

FRASERS NEWSLETTER

In this edition of our newsletter we report on:

- (i) new guidelines on the implementation of the Law on Investment;
- (ii) new regulations in relation to the supply and use of cheques;
- (iii) a new Decree guiding the Law on Social Insurance; and
- (iv) new regulations on regional minimum wage rates to be applied as from 1 January 2016.

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 newsletter@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 our Newsletter, please contact us at the address above or via your usual Frasers' legal adviser.

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NEW DECREE IMPLEMENTING THE LAW ON INVESTMENT

After a long wait, the Government has introduced a new legal instrument providing detailed guidelines on the implementation of certain clauses in the new Law on Investment and setting out clear regulations on investment procedures for foreign investors. Decree No. 118/2015/ND-CP, dated 12 November 2015 (**Decree 118**) came into effect on 27 December 2015, replacing Decree No. 108/2006/ND-CP dated 22 September 2006.

We highlight below the key points of Decree 118.

Investment conditions applicable to foreign investors

Apart from business investment conditions applicable to all investors, Decree 118 sets out separate clauses clearly regulating the necessary requirements and conditions for foreign investors depending on the nature of the investment, relating to:

- (i) the ratio of ownership of foreign investors in the charter capital of an economic organisation;
- (ii) the type of investment;
- (iii) the scope of investment activities;
- (iv) various conditions relating to Vietnamese parties participating in investment activities; and
- (v) other conditions provided under the laws of Vietnam and applicable international treaties to which Vietnam is a party, such as the WTO Commitments and, potentially in the future, the Trans Pacific Partnership.

Decree 118 also sets out the principles for application of investment conditions applicable to foreign investors, including among others:

- (i) foreign investors from territories which are not WTO members shall be subject to the same investment conditions as prescribed for investors from WTO member states, unless otherwise stipulated by law and the relevant international treaty between Vietnam and such nations or territories;
- (ii) with respect to those service sectors which are not covered by the WTO Commitments nor any other international treaties on investment, and the laws of Vietnam do not yet have provisions on investment conditions applicable to foreign investors (**Uncommitted Sectors**), the relevant licensing authorities shall seek the approval of the Ministry of Planning and Investment (**MPI**) and other relevant Ministries.

Remarkably, Decree 118 provides that the requirement to seek the opinion of the relevant Ministries can be released if (i) another foreign investor has been permitted to conduct business activities in Uncommitted Sectors; and (ii) such Uncommitted Sectors have been listed on the national portal for foreign investment.

Investment incentives

Decree 118 provides new lists of (i) preferential investment industries and trades and special preferential investment industries and trades; and (ii) areas with difficult socio-economic conditions or areas with severely difficult socio-economic conditions, which provide the legal basis for identifying the relevant investment incentives.

With respect to an investment project subject to the issuance of an Investment Registration Certificate (**IRC**) or Approval In-principle, an investor shall rely on the investment incentive(s) prescribed in its IRC or Approval In-principle in order to claim the incentive entitlements.

With respect to science and technology enterprises, the investment incentives will be applied on the basis of the certificate of the science and technology enterprise.

Investment deposit

Under the Law on Investment 2014, investors must provide a deposit as security for the performance of investment projects for which the State allocates or leases land or permits conversion of the land use right. However, Decree 118 provides the following exceptions to the deposit requirement:

- (i) an investor winning an auction of a land use right for implementation of an investment project for which the land use right fee/rental will be paid as a lump sum payment;
- (ii) an investor winning a tender for the implementation of an investment project using land in accordance with the law on tendering;
- (iii) an investor obtaining land allocated or leased by the State as a result of the transfer of an investment project, and (i) the deposit applicable to such project has been fully paid; or (ii) the capital contribution and/or calling of capital has been completed in accordance with the schedule set out in the IRC or Approval In-principle in relation to such project;

- (iv) an investor obtaining land allocated or leased by the State as a result of a transfer of the land use right and assets attached to the land from another land user; and
- (v) an investor being a specific State agency or developer of a high-tech zone established under a specific decision of the relevant State authority in certain projects.

The ratio of the investment deposit on each portion of investment capital shall apply on a progressive basis as follows:

Portion of investment capital	Deposit ratio
Up to VND300 billion (approximately equivalent to US\$13 million)	3%
Over VND300 billion up to VND1 trillion (approximately equivalent to over US\$13 million up to US\$45 million)	2%
Over VND1 trillion (approximately equivalent to over US\$45 million)	1%

It is noted that the investment capital of a project for the purpose of calculating the investment deposit does not include land use fees or land rental payable to the State and costs of construction of public works belonging to the investment project. If the land allocation/lease of investment project comprises numerous phases, the deposit ratio will be calculated on the basis of the investment capital for each phase. In the circumstance where an investor has made an advance payment for site clearance and resettlement, the investor shall be entitled to postpone a portion of the investment deposit equivalent to the amount of such advance payment.

