issues in this edition of the Newsletter, please contact us at the address above or via your usual Frasers' legal adviser.

1. **New Circular on factoring activities of credit institutions and foreign branches**

On 17 May 2017, the State Bank of Vietnam issued Circular No. 02/2017/TT-NHNN regulating debt factoring activities of credit institutions and branches of foreign banks (**Circular 02**). Circular 02 came into force on 30 September 2017 and replaced all preceding relevant regulations, including Decision No. 1096/2004/QD-NHNN dated 6 September 2004 and all of its amendments (**Decision 1096**).

Decision 1096 was issued to implement the Law on Credit Institutions 1997 (as amended), which was replaced by the Law on Credit Institution 2010 on 1 January 2011. While the Law on Credit Institutions 1997 and Decision 1096 only permitted factors to purchase accounts receivables from sellers or service providers, the Law on Credit Institutions 2010 permits factors to purchase both accounts receivables from sellers and accounts payable from buyers. Especially, the Law on Credit Institutions 1997 allowed both recourse factoring and non-recourse factoring, while the Law on Credit Institutions 2010 only permits recourse factoring (meaning that the factors are entitled to claim the amount advanced to their clients under the factoring agreement if the factors cannot collect the receivables or payables).

Decision 1096 has been effective even though there were provisions thereof which have not been consistent with the Law on Credit Institutions 2010. The long awaited Circular 02 finally provides detailed regulations on factoring in line with the Law on Credit Institutions 2010.

Some notable provisions contained under Circular 02 include (but are not limited to) the following:

- Factors involved in factoring activities include commercial banks, general finance companies, factoring finance companies and branches of foreign banks. Finance leasing companies are no longer permitted to conduct factoring activities.
- In addition to companies, individuals are also allowed to sell their accounts receivables or accounts payable to factors.
- Circular 02 sets out clear definitions for accounts receivable factoring and accounts payable factoring.
- Circular 02 provides a list of cases where a factor is not permitted to provide factoring, and which include the following accounts receivable and accounts payable:
 - i) arising from contracts for sale and purchase of goods or provision of services prohibited by law;
 - ii) arising from contracts for sale and purchase of goods or provision of services where the residual term for payment is more than 180 days as from the date of receipt of the request for debt factoring;
 - iii) arising from contracts for sale and purchase of goods or provision of services where it is agreed that rights and obligations under such contracts shall not to be transferred;
 - iv) arising from contracts for provision of services in the finance, banking and insurance sectors in accordance with the regulations of the Prime Minister on Vietnam's Economic Branch System;
 - v) have been subject to other factoring or have been used to secure other payment obligations;
 - vi) accounts receivable and accounts payable for which the term for payment has expired pursuant to contracts for sale and purchase of goods or provision of services; and
 - vii) accounts receivable and accounts payable which are subject to a dispute.

Circular 02 prohibits factoring of accounts receivable and/or accounts payable arising from contracts for the provision of services in the insurance sector, while it allows those arising from contracts for provision of services in the construction sector (which was instead prohibited under Decision 1096).

- Circular 02 also provides detailed regulations with respect to the currency to be used in factoring, interest rates, fees, factoring contracts, etc.

2. **New Circular on bank guarantees amending provisions on guarantees for future housing projects**

On 29 September 2017, the State Bank of Vietnam issued Circular 13/2017/TT-NHNN (**Circular 13**) amending and supplementing a number of articles of Circular 07/2015/TT-NHNN (**Circular 07**) on bank guarantees. Circular 13 took effect on 15 November 2017.

Circular 13 focuses on bank guarantees for the sale, purchase and lease of future houses. The entire Article 12 of Circular 07 is now replaced by a new Article with more detailed regulations on guarantee for sale, purchase and lease of future houses.

Some notable provisions contained under Circular 13 include (but are not limited to) the following:

- Banks normally issue bank guarantees which the bank undertakes to pay the beneficiary if the obligor fails to perform the guaranteed obligations. In a resident housing project, purchasers of future houses are all beneficiaries who may claim against the bank to pay them if the developer

fails to handover the house. Circular 13 mandates banks to issue a bank guarantee to each purchaser of future houses. Previously banks were not required to do so.

