Newsletter April 2015

FRASERS NEWSLETTER

In this edition of our newsletter we report on:

(i) new guidance on the Labour Code;

(ii) recent guidelines for cash payments by enterprises;

(iii) the new regime for lending in foreign currencies; and

(iv) trading methods for unlisted public companies.

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

NEW GUIDANCE ON THE LABOUR CODE 2012—A 'MINI' LABOUR CODE

It has been nearly two years since the new Labour Code came into effect on 1 May 2013, and on 12 January 2015, the Government of Vietnam issued Decree No. 05/2015/ND-CP providing guidelines on various sections of the Labour Code (***Decree 5***). Decree 5 specifies the rights and obligations of entities involved in the implementation of labour contracts, collective bargaining, collective labour agreements, wages, labour discipline, liability for material loss and resolution of labour disputes. Decree 5 provides regulations on numerous issues under the new Labour Code and its implementing legislation that were previously unclear. Decree 5 came into effect on 1 March 2015.

Key issues covered by Decree 5 include:

Labour Contracts

Apart from provisions on the authorisation to enter into a labour contract and the contents of a labour contract, Decree 5 further provides specific regulations in relation to the termination of employment.

An employer is entitled to unilaterally terminate the labour contract of an employee where the employee repeatedly fails to perform the work. In order to determine whether or not an employee "repeatedly fails to perform the work", we usually suggest that employers include a provision in their Internal Labour Rules on performance reviews. Now, Article 12.1 of Decree 5 expressly requires employers to prepare and issue a

regulation on performance reviews, which need to be reviewed by the trade union. It is likely that this is a new employment regulation which needs to be prepared by an employer, apart from other employment regulations such as internal labour rules and regulations on "democracy" at the workplace.

According to Article 8.3 of Decree 5, should an employee be requested to accept a temporary assignment to perform work that is different from the job specified in an employee's labour contract for an accumulated period of 60 working days within a year, the employer must obtain written consent from the employee on such further assignment. Should the employee not consent to the temporary assignment, then the employee is required to cease work, and the employer is required to pay the employee's wages in accordance with Article 98.1 of the Labour Code.

Severance Allowance and Retrenchment Allowance

Under the Labour Code, where an employer retrenches an employee as a result of restructuring, change of technology, for economic reasons, or due to a merger, consolidation or separation of the enterprise, the employer is required to pay both a severance allowance and a retrenchment allowance to the retrenched employee(s).

However, as provided under Article 14 of Decree 5, it is specified that where a labour contract is terminated as a result of the abovementioned circumstances, the employer is only required to pay a retrenchment allowance. This will be welcome news for employers.

Another significant advance is found in relation to the circumstances in which a labour contract can be terminated as a result of any restructuring, change of technology and economic reasons. The concept of "economic reasons" is interpreted for the first time in Article 13 of Decree 5, and includes economic crisis or recession, or for the purpose of implementing the State's economic restructuring plan or international commitments.

Wages

Decree 5 also provides more detailed guidance regarding overtime payments in relation to overtime work at night, on public holidays or over the Tet holiday, and which coincides with a weekly day off as prescribed in Article 110 of the Labour Code, as well as overtime worked on days for which an employee is entitled to take off in lieu of a public holiday and which coincides with a weekly day-off, as prescribed in Article 115.3 of the Labour Code.

Labour Discipline

Under Article 30 of Decree 5, the procedures for dealing with a breach of labour discipline as prescribed in Article 123 of the Labour Code are reinforced. We note that the first step in these procedures requires the employer, among others, to send a written invitation to the trade union at least five working days prior to conducting a disciplinary meeting.

