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Dear Readers,

We welcome our readers to the October edition of the Frasers' Newsletter, as 2011 begins to draw to a close the Vietnamese regulatory authorities have been turning their minds to financial matters and report in this edition on regulations relating to corporate bonds, taxation reductions and government guarantees amongst our other items.

- A new circular guiding the management of foreign currency in the context of international corporate bonds, a financing method increasingly being used by Vietnamese domiciled enterprises;
- Regulations governing the purchase of corporate bonds by credit institutions – fiscal stimulus or more red tape?
- Implementing legislation for the establishment of domestic and foreign arbitration centres in Vietnam which give flesh and bones to the legislation promised by the Law on Commercial Arbitration;
- Reductions in corporate income tax and personal income tax for certain business sectors, focusing specifically on those with lower incomes and in sectors which may be hardest hit in the current economic climate; and finally
- Further implementing legislation for Decree 15 on the issue of Government Guarantees detailing the sectors prioritised for allocation of such Guarantees.

We trust that you find this edition of the newsletter an interesting read and welcome any feedback or comments you may have on any of our subjects. Our address for comments is newsletter@frasersvn.com. You may have noticed that the format of our monthly newsletter has been recently enhanced as a result of readers' constructive feedback.

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute legal advice. Should you feel that you require further information on any of the issues in this edition of the Newsletter please do not hesitate to contact us.

International Corporate Bonds: management of foreign currency requirements

As the Vietnamese economy becomes more closely integrated into the global financial community, Vietnamese enterprises require greater access to foreign currencies in order to expand internationally and to attract international investors who may be more confident investing in foreign currency denominated bonds rather than in Vietnamese Dong. We examine in this article new legislation governing the procedures imposed by the Government via the State Bank of Vietnam (SBV) to regulate the management of foreign currency denominated international bonds.

On 24 August 2011, the Governor of the SBV issued Circular 19/2011/TT-NHNN (**Circular 19**) guiding the

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management of foreign currency for international corporate bonds without government guarantees. Circular 19 consists of 6 main aspects, including (i) the governing scope; (ii) procedures to define credit limits; (iii) registration procedures for issuance; (iv) responsibilities of the issuers; (v) reporting regime; and (vi) supervision and sanctions.

In accordance with Circular 19, it is obligatory for corporations issuing international corporate bonds to open and utilise a foreign loan and debt account at a permitted credit institution for foreign loans via the issuance of international bonds.

Corporations, which are not state-owned business groups and corporations or state-owned commercial banks, are required to request the SBV to verify the credit line for the issuance of international bonds after the bond issue scheme has been approved by the General Meeting of Shareholders, Board of Directors, Members Council or the capital owners of the relevant corporation.

Approval of Investment Plan

The issuing enterprise must submit an application dossier to the SBV for confirmation of the international bond issuance limit with respect to the investment plan to be implemented with the capital raised by the bond issue.

The application dossier comprises a letter of request; the enterprise's registration certificate or licence; a copy of the approved issue document; a copy of the decision to approve the issue scheme (the exact documents may vary depending upon the nature of the issuing enterprise). Under Circular 19, the SBV, in conjunction with the Ministry of Finance, has 15 business days after receipt of a valid and complete dossier, to verify the credit line for the issue of international bonds by the relevant enterprise.

Circular 19 also lays out the procedures for registration of the amount of bonds to be issued and the procedures for registration of any change to the amount of the bonds issued.

Conversion

Pursuant to Circular 19, if the bonds in question are convertible bonds, when converting the bonds into shares, corporations are obliged to:

- comply with the applicable provisions on convertible bonds;
- comply with the provisions governing the limit of ownership of foreign investors; obligations of notification; information publication; and other related provisions;
- establish a repayment schedule specifying the amount required to repay the bond owners after conversion;
- provide commitments as to the accuracy of the conversion as compared to the application dossier for registration of the issuing amounts.

In addition, corporations are responsible for submitting a report on the implementation of the issuance of international bonds to the branch of the SBV where the relevant corporation has its head office and

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submit to the SBV headquarters a copy of such report.

Following the issue of the international bonds, in order to make payments relating to the international bonds (i.e. repayment of the principal, as well as payment of interest and other fees relating to the issue), corporations are entitled to buy foreign currency at permitted credit institutions.

Circular 19 came into effect on 15 October 2011. For international bonds issued prior to this date, these will remain under the governance of the registration and verification procedures of the SBV.