- The bank guarantee issued to each purchaser will be effective from the issuance date until at least 30 days after the hand-over date of the house in accordance with the sale and purchase contract of the house.
- The maximum guaranteed amount for a future house project is equal to the total advance payment which the developer has received from the purchasers, and other amounts the developer must return to the purchasers if the developer fails to hand over the house in accordance with the sale and purchaser contract.
- The guarantee agreement between banks and house developers will be effective from the signing date until all guaranteed obligations with each purchaser are terminated.
- Circular 13 specifies the criteria for commercial banks to be eligible for providing guarantees for future houses. Based on such criteria, the State Bank of Vietnam (**SBV**) will publish the list of eligible banks for providing guarantees for future houses from time to time. Circular 13 makes it very clear that even if a bank is no longer in the SBV's list of eligible banks, the bank is still responsible for the guarantee contracts that it has concluded previously.

3. **New Circular guiding Decree 71/2017ND-CP on corporate governance of public companies**

On 22 September 2017, the Ministry of Finance issued Circular No. 95/2017/TT-BTC (**Circular 95**) guiding the implementation of some articles of [Decree 71/2017/ND-CP](#) (**Decree 71**) on corporate administration of public companies. Circular 95 took effect on 6 November 2017.

Circular 95 provides a sample charter and a sample of internal regulations for public companies in its Appendix 1 and Appendix 2. It is not compulsory for public companies to use the sample charter or the sample internal regulations but they are encouraged to use them for the purpose of ensuring compliance with the corporate governance requirements provided for under Decree 71, the Law on Securities and the Law on Enterprises.

The sample charter consists of a preface and 21 chapters containing all compulsory contents required under Article 25 of Law on Enterprises.

The sample internal regulations on corporate governance sets out the main contents on corporate governance such as procedures for convening meetings of the General Meeting of Shareholders (**the GMS**); voting of the GMS; electing the members of the Board of Management (**the BOM**); requirements applicable to members of the BOM or the Board of Inspectors, etc.

4. **New Decree on wine and liquor business**

On 14 September 2017, the Government issued Decree No. 105/2017/ND-CP on Alcohol Business (**Decree 105**), which takes effect from 01 November 2017. Decree 105, replacing Decree No. 94/2012/ND-CP governing the same issue (**Decree 94**), provides the conditions that must be satisfied by alcohol producers and traders in order to conduct an alcohol related business in Vietnam.

Pursuant to Decree 105, the permitted forms of alcohol business include: (i) industrial production of alcohol, (ii) home-made production of alcohol for business, (iii) home-made production of alcohol for selling to enterprises licensed for industrial production for further processing, and (iv) distribution of alcohol, (v) wholesale of alcohol, (vi) retail sale of alcohol, and (vii) sale of alcohol for on-premises consumption.

- **Conditions for alcohol business**

Due to the fact that an alcohol business is listed among the business lines that are conditional in Vietnam, companies or individuals engaged in this business must satisfy certain requirements, including, among others, (i) establish a certain type of legal entity, (ii) obtain a license for an alcohol business, (iii) satisfy conditions of food safety, fire prevention and fighting, environment protection, (iv) comply with labeling requirements, (v) obtain a certification of conformity, and (vi) submit an annual report of alcohol business record.

Depending on the form of alcohol business that a company or individual engages in, the above requirements may vary. For example, a license for an alcohol business is required for

most forms of alcohol businesses, except for home-made production for selling to enterprises licensed for industrial production for further processing (which only have to register at communal-level People's Committees).

Depending on the form of alcohol business, the licensing authority for alcohol business will either be the Ministry of Industry and Trade, the Department of Industry and Trade or the relevant Economic and Infrastructure Divisions.

Decree 105 offers certain reductions in terms of the number of conditions for organizations or individuals engaged in the trading of alcohol products, as compared to the conditions previously set out under Decree 94. Specifically, Decree 105 has removed the requirements for compliance with the plan for development of alcohol production and trading as a condition for conducting an alcohol business. In addition, Decree 105 has removed, among others, the requirements on transportation vehicles and financial capacity for distributors and wholesalers of alcohol products.

- **Violations of alcohol business regulations**

Under Decree 105, violations against the regulations on alcohol businesses have been reduced significantly compared with those applicable under Decree 94. Prohibited activities now include the following:

- i) Conducting an alcohol business without the license or the contents are inconsistent with the contents registered in the license issued by the relevant State agencies;
- ii) Using ethanol which fails to meet the standard requirements, industrial alcohol or other prohibited materials for production or preparation of alcohol;
- iii) Leasing or lending the alcohol business license;
- iv) Displaying, buying, selling or circulating alcohol products without proper labels; alcohol which fails to meet the required standards, quality or regulations on food safety; or alcohol with unclear origin;
- v) Selling alcohol to people under 18; alcohol with 15 degrees or higher through the internet; or alcohol through vending automatic machines;
- vi) Advertising or conducting sales promotions of alcohol that are not permitted under the applicable regulations.

