

FRASERS NEWSLETTER

In this edition of our newsletter we report on:

- (i) new regulations on debt trading by credit institutions and foreign bank branches;
- (ii) a draft decree in relation to work permits for foreign employees working in Vietnam;
- (iii) a new agreement on the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income between Vietnam and the United States of America; and
- (iv) a Legal framework for the development of a nationwide logistics system.

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 REGULATIONS ON DEBT TRADING

As from 1 September 2015, any credit institution and foreign bank branch, which engages in the purchase of debt, is required to register such activities with the State Bank of Vietnam (**SBV**). This is a requirement of Circular No. 09/2015/TT-NHNN of the SBV, dated 17 July 2015, in respect of debt trading by credit institutions and foreign bank branches (**Circular 9**).

With respect to the governing scope of Circular 9, all activities in relation to the purchase and sale of debt arising from professional lending transactions (including payments on a third party's behalf in a guarantee transaction) by credit institutions and foreign bank branches shall be subject to Circular 9. Please note that the purchase and sale of debt by the State-owned Vietnam Asset Management Company or debt trading arising from loan contracts among credit institutions and foreign bank branches will not be governed by Circular 9.

As set out in Article 10 of Circular 9, the sale and purchase of debt shall be conducted by means of agreement or auction.

With respect to the purchase of debt, in addition to the requirements on the registration of debt purchase activities mentioned above, according to Article 5 of Circular 9, a credit institution or foreign bank branch is only permitted to purchase debt if their non-performing loan (**NPL**) ratio is below 3%, except in cases whereby the

purchase of debt is pursuant to a SBV-approved restructuring plan. A debt and asset management company, which is a subsidiary of a credit institution, is only permitted to purchase the debt of other credit institutions and foreign bank branches when the relevant parent company has a NPL ratio below 3%, except in cases whereby the purchase of debt is in accordance with an approved restructuring plan.

With respect to the sale of debt, it is clearly stipulated in Article 5.3 of Circular 9 that credit institutions and foreign bank branches are allowed to sell debt without the approval of the SBV.

Circular 9 also sets out several new restrictions applicable to the trading of debt. In particular, a debt seller is not permitted to repurchase any debt already sold. A credit institution is not permitted to sell a debt to its subsidiary, unless it is sold to the company managing the debts and operating the assets of the parent company pursuant to an approved restructuring plan.

Credit institutions and foreign bank branches must take into account certain new requirements for debt trading activities. Prior to conducting any debt trading activities, they must establish internal rules which clearly stipulate the delegation of authority and responsibility for the two stages of evaluation and for making decisions on debt trading, methods of trading, rules of trading, rules of debt valuation, rules of auctions if the debts are sold by auction, and rules of risk management applicable to the activity of debt trading. Such internal rules must be submitted to the SBV within five working days as from the date of issuance or amendment. Furthermore, they shall also follow the requirements on statistics and the reporting of debt trading in accordance with the laws of Vietnam.

Previously, pursuant to Decision 59/2006/QĐ-NHNN of the SBV, dated 21 December 2006 (**Decision 59**), the currency to be used in debt trading transactions is the currency of the relevant debt unless otherwise agreed by the relevant parties. Under Circular 9, however, it is now required that the currency to be used in a debt trading transaction is Vietnamese Dong. A foreign currency may only be used as the currency for payment in a debt trading transaction when the credit institution or foreign bank branch in question sells a debt in a foreign currency to a non-resident debt purchaser. In the case of debt recovery, the currency to be used is the currency of the debt or other currency as agreed by the debt purchaser and debtor in compliance with the legislation on restricting the use of foreign currencies within the territory of Vietnam.

Circular 9 shall take effect as from 1 September 2015, and will replace Decision 59.

DRAFT DECREE ON FOREIGN EMPLOYEES WORKING IN VIETNAM

Nearly two years after taking effect, Decree No.102/2013/ND-CP of the Government, dated 5 September 2013, providing detailed guidelines for the implementation of certain articles of the Labour Code on foreign employees working in Vietnam (**Decree 102**), the Ministry of Labour, Invalids and Social Affairs has prepared and recently circulated a draft decree (**Draft Decree**) amending Decree 102 for the purpose of further developing the legal framework in relation to the employment of foreigners in Vietnam.

Below, we draw your attention to certain key issues provided in the latest version of the Draft Decree released earlier this month.