With respect to dismissal as a disciplinary penalty, under Article 33.3 of Decree 5, if an employer unlawfully applies the disciplinary penalty of dismissal, then the employer is obliged to pay salary to the relevant employee for the period of time during which the employee did not work, in addition to at least two months' salary, as well as other compensation as specified in Article 42 of the Labour Code. Under the Labour Code, dismissal is not considered to be unilateral termination, and an illegal dismissal is not considered an illegal unilateral termination, therefore, an employer who has illegally dismissed an employee is not obliged to pay or compensate the relevant employee as required under Article 42 of the Labour Code. However as from 1 March 2015, it is required to further pay compensation specified in Article 33.3 of Decree 5 as outlined above. This provision of Decree 5 will further encourage employers to be prudent in their decision to use dismissal as a disciplinary penalty.

Decree 5 also provides specific regulations in relation to strikes and compensation to an employer where a strike is declared illegal.

NEW GUIDELINES FOR FINANCIAL TRANSACTIONS BY ENTERPRISES

The Ministry of Finance recently introduced new guidelines for financial transactions by enterprises in Circular No. 09/2015/TT-BTC (***Circular 9***), in accordance with Article 6 of Decree No. 222/2013/ND-CP of the Government, dated 31 December 2013, on cash payments.

Circular 9 prohibits enterprises from making cash payments for the following transactions:

- capital contribution, purchase, sale of or assignment of capital contribution portions in other enterprises; and
- lending, borrowing or loan repayments within Vietnam by enterprises not being credit institutions.

According to Circular 9, acceptable forms of payment by enterprises for the above transactions include payments by cheque, standing orders, bank transfers, or other legal forms of non-cash payments in accordance with the current regulations.

We note that the rights of enterprises to conduct lending and borrowing activities in Vietnam remain ambiguous, where the lender is not a credit institution. On the one hand, there is an argument that enterprises not being credit institutions are restricted from lending activities. This restriction is supported by the Law on Credit Institutions 2010 that only credit institutions are permitted to conduct banking activities in Vietnam, including providing credit facilities on a regular basis. However, we are not aware of any provision that interprets "on a regular basis". As a result, it is uncertain whether an enterprise's lending activity can be on a regular basis or occasional basis. Unfortunately, a breach of such restriction may result in an enterprise incurring a fine of between VND15,000,000 and VND20,000,000.

On the other hand, we note that in 2012, the Prime Minister provided his opinion on the lending activities of non-credit institution enterprises as follows:

> *"economic organisations which do not register a credit business are not encouraged to conduct credit activities; however, if any "credit services" arise then such activities must be subject to value added tax in accordance with the law."*

It seems that the above opinion of the Prime Minister supports the argument that enterprises not being credit institutions may grant loans, although such provision is not encouraged. Circular 9 further supports this argument, since Circular 9 provides payment methods for non-credit institutions to grant loans.

Until appropriate guidelines are introduced to interpret "the provision of credit facilities "on a regular basis", non-credit institution enterprise lenders remain at risk of incurring an administrative penalty for such activities.

NEW REGIME FOR LENDING IN FOREIGN CURRENCY IN 2015

Circular No. 43/2014/TT-NHNN of the State Bank of Vietnam, on foreign currency loans provided by credit institutions and branches of foreign banks for clients being residents, came into effect on 1 January 2015 (***Circular 43***). The State Bank of Vietnam (***SBV***) has welcomed the new lending regime provided in this new legislation, and which replaces Circular No. 29/2013/TT-NHNN (***Circular 29***).

Circular 43 provides a list of purposes for which credit institutions would consider lending in a foreign currency. In general, the list contained in Circular 43 provides no material difference from Circular 29. Key changes have been made regarding the sequence and procedures for obtaining the SBV's consent to provide a foreign currency loan, as well as the currency of repayment.

Sequence and procedures for obtaining the SBV's consent

Circular 43 clarifies in detail a bank's obligation to evaluate a project for which the loan is proposed to be granted. For the first time banks are now required to report to the SBV on specific items they have evaluated and approved to provide a foreign currency loan, including the client's information such as current financial status, production or business status and source for repayment. The SBV is obliged to give its consent no later than 30 days upon receipt of a request to do so. In case consent is not granted, the SBV must provide clear and sufficient reasons in writing to the lending bank. In brief, the sequence and procedures are now more transparent and streamlined in comparison with the regulations of Circular 29.