- **Transitional provisions**

Pursuant to Article 39 of Decree 105, alcohol producers, distributors, wholesalers and retailers that have been using valid licenses are entitled to continue to operate in accordance with the contents registered in their licenses, and will be required to apply for the new licenses as prescribed by this Decree only when the old one expires.

Sellers of alcohol for on-premises consumption shall comply with the procedures for the issuance of licenses within 3 months from the effective date of this Decree.

5. Law on management of foreign trade

On 12 July 2017, the National Assembly of Vietnam passed the Law on Foreign Trade Management No. 05/2017/QH14 (**Law on Foreign Trade**) to regulate the management or administrative components of foreign trade in line with the country's international commitments.

The Law on Foreign Trade aims to reinforce the regulations on trade remedies under a centralised mechanism, to bring together the scattered regulations on different areas of foreign trade into a single consolidated law, and to supplement necessary regulations to help foster and managing foreign trade activities in Vietnam.

With respect to trade remedy measures, the Law on Foreign Trade consolidates the regulations under the current ordinances on safeguard, anti-dumping and anti-subsidy measures, and follows basic principles on the application of these measures in accordance with the rules of the World Trade Organisation and other relevant international treaties. As compared to the old

ordinances, the Law on Foreign Trade supplements a few additional provisions in relation to (i) the confidentiality of information during the investigation phases (Article 75), (ii) the representation percentage of the plaintiff requesting for the application of trade remedy measures (Article 79 and Article 87), (iii) the prevention of evasion of trade remedies (Article 72), and (iv) the application of special safeguard measures (Article 99).

With respect to the activities of importing and exporting of goods, the Law on Foreign Trade provides general administrative measures relating to foreign trade management. These include, among others, administrative measures involving export prohibition, export suspension, import prohibition and import suspension; export and import restrictions; management measures based on permits and regulatory conditions; certificate of origin of goods; certificate of free circulation; and other measures for foreign trade management; etc. (Article 8 to Article 59).

The Law on Foreign Trade also provides a specific chapter on the technical and quarantine measures, including sanitary and phytosanitary measures applicable to plants and products from animals. These measures are applied in order to ensure the quality of products and the safety of human health, to protect animals, plants, ecological environment and biodiversity, and to prevent epidemics and ensure the national security and interests (Article 60 to Article 66).

Furthermore, the Law on Foreign Trade also provides a new mechanism relating to urgent control measures for foreign trade activities. Specifically, Article 100 provides for cases that are subject to urgent control measures, including for example, with respect to products from countries which have or are participating in war affecting the national security or interests of Vietnam; or products coming from countries where there are occurrences of natural disasters, epidemics or environmental incidents which may cause serious threats to the health of consumers of such products. The Law on Foreign Trade (Article 100 to Article 102) also provides principles for the application and implementation of these urgent control measures.

The Law on Foreign Trade will come into effect from 1 January 2018. Once effective, the Law on Foreign Trade will supersede several Ordinances and Articles, including Ordinance No. 42/2002/PL-UBTVQH10 on safeguard, Ordinance 20/2004/PL-UBTVQH11 on anti-dumping, Ordinance No. 22/2004/PL-UBTVQH11 on anti-subsidy, and Articles 28.3, 29.3, 30.3, as well as Articles 31, 33, 242, 243, 245, 246 and 247 of the Commercial Law.

Ho Chi Minh City

Unit 1501, 15th Floor, The Metropolitan
235 Dong Khoi Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84 28 3824 2733

Email: legalenquiries@frasersvn.com

Hanoi

Unit 1205, 12th Floor, Pacific Place
83B Ly Thuong Kiet Street, Hoan Kiem District
Hanoi, Vietnam
Tel: +84 24 3946 1203

Website: www.frasersvn.com

This article provides a summary only of the subject matter covered, without the assumption of a duty of care by Fraser's Law Company.

The summary is not intended to be nor should it be relied on as a substitute for legal or other professional advice.