Potential advantages provided by the Draft Decree

The definition of “foreign experts” has been revised under the Draft Decree so that a foreigner shall be regarded as an “expert” if he/she satisfies one of the following criteria:

- (i) obtains written confirmation from a foreign agency, organisation or enterprise certifying such foreigner as an expert;
- (ii) obtains a bachelor’s degree or higher level (or equivalent documentation) in the major compatible with the proposed position in Vietnam; or
- (iii) has at least five years’ experience working in the proposed position in Vietnam.

The Draft Decree clearly states that a new work permit shall be required if:

- (i) the current employee’s work permit is still valid but the employee wishes to (i) work for another employer in the same position as to that provided in the current work permit; or (ii) work for the same

employer in another position provided in the current work permit; and

- (ii) the current employee's work permit has expired and the employee wishes to continue to work in Vietnam in the same position as to that provided in the current work permit.

Additionally, the Draft Decree repeals the obligation on companies to prepare an annual report on the demand for the recruitment of foreign employees (**Recruitment Demand Report**). Instead, a Recruitment Demand Report shall be prepared when the need for further recruitment arises. Furthermore, there is good news for both employers and foreign employees in relation to exemptions for the Recruitment Demand Report, work permit or confirmation on the exemption of work permit (**Work Permit Exemption Confirmation**) in the

Exemption for:	Recruitment Demand Report	Work Permit	Work Permit Exemption Confirmation
Cases			
A foreigner enters Vietnam for a period of under three months in order to offer services.	√	√	√
A foreigner enters Vietnam for a period of under three months in order to resolve an incident (a breakdown or technically/technologically complex situation) arising and affecting, or potentially affecting production or business, and which the Vietnamese experts or foreign experts currently in Vietnam are unable to manage.	√	√	√
A foreign employee enters Vietnam to work for fewer than 30 days.	√	√	√
A foreign student studying in Vietnam wishes to work in Vietnam.	√	√	x
A foreign student studying in a foreign country wishes to work in Vietnam.	√	√	x

following cases:

The Draft Decree also simplifies and clarifies the administrative requirements in relation to the recruitment of expatriates. In particular, it is highlighted that:

- (i) health certificates must be issued (by either a Vietnamese or an offshore medical organisation) within 12 months prior to the date of submission of the relevant applications;
- (ii) criminal records issued in accordance with the laws of Vietnam **or** foreign country will be sufficient;
- (iii) a certificate or degree regarding the professional level of the foreigner which is required to be consular legalised can be altered by a non-certified copy, provided that the original document is presented for verification upon the submission;
- (iv) the timeline for issuing a work permit will be reduced from 10 to 7 working days; and
- (v) the timeline for submitting an application for the re-issuance of a work permit will be extended from 15 to 45 days before the expiration of the current work permit.

Outstanding issues to be further considered

Unfortunately, as provided in the Draft Decree, the term of the confirmation on the exemption of work permit will not exceed two years. It is noted that under Decree 102, in order to obtain a Work Permit Exemption Confirmation, the employer and its foreign employee must submit an application dossier to the relevant local authority.

If such Work Permit Exemption Confirmation has a definite term of up to two years (i.e. similar to the term of a work permit), then it could be considered as an alternative procedure to the work permit procedure and the work permit exemption may not be meaningful to the employer and its foreign employees. Therefore, stipulating

that the Work Permit Exemption Confirmation has a definite term may create additional administrative burdens for the employer, its foreign employees and the labour authority.

In addition, in principal, if a foreign employee is exempt from work permit procedures, he/she may still be subject to the legal requirements for a foreigner to work in Vietnam, as provided in Article 169.1 of the Labour Code, including the conditions on speciality and technical skills, for example, being a manager/executive officer/expert or technician. However, both Decree 102 and the Draft Decree remain silent on this issue, which may result in inconsistent interpretations of the relevant provisions of the Labour Code.

NEW AGREEMENT ON DOUBLE TAXATION AVOIDANCE AND PREVENTION OF FISCAL EVASION BETWEEN VIETNAM AND THE UNITED STATES OF AMERICA

On 7 July 2015, an agreement on avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (***the Agreement***) between the Socialist Republic of Vietnam (***Vietnam***) and the United States of America (***USA***) was executed in Washington, D.C. This significant development in the trade relations of these two countries is based upon 10 years of negotiations. Key provisions of the Agreement are as follows:

Applicable entities and taxes covered

The Agreement applies to persons residing in one or both of the contracting states and the term “person” shall be construed as an individual, estate, trust, partnership, company or other body of persons. The taxes which are subject to the Agreement are the personal income taxes and the corporate income taxes in the case of Vietnam and Federal income taxes imposed by the Internal Revenue Code (not including social security and unemployment taxes) and the Federal taxes imposed upon the investment income of foreign private foundations in the case of the USA.