Fresh guidance on the purchase of corporate bonds by credit institutions and foreign bank branches

Continuing with the bond theme, on 1 September 2011, the State Bank of Vietnam (**SBV**) issued Circular No. 28/2011/TT-NHNN (**Circular 28**) guiding the purchase of corporate bonds by commercial banks, finance companies and branches of foreign banks (**Credit Institutions**). Circular 28 applies to corporate bonds issued for initial sale to entities eligible to purchase them on the primary market in Vietnam, including the purchase by credit institutions of corporate bonds not taken up by investors pursuant to an underwriting agreement with the issuer (**Purchase of Corporate Bonds**).

Whilst providing useful guidance, Circular 28 is unlikely to lessen the regulatory burden on Credit Institutions making an investment in corporate bonds. With the obligation to have regard to the creditworthiness of the enterprise and validity of the issuing enterprise's investment plan (see more below), there will be a more than nominal duty to carry out due diligence before extending any financing by way of purchase of corporate bonds.

To be eligible for Purchase of Corporate Bonds, Credit Institutions must:

- be a commercial bank, finance company or foreign bank branch established in Vietnam and operating in accordance with the Law on Credit Institutions;
- have the right to purchase corporate bonds described in its establishment license;
- satisfy the requirements on prudential ratios during its banking operation as stipulated in the SBV's regulations;
- have an internal system which it uses to rank loans including the credit rating of enterprises which issue bonds;
- issue regulations on the Purchase of Corporate Bonds in accordance with Circular 28 and relevant legal documents.

It is noted that under Circular 28 whilst branches of foreign banks may subscribe for corporate bonds, they are not entitled to purchase *convertible* bonds.

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Circular 28 also stipulates the conditions for the Purchase of Corporate bonds, which are as follows:

- the bonds are correctly issued in accordance with law;
- the proceeds from the issuance of bonds by the enterprise will be used for a purpose which is legal and consistent with the production and business sector or industry of such enterprise;
- the enterprise issuing the bonds has the financial capacity to ensure repayment of the principal and interest on time and as undertaken;
- the enterprise undertakes to redeem the bonds before they mature for payment if it breaches the law on the issuance of corporate bonds or breaches the provisions in its plan for the issuance of the bonds.

Furthermore, the currency for implementing a purchase of corporate bonds shall be Vietnamese dong.

With respect to the limits on the Purchase of Corporate Bonds, Circular 28 provides that the total investment in bonds shall be counted in the total of outstanding credit permitted to be made to a single client, and to a single client plus related persons. In other words, funds invested in bonds will be treated as part of a Credit Institution's credit limits. Therefore, the total balance of credit extended must not exceed fifteen (15) per cent (for a single client) or twenty five (25) percent (for a single client plus related persons) of the equity of the commercial bank or foreign bank branch; In addition, the total balance of credit extended must not exceed twenty-five (25) per cent (for a single client) or fifty (50) percent (for a single client plus related persons) of the equity of a finance company¹.

In addition, Circular 28 requires the Credit Institution to set up reserves and conduct risk management procedures in accordance with the guidance of Ministry of Finance for listed bonds and bonds registered for trading on the unlisted public company market (**UPCOM**) and in accordance with the guidance of the SBV for unlisted bonds or bonds not yet registered for UPCOM trading.

Will Circular 28 provide much needed stimulus to facilitate the circulation of capital in the market and help the Vietnamese Stock Market to find a way to escape its current sombre status, or will it place more regulatory obstacles in the way of enterprises and Credit Institutions? Certainly, issuing enterprises would be advised to prepare comprehensive proposals demonstrating their creditworthiness and sharing the investment plans for proceeds derived from the issue as an up front measure to ensure the smooth passage of any financing.

Circular 28 came into effect from 20 October 2011. Corporate bonds purchased prior to this date are permitted to be held in accordance with their existing terms until their maturity date.

1. Article 128 of the Law on Credit Institutions.

New Regulations on the Commercial Arbitration Law and the Establishment of Arbitration Centres in Vietnam

On 28 July 2011, the Government promulgated Decree No. 63/2011/ND-CP providing detailed regulations and guidelines for the implementation of the Law on Commercial Arbitration (**Decree 63**). Decree 63 is concerned mainly with the procedural aspects of the establishment and operation of domestic and foreign arbitration centres, branches and representative offices of arbitration centres and execution of injunctions made by arbitration tribunals.

Decree 63 now provides the legislative framework, for the first time, for foreign, as well as domestic, arbitration centres to operate in Vietnam which may provide a welcome alternative forum for dispute resolution.