Currency of repayment

Circular 43 requires the currency of repayment to be in the same foreign currency as the loan. A different foreign currency is only allowed subject to an agreement between the bank and the borrower.

TRADING METHODS FOR UNLISTED PUBLIC COMPANIES

On 20 November 2008, the Ministry of Finance issued Decision No. 108/2008/QD-BTC setting out regulations in relation to the organisation and management of unlisted public company securities being traded on the Hanoi Stock Exchange (***Decision 108***). As a result of this decision, a new securities market, the Unlisted Public Company Market (***UPCoM***), was established and commenced operations on 24 June 2009. The issuance of Decision 108 and subsequent establishment of UPCoM has resulted in a more regulated and transparent trading platform.

Immediately following the issuance of Decision 108, it was unclear as to whether or not all and any unlisted public companies are required to register for trading of securities on UPCoM. In practice, there have been only a few unlisted public companies whose securities have been registered to be traded via UPCoM.

In 2012, Decree No. 58/2012/ND-CP (***Decree 58***) was issued, reinforcing the requirement for public companies that have made public offers to register their securities transactions via UPCoM. On 5 January 2015, the Ministry of Finance issued Circular 01/2015/TT-BTC providing guidelines for the registration of trading securities of unlisted public companies (***Circular 1***). Circular 1 replaces Decision 108 and provides detailed guidelines on the implementation of Decree 58, especially in respect of application dossiers and the procedures for securities trading registration by unlisted public companies.

We note that Article 3 of Circular 1 clearly identifies the types of public companies that are officially required to trade their securities via UPCoM. In particular:

(i) any public company which has made a public offer of securities as from 1 July 2011, and has not yet been listed or has not yet satisfied the conditions for listing, is required to register for trading on UPCoM within one year as from the date of the end of the offer tranche as passed by a general shareholders' meeting;

(ii) any listed company which has made a public offer of securities as from 1 July 2011, and after being delisted, still satisfies the conditions of a public company, is required to register for trading on UPCoM within 30 days as from the date of being delisted;

(iii) any public company which is formed from the equitisation of a 100% State-owned enterprise as from 1 November 2014, is required to:

(1) register as a public company with the State Securities Commission (***SSC***);

(2) register for depository at the Vietnam Securities Depository (***VSD***); and

(3) register for trading on UPCoM,

within 90 days as from the date of issuance of the company's enterprise registration certificate; and

(iv) any public company which is formed from a 100% State-owned enterprise before 1 November 2014, and has not been listed, is required to:

(1) register as a public company;

(2) register for depository at the VSD; and

(3) register for trading on UPCoM,

within one year as from 1 November 2014.

Additionally, with respect to any public company whose securities have been registered at the VSD, but has not yet been listed or delisted, such public company is entitled to (but not required to) register its transactions on UPCoM.

UPCoM will still be located in Hanoi, and organised and managed by the Hanoi Stock Exchange (***HNX***). The registration, depository, clearing and settlement of securities being traded on UPCoM shall be conducted via the VSD, upon and following the trading results provided by HNX. Please note that with effect from 15 March 2015, the procedures for registration, depository, clearing and settlement of securities shall be governed by Circular No. 05/2015/TT-BTC of the Ministry of Finance, dated 15 January 2015.

Another point worth taking into account is that securities which have been registered for trading on UPCoM shall be delisted in the following cases:

(i) where the registered organisation fails to satisfy the conditions of being a public company in accordance with a notification of revocation of public company status by the SSC;

(ii) where the registered organisation ceases its operations as a result of a merger, consolidation, division, dissolution or bankruptcy;

(iii) where the enterprise registration certificate or license for establishment and operations in the specific area of the registered organisation is revoked;

(iv) where the registered organisation is approved to be listed on the stock exchange; and

(v) other cases as approved by the SSC.

With an increasing number of unlisted public companies trading their securities via UPCoM as a consequence of the implementation of Circular 1, UPCoM is expected to become a more effective market for unlisted securities.

Circular 1 came into effect as from 1 March 2015.

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