Permanent establishment

One of the most important issues in the Agreement is that of permanent establishments (***PE***). According to the concept of PE, the profits of a person of one contracting state are taxable in the other state only in the case whereby such person maintains a PE in the other state and to the extent that its profits are attributable to a PE. Under the Agreement, PE is defined as a fixed place in which the business of an enterprise is wholly or partly carried out. The Agreement also states that an enterprise from a contracting state shall not be deemed to have a PE in the other contracting state merely because it carries out business through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting as independent agents in the development of their business.

Dividends, interest and royalties

The tax cap for dividends shall be 5% if the beneficial owner is:

- (i) a Vietnam resident company which directly owns at least 25% of the voting stock of the USA company paying the dividends; or
- (ii) a USA resident company which directly owns at least 25% of the capital of a Vietnam company paying the dividends.

With the exception of the above cases, all other dividends shall be taxed at 15%.

Interest may be taxed in the contracting state in which it arises, but if the beneficial owner of the interest is a resident of the other contracting state, the tax charged shall be limited to 10% of the gross amount of the interest. However, if it is determined with reference to receipts, sales, income, profits or other cash flow of the debtor, to any change in the value of any property of the debtor, or to any dividend, partnership distribution or similar payment made by the debtor, it is taxed at a maximum of 15%.

Royalties paid for the use of, or the right to use, industrial, commercial, or scientific equipment are taxed at a maximum of 5% (not including rental payments for ships or aircraft on a bareboat basis and payments for the use, maintenance or rental of containers). A tax rate of 10% shall be applied for royalties paid for the use of, or the right to use any copyright of literary, artistic, scientific, or other work (including cinematographic films and films or tapes used for radio or television broadcasting), patent, trademark, design or model, plan, secret formula, or process.

The Agreement shall take effect and come into force following ratification or approval by the relevant authorities of Vietnam and the USA. The provisions with respect to withholding taxes shall come into effect on amounts paid or credited on or after 1 January of the year immediately following the year in which this Agreement comes into force. For all other taxes, the Agreement shall come into effect in Vietnam for taxable years and in the USA for taxable periods beginning on or after 1 January of the year immediately following the year in which this Agreement comes into force.

PRIME MINISTER URGES DEVELOPMENT OF NATIONWIDE LOGISTICS CENTRE SYSTEM

With the key objective being to develop a framework of logistics centres throughout the country, the master plan on the development of a nationwide logistics centre system (**Logistics Master Plan**) was announced under Decision 1012/QĐ-TTg of the Prime Minister, dated 3 July 2015 (**Decision 1012**).

We provide below certain information on the current status of logistics services in Vietnam, including opportunities for participation by foreign investors and the development scheme in terms of a nationwide logistics centre system.

The concept of “logistics services” under Vietnamese law

First introduced in the Commercial Law of 2005, any activities involving the receipt of goods, arranging transportation, warehousing, storage, completion of customs formalities and other documentation procedures, consultancies, packing and labelling of goods would be known as “logistics services” in Vietnam. Further to the general concept, certain categories of logistics services have been clarified under Decree 140 of the Government dated 5 September 2007 implementing the Commercial Law of 2005, including:

- (i) principal services (e.g., container stations, depots, warehousing, transportation agencies);
- (ii) logistics services relating to transportation (e.g., maritime, internal waterways, railway, road, pipeline transportation services); and
- (iii) relevant logistics services (e.g., technical checks and analysis, postal services, wholesale commercial services and retail commercial services).

Foreign investment in the logistics sector

Following Vietnam’s accession to the World Trade Organization (**WTO**) in 2007, foreign investors have been permitted to establish joint-venture logistics services companies, except in the area of pipeline conduit services. As of 2012, restrictions on the capital contribution ratio and joint-venture investment form were eliminated for international maritime transport and courier services. Since January 2014, pursuant to Vietnam’s WTO Commitments Schedule, the logistics sector has become more accessible for foreign investment, allowing 100% foreign ownership in a logistics company engaging in container stations, depots, storage, and/or warehousing services. While foreign invested logistics enterprises currently dominate the market, especially in the area of international transportation, Vietnamese logistics companies are keen to cooperate with their foreign counterparts to benefit from their sizable customer networks and renowned service quality in order to better serve the increasing demand for progressive logistics services in Vietnam.

Please refer to Table 2 at the end of this article for specific limitations of foreign investors corresponding to each type of logistics services.