Furthermore, Decree 118 stipulates detailed provisions on reductions and refunds of the investment deposit. Basically, 50% of the investment deposit shall be refunded upon the completion of the procedures for land allocation, land lease or permission to convert the land use purpose, the issuance of a construction license or equivalent approvals (if any) no later than the schedule prescribed in the IRC or Approval In-principle. The remaining balance of the deposit and interest (if any) arising from the deposit will be refunded upon completion of (i) the procedures for checking and acceptance of the construction works; and (ii) the installation of machinery and equipment for operating the investment project in accordance with the schedule prescribed in the IRC or Approval In-principle.

Investment registration procedures

Decree 118 introduces clear and specific investment registration procedures. Generally, there are no major changes to the investment registration procedures provided in the relevant Official Letter of the MPI on investment registration in the interim period.

Upon Decree 118 coming into effect, prior to implementing the investment registration procedures, an investor must make an online declaration of information on its investment projects on the national information system on foreign investment. Subsequently, within 15 days as from the date of an online declaration, the investor shall submit the hard copy application dossier to the relevant licensing authority. In the event that access to the national portal for foreign investment is not available, then the online declaration will not be required.

Decree 118 confirms that foreign investors undertaking mergers and acquisitions will not be subject to the requirements for issuance of an IRC, except in the event that:

- (i) the target company is conducting business in conditional sectors in respect of foreign investors; or

- (ii) the transfer of equity results in an increase of the capital ratio holding by foreign investors and 'deemed foreign investors'¹:
 - (a) from less than 51% (prior to the acquisition) to 51% and above (upon the acquisition); or
 - (b) from 51% and above (prior to the acquisition) to a higher ratio (upon the acquisition).

A target company is not required to carry out the procedures for issuance of, or amendment to, an IRC or Approval In-principle prior to the time of the M&A transaction. Nonetheless, we note that an IRC would indicate the name of the sellers as the investors of the target company. Consequently, it is arguable that the IRC or Approval In-principle must also ultimately be adjusted to update the details of the investors in the target company.

Moreover, a new mechanism for coordination of the investment procedures and enterprise registration procedures for foreign investors is also introduced in Decree 118. In particular, apart from the normal investment registration and enterprise registration procedures, foreign investors are entitled to carry out such procedures at the relevant investment licensing authority as a 'one-stop shop'. However, the specific instructions for implementing this coordination mechanism will be subject to guidelines to be issued by the MPI to be provided under separate legislation.

NEW CIRCULAR ON SUPPLY AND USE OF CHEQUES

On 20 November 2015, the State Bank of Vietnam (**SBV**) introduced Circular No. 22/2015/TT-NHNN, regulating the supply and use of cheques (**Circular 22**). Circular 22 governs the supply and use of cheques in commercial banks and foreign bank branches in Vietnam, and replaces Decision No. 30/2006/QD-NHNN of the SBV, dated 11 July 2006, introducing regulations on the supply and use of cheques. The introduction of Circular 22, according to the opinion of the SBV, serves the multiple purposes of complying with the applicable Law on Credit Institutions and the Law on Negotiable Instruments, as well as international standards on the payment by and use of cheques.

Circular 22 stipulates the following regulations in relation to the supply and use of cheques: substance of cheques and cheque drawing, cheque book ordering, transfer and collection of cheques, cheque clearing guarantee, cheque presentation and payment, resolution of loss and damage of cheques.

Supply of cheques

Organisations supplying blank cheques shall themselves decide on the designs for blank cheques in accordance with the Law on Negotiable Instruments. Commercial banks and other credit institutions permitted to supply cheques are required to register samples of the blank cheques with the SBV prior to printing and supplying to customers.

Transfer of cheques

With respect to cheques signed for transfer, the continuity of the row of transfer signatures shall be expressed as follows: In the first transfer of a cheque, the person named as the transferor must be the beneficiary of the cheque, whose name has been written on the front side of the cheque; in the second transfer of the cheque, the person named as the transferor must be the transferee in the first transfer; and so on until the last transfer. The beneficiary of a cheque which has been signed for transfer shall be the

¹ 'Deemed foreign investors' means economic organisations prescribed in Article 23.1 of the Law on Investment, comprising:

- (i) economic organisations having 51% or more of their charter capital held by one or more foreign investors (**Foreign-Dominated Companies**);
- (ii) economic organisations having 51% or more of their charter capital held by one or more Foreign-Dominated Companies; and
- (iii) economic organisations having 51% or more of their charter capital held by one or more Foreign-Dominated Companies and one or more foreign investors.

last transferee with his/her signature in the continuous row of transfer signatures.