Establishment and operation of domestic arbitration centres

Before being entitled to operate, a domestic arbitration centre must go through two procedural steps. Firstly, it has to apply for an establishment licence issued by the Ministry of Justice. Secondly, an application dossier must be lodged with the Department of Justice in the locality where the arbitration centre has its headquarters, for the issue of a certificate of registered operation. An arbitration centre may only commence operations from the date of issuance of its certificate of registered operation.

Whilst the regulations on the application dossier for an establishment licence are provided in the Law on Commercial Arbitration, Decree 63 provides details of the application process for a certificate of registered operation, including the documents that must be submitted and the time-limit for granting the certificate of registered operation, which shall be fifteen (15) business days from receipt of a valid dossier.

Establishment and operation of foreign arbitration centres in Vietnam

Foreign arbitration centres which are legally operating in their country of origin are permitted to operate in Vietnam in the form of either a branch or representative office. Whilst a branch is permitted to conduct arbitration activities in Vietnam, a representative office may seek out and promote opportunities for its parent arbitration centre, but may not itself carry out arbitration activities.

Under Decree 63, the Ministry of Justice will be the licensing authority for the issue of an establishment licence to a branch or a representative office of a foreign arbitration centre. After being granted such establishment licence, a *branch* must apply for a certificate of registered operations issued by the local Department of Justice whilst a *representative office* is only required to carry out notification procedure with the local Department of Justice.

Withdrawal of establishment licence and certificate of registered operation

The establishment licence and certificate of registered operation of a domestic arbitration centre will be revoked in the following circumstances:

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- the arbitration centre, after imposition of an administrative penalty for a breach, commits a repeat offence;
- the arbitration centre fails to carry out any of the activities stipulated in its charter or establishment licence for five consecutive years from the date of issuance of such licence;
- the arbitration centre fails, within thirty (30) days from the date of receipt of its establishment licence, to register its operations with the Department of Justice in the locality where it has its headquarters; or
- the arbitration centre fails to amend or supplement its charter and Arbitration Procedural Rules for compliance with the Law on Commercial Arbitration within twelve (12) months from the effective date of such Law.

In the case of a branch or a representative office of a *foreign* arbitration centre, the establishment licence and certificate of registered operations may be revoked in the event of the first two circumstances listed above.

Execution of injunctions issued by arbitration tribunals

Decree 63 confirms that the enforcement of injunctions and of decisions amending, supplementing or rescinding injunctions of arbitration tribunals shall be implemented in accordance with the applicable law on the enforcement of civil judgments and injunctions of courts.

Decree 63 came into effect on 20 September 2011.

Tax breaks for organisations and individuals: Resolution 08

In recognition of the need for fiscal stimulus measures to counteract the negative impact of the gloomy international financial situation, on 6 August 2011, the National Assembly promulgated Resolution No. 08/2011/QH13 (**Resolution 08**) which announced tax incentives for certain categories of enterprises and individuals by way of reductions in corporate and personal income tax for the tax year 2011. Accordingly, the Ministry of Finance has issued Official Letter 10790/BTC-CST dated 12 August 2011 (**Official Letter 10790**) directing municipal/provincial people's committees via their tax departments to guide the implementation of Resolution 08 while a government decree has been drafted for the purpose of implementing Resolution 08 and regulating fiscal stimulus measures (**the Draft Decree**).

The principal beneficiaries of the tax reductions are those on lower incomes, and small and medium sized enterprises who may be struggling in the uncertain economic climate. Notably, there is also a tax reduction for manufacturers in certain sectors, including textile and garment manufacturing regardless of size. Outside these specific industries, given the threshold definitions of small and medium sized enterprises (see below) it seems that Resolution 08 will not have a significant impact on many foreign invested enterprises.

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Corporate income tax (CIT) – 30% reduction

Pursuant to Resolution 08, CIT due in respect of the tax year 2011 shall be reduced by 30% in the following cases:

- a) Small and medium-sized enterprises, but excluding any tax assessed on income from the following business activities:
 - Profits from lotteries, property trading, securities business, finance, banking, insurance or production/services subject to special sales tax;
 - Profits of small and medium-sized enterprises belonging to Economic Groups and classified as Grade I or Special Grade; and
 - Profits of small and medium-sized enterprises which are majority owned by a holding company which is not itself a small or medium-sized enterprise and which holds more than 50% of the equity in the subsidiary company.