Logistics Centre System – Advancement for growth of the logistics sector

At present, there is a modest number of active logistics centres in Vietnam, concentrated in the North and the South of the country, including Cai Lan Logistics Centre, Green Logistics Centre, Geodis Wilson Cat Lai Logistics Centre, Schenker Gemadept Logistics Vietnam, Gemadept Song Than Logistics Centre, and Damco Logistics Centre. Most of these centres are foreign owned and managed. However, there is little integration among these centres.

The delayed development of logistics centres in Vietnam has been largely due to the delayed development of the regulatory framework required for business, operation, engineering standards and investment conditions in this sector. Since 2012, the Ministry of Industry and Trade (**MOIT**) has called for a uniform policy, clear guidance to support the development of logistics centres and a logistics centre system in Vietnam.

Up to 2020 and with a vision to 2030, the Government now proposes to connect the existing logistics centres and expand the quantity of logistics centres regionally as follows:

- (i) adding 8 logistics centres in the north;
- (ii) developing 7 new logistics centres in the central region; and
- (iii) adding 6 logistics centres in the south.

As provided in the Logistics Master Plan, logistics centres will be located in the north; along the economic corridors of the northern and central regions, Danang; and in the economic zone in the provinces northeast of Ho Chi Minh City, the Red River and Cuu Long deltas. The criteria for identifying a suitable location for a logistics centre are:

- (i) the location is adjacent to densely populated areas and the supply of goods;
- (ii) the location offers convenient connections to transport corridors and major transport routes; and
- (iii) the location coordinates with other governmental strategies, master plans, such as spatial planning, construction and land use master plans.

For the future construction and management of logistics centres, the Prime Minister is encouraging private enterprises to step in and collaborate with the Government. A number of key and prioritised projects shall be decided by the relevant authorities for investment in the form of public private partnership (**PPP**) projects. Considering fair opportunities for foreign investors, the tender process and selection of eligible investors for implementing projects of logistics centres shall be conducted with strict observation from the Prime Minister himself in conjunction with the MOIT.

However, looking forward to the adoption of the Logistics Master Plan within the current commercial regulatory framework, it is expected to take time for the Ministry of Planning and Investment (**MPI**) to undertake the Prime Minister's assignment under Decision 1012 and undertake its evident review of the current legislation for further amendments. Another aspect in the implementation of the Logistics Master Plan which will take time is the responsibility of the municipal/provincial people's committees to rearrange the current land use fund of each province for the construction of logistics centres.

Vietnam is clearly making progress in the development of its logistics sector, and each step taken towards achieving the goals of the Logistics Master Plan will bring the reality of a nationwide logistics centre system closer.

Table 1: List of Prioritised Logistics Centre Projects for Investment to 2020

No.	Name of project	Level	Proposed use area
1	Northern Hanoi Logistics Centre	I	20 to 30 ha
2	Logistics Centre for the Coastal Economic Corridor of Northeast Tonkin	II	20 ha
3	Danang Logistics Centre	I	30 to 40 ha
4	Logistics Centre for the Economic Corridors of Route No. 19 and South Central Coast	II	20 ha
5	Logistics Centre for the Sub-regional Economic at North-eastern Provinces of Ho Chi Minh City (belonging to the Southeast economic region)	I	60 to 70 ha
6	Logistics Centre for the central economic region of the Cuu Long Delta	II	30 ha
7	Airway Logistics Centre for the Red River Delta (in association with Noi Bai International Airport)	Specialised	5 to 7 ha

Table 2: Capital contribution ratio of foreign investors in the logistics sector¹