Cheque presentation and payment

The period for which a cheque must be presented for payment is within 30 days from the date the cheque was drawn (excluding the time when force majeure circumstances or contingencies occur). A cheque presented for payment after the 30 day period but within six months of the cheque having been drawn may still be paid provided no "stop payment" notice regarding such cheque has been issued and the drawer of the cheque remains solvent.

With respect to cheques used for payments conducted in foreign currencies:

- (i) cheques used for foreign-currency payments shall be paid with the sums written in foreign currencies provided the ultimate beneficiary is allowed to receive foreign currencies in accordance with the regulations on foreign exchange;
- (ii) in the event that the ultimate beneficiary is not allowed to receive foreign currencies under the regulations on foreign exchange, the amount of money written on the cheque shall be paid in Vietnamese dong at the exchange rate announced by the SBV at the time of payment or at the foreign currency trading rates announced by the bank which carries out the payment at the time of payment.

The late payment penalty interest rate shall be equal to 150% of the interest rate applicable to on-call deposits of the cheque-supplying organisation listed at the time of payment of the cheque.

Circular 22 shall take effect as from 12 January 2016.

NEW SOCIAL INSURANCE POLICY

As from 1 January 2016, Law No. 58/2014/QH13, entitled the Law on Social Insurance, passed by the National Assembly on 20 November 2014 (*the Law on Social Insurance*) and its implementing legislation, Decree No. 115/2015/ND-CP of the Government of Vietnam, dated 11 November 2015 providing guidelines to a number of articles of the Law on Social Insurance regarding compulsory social insurance (*Decree 115*) took effect.

Below we provide the highlights of the new social insurance policy.

No guidance for foreign employees participating in social insurance scheme

Pursuant to Article 2.2 of the Law on Social Insurance, foreign employees in Vietnam who have a valid work permit, practising certificate or any practising license issued by the relevant State authorities, shall be entitled to participate in compulsory social insurance as guided by regulations to be issued by the Government (this provision shall come into force as from 1 January 2018).

Notwithstanding, Decree 115 only applies to State officials and Vietnamese employees working under a labour contract. Accordingly, it appears that the social insurance scheme applicable to foreign employees will be further clarified in forthcoming implementing legislation.

Calculation of wages for the purposes of contribution to compulsory social insurance

Guiding Article 89.2 of the Law on Social Insurance, Article 17 of Decree 115 provides that the amount of wages to be contributed to social insurance shall be based upon the remuneration package offered by each employer, in particular:

- (i) from 1 January 2016 to 1 January 2017, the monthly contribution to social insurance shall include basic salary and other allowances/benefits as provided in the labour contract;
- (ii) from 1 January 2017 to 1 January 2018, the monthly contribution to social insurance shall include basic salary, other allowances/benefits and other additional amounts as provided in the labour contract; and

- (iii) with respect to managerial positions, Decree 115 states that the monthly contribution to social insurance shall include the monthly wages paid by the enterprise, with the exception of managerial positions at State-owned one member limited liability companies.

In cases whereby the actual monthly wages are higher than 20 times the basic minimum wage rate (being the salary applied to State officials), the monthly wages for contribution to social insurance shall be capped at 20 times the basic minimum wage rate.

REGIONAL MINIMUM WAGE RATES

Regional minimum wage rates have been increased by an average 12.4% as from 1 January 2016 as approved by the Government of Vietnam, two months after the plan was proposed by the National Salary Council. Under Decree No. 122/2015/ND-CP of the Government of Vietnam, dated 14 November 2015 (**Decree 122**), regional minimum wage rates for employees of enterprises, cooperatives, cooperative groups, farms, family households, individuals and other agencies and organisations hiring labour pursuant to a labour contract, will be as follows:

- (i) VND3,500,000 per month, applicable to enterprises operating in Region I (up VND400,000 from 2015);
- (ii) VND3,100,000 per month, applicable to enterprises operating in Region II (up VND350,000 from 2015);
- (iii) VND2,700,000 per month, applicable to enterprises operating in Region III (up VND300,000 from 2015); and
- (iv) VND2,400,000 per month, applicable to enterprises operating in Region IV (up VND250,000 from 2015).

Please note that the regional minimum area wage rates referred to above serve only as a basis for employers and employees to negotiate and pay monthly wages. Decree 122 also clarifies that trained workers must be paid at least 7% higher than the relevant regional minimum wage rate.

Decree 122 took effect as from 1 January 2016.

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