The draft decree refers to Decree 56/2009/ND-CP dated 30 June 2009 (**Decree 56**) which defines small and medium-sized enterprises based on their total assets or number of employees. According to Decree 56, for enterprises engaged in agriculture, forestry, fishing, industry and construction, to qualify as a small or medium enterprise either their total assets must not exceed VND100 billion (approximately US\$4.775m) or they must not have more than 300 employees. For enterprises engaged in the trade and services sector, the thresholds are VND50 billion (approximately US\$2.35m) and 100 employees respectively.

- b) Enterprises engaged in the production or processing of agricultural products, forestry products, aquatic products, garments and textiles, footwear or electronic components and construction of socioeconomic infrastructure. According to the Draft Decree, such enterprises must have more than 300 employees (not including short-term employees with contracts of less than 3 months) on average in 2011. However, the CIT eligible for the reduction is limited to the CIT deriving only from the above sectors. Therefore, for enterprises engaged across multiple industrial sectors, only the income derived from the operation of the categories mentioned above is entitled to the CIT reduction.

To apply these CIT incentives, the Draft Decree stipulates that enterprises should maintain full accounting books, invoices, documents and pay taxes in accordance with the regulations and should separately record profit from activities entitled to these CIT incentives.

Personal Income Tax (PIT) exemptions and reductions

The National Assembly has also approved fiscal stimulus measures for PIT focusing on lower earning individuals and also income derived from investment activities, as follows:

A PIT exemption will be applied to:

- individuals with taxable income from salary and wages and from business in the Bracket I taxable

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income level on the scale of progressive tax tariffs. Currently this means individuals with salary/wages or business income subject to PIT at the lowest rate of 5% (i.e. a taxable amount not exceeding VND5 million per month). This exemption applies for the period from 1 August 2011 until the end of 31 December 2011;

- dividends distributed to individuals from investment activities in the securities market and from capital contributions in the form of the purchase of shares in enterprises, except for dividends of commercial joint stock banks, financial investment funds and credit institutions. This exemption will apply to income generated from 1 August 2011 until the end of 31 December 2012. The Draft Decree further explains that the exemption will extend to profits of the 2012 year distributed after 31 December 2012.

Moreover, from 1 August 2011 to 31 December 2012, proceeds/profits from sales of securities will be entitled to a 50% PIT reduction

50% reduction of other tax:

Furthermore the National Assembly has announced a further tax reduction of 50% on value added tax (**VAT**) paid on the basis of a fixed level of turnover, and PIT and CIT as from the third quarter of 2011 until the end of 2011, for individuals and family households conducting the business of leasing accommodation to workers and students; for individuals and family households providing child care services; and for individuals and organisations providing shift meals for workers, on condition that such taxpayers maintain the rents and prices for all the above-mentioned services at the same level they were at the end of 2010.

Follow up implementing legislation on Government Guarantees

Following the issue of Decree 15/2011/ND-CP dated 16 February 2011 of the Government on the issuance and management of government guarantees (**Decree 15**) earlier this year, further implementing legislation has been developed to assist the practical implementation of Decree 15.

On 18 August 2011, the Prime Minister issued Decision 44/2011/QĐ-TTg (**Decision 44**) comprising the list of programmes/projects prioritised for consideration for government guarantees. Drawn up upon the recommendation of the Minister of Finance, Decision 44 aims to flesh out and implement Article 6.2 of Decree 15 which should assist investors to progress projects.

Following the provisions of Decision 44, as from 10 October 2011, there are seven groups of projects/programmes prioritised for the grant of government guarantees. These are:

- Programmes and projects designated by the National Assembly or the Prime Minister and considered as major projects and urgent, in all areas;
- Credit programmes with the goal of the State conducted by the policy banks of the State in areas as determined by the Prime Minister;

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- Programmes and projects financed by commercial loans associated with ODA under the form of integrated credit;
- Programmes and projects in the energy sector and minerals exploitation: Investment and development projects for the electricity sector; Investment in oil refineries and gas; Exploitation projects of alumina and aluminum approved by the National Assembly;
- Programmes and projects in the construction sector, infrastructure development and infrastructure: Construction and operation of seaports and exploitation of deep-water seaports; highways; national transportation bridges; locomotives and carriages for the national railways system; projects relating to educational, training and vocational establishments;
- Programmes and projects for the manufacture of key mechanical products replacing imported products;.
- Other programmes and projects as determined by the Prime Minister.

Under Decision 44, the Ministers, Heads of ministerial-level agencies and the Government's units, and the Chairpersons of People's Committees of provinces and cities under direct central management are responsible for the implementation of this legislation.