Logistics services	Capital contribution ratio of foreign investors (updated 2015)	
	Vietnamese laws	WTO Commitments
Principal services		
<ul style="list-style-type: none"> • Container station and depot services (CPC 7411) 	50% <i>(Article 5.3(a) of Decree 140)</i>	<ul style="list-style-type: none"> • Subsidiary services to maritime transportation services: 50% • Subsidiary services to aviation transportation services: 50%
<ul style="list-style-type: none"> • Storage and warehouse services (CPC 742) 	100% <i>(Article 5.3(b) of Decree 140)</i>	100%
<ul style="list-style-type: none"> • Freight transport agency services (CPC 748) 	Permitted to establish a joint venture company without limitation on capital contribution. <i>(Article 5.3(c) of Decree 140)</i>	100%
<ul style="list-style-type: none"> • Other subsidiary services (CPC 749) 	Permitted to establish a joint venture company in which the capital contribution ratio of the foreign investor does not exceed 49%; this restriction shall be 51% as from year 2010 and shall terminate in year 2014. <i>(Article 5.3(d) of Decree 140)</i> <i>This would suggest that the restrictions have been removed, and foreign investors are now permitted to contribute 100% of capital, but there have been no specific guidelines to clarify this point.</i>	Permitted to establish a joint venture company without limitation on capital contribution.
Logistics services relating to transportation		
<ul style="list-style-type: none"> • Maritime transportation services (CPC 7212) 	<ul style="list-style-type: none"> • Operating a fleet under the national flag of Vietnam to conduct transportation services: 49%. • Otherwise, for the supply of international maritime transport services: permitted to establish a joint venture company with a limitation in which the capital contribution ratio of the foreign investor does not exceed 51%, and this restriction shall terminate in year 2012. <i>(Article 6.3(a) of Decree 140)</i> <i>This would suggest that the restrictions have been removed, and foreign investors are now permitted to contribute 100% of capital, but there have been no specific guidelines to clarify this point.</i> 	<ul style="list-style-type: none"> • Operating a fleet under the national flag of Vietnam to conduct transportation services: 49%. • Otherwise, for the supply of international maritime transport services: permitted to establish a joint venture company with 51% foreign ownership or a 100% foreign-invested enterprise.
<ul style="list-style-type: none"> • Internal waterways transportation services (CPC 7222) 	49% <i>(Article 6.3(b) of Decree 140)</i>	49%
<ul style="list-style-type: none"> • Air transport services 	30% <i>(Article 6.3(c) of Decree 140; Article 11.1 of Decree 30/2013/ND-CP providing air transportation business and general air operations)</i>	No commitment on the foreign ownership ratio. Foreign airlines are permitted to provide services in Vietnam through their ticketing offices or agents in Vietnam.

¹ Please note that, besides the respective regulations contained in the legislation of Vietnam and Vietnam's WTO Commitments, the specific capital contribution ratio of a foreign investor in a particular case shall also depend on other provisions set forth under international treaties to which Vietnam is a member, including but not limited to:

- ASEAN Framework Agreement on Services;
- Agreement on Establishing the ASEAN – Australia – New Zealand Free Trade Area;
- ASEAN – Korea Free Trade Area;
- Agreement between Japan and ASEAN for an Economic Partnership;
- Agreement between Japan and Vietnam for an Economic Partnership;
- Korea – Vietnam Free Trade Area; and
- Bilateral Trade Agreement between United States of America and Vietnam.

Logistics services	Capital contribution ratio of foreign investors (updated 2015)	
	Vietnamese laws	WTO Commitments
Logistics services relating to transportation		
• Railway transport services (CPC 7112)	49% (Article 6.3(d) of Decree 140)	49%
• Road transportation services (CPC 7123)	51% (Article 6.3(dd) of Decree 140)	49% or 51% depending on the market's need.
• Pipeline conduit services	Not permitted to conduct this business. (Article 6.3(e) of Decree 140)	No commitment.
Relevant logistics services		
• Technical checks and analysis (CPC 8676 - excluding conformity testing of transport vehicles and certification of transport vehicles)	<ul style="list-style-type: none"> • In the case of services provided in order to exercise the authority of the Government, they may only be provided in the form of a joint venture after three years or in other forms after five years, as from the date on which a private enterprise is permitted to conduct business activities in such services. • Not permitted to conduct business activities in the services of acceptance testing of, and issuance of certificates for transportation facilities. (Article 7.2(a) of Decree 140) 	<p>None, except:</p> <ul style="list-style-type: none"> • Where Vietnam allows private suppliers access to a sector previously closed to private sector competition on the grounds that the service had been supplied in the exercise of governmental authority, joint ventures to supply such service shall be allowed without any limitation on foreign ownership three years after such access to private sector competition is allowed. • Five years after those private sector services suppliers have been granted such access: none.
• Postal services (CPC 7512**)	<ul style="list-style-type: none"> • Courier services: 100%. • Other services: unclear under the law on post. (Article 7.2(b) of Decree 140, Official Letter No. 1327/BTTTT-KHTC dated 12 May 2014 of the Ministry of Information and Communications) 	Courier services: 100%
• Wholesale commercial services and retail commercial services (CPC 622, 61111, 6113, 6121, 631 + 632, 61112, 6113, 6121)	100% (Article 7.2(b) of Decree 140)	100%
• Other subsidiary transportation services	Not permitted to conduct this business. (Article 7.2(c) of Decree 140)	No commitment.

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