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FRASERS NEWSLETTER

In this edition of our newsletter we report on:

(i) a selection of problematic issues raised by the new Law on Enterprises, namely:

  (a) Legal Representatives and authorised representatives – what is the extent of their powers;

  (b) limited liability company with one member – how the managerial structure will change;

  (c) cross ownership in a group company – what are the restrictions; and

  (d) threshold of foreign ownership – how it should be calculated;

(ii) some crucial articles from a new decree of the Government in relation to derivative securities and derivative securities market; and

(iii) an outline of three recent decrees impacting upon the construction sector.

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.

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PROBLEMATIC ISSUES RAISED BY THE NEW LAW ON ENTERPRISES

As highlighted in our previous Legal Update, on 1 July 2015 the new Law on Enterprises No.68/2014/QH13 (***new Law on Enterprises***) will come into force, and many changes thereto will have a major impact on the operations of all of the enterprises and investors in Vietnam.

In this article, we analyse some issues with the new Law on Enterprises, which might be problematic unless and until they are further clarified by future implementing legislation.

Legal Representatives – What is the extent of their powers?

Generally, the Legal Representative of an enterprise is authorised to act on behalf of such enterprise before other parties. In practice, whenever a contract is executed by the respective registered Legal Representative of the relevant parties, it is deemed to be executed by the respective enterprises (unless otherwise stipulated by the company's charter). However, under the new Law on Enterprises, this common understanding might no longer be accurate, and a more careful approach should be adopted.

On one hand, as provided in Article 13 of the new Law on Enterprises, the "Legal Representative of an enterprise" means an individual representing the enterprise to *exercise the rights and perform the obligations arising out of the transactions of the enterprise*, and representing the enterprise during litigation proceedings and in performing other rights and obligations in accordance with the laws of Vietnam.

On the other hand, according to the relevant provisions of the new Law on Enterprises, the authority to execute contracts on behalf of the company is now expressly assigned to the (General) Director, the Chairman of the Members' Council, the President, the unlimited liability partners or the owner of the private company as the case may be. Therefore, from a restricted perspective, the Legal Representative may *not* be the person automatically authorised to represent the enterprise to *execute transaction documents*.

While the new Law on Enterprises is inconsistent on this issue, the Civil Code is also unable to provide clear guidance. According to the Civil Code, a Legal Representative has the right to *enter into and perform* all civil transactions in the interests of the represented legal entity, unless otherwise provided by the law. It seems therefore that a clear answer to the question, "Who is authorised to act on behalf of an enterprise to enter into contracts?" is not possible at the moment.

Thus, in order to identify who has the power to execute contracts on behalf of a certain company, the other parties shall always and carefully check the wording of the charter of such company, as well as its enterprise business registration certificate.

President of a LLC1 – What is the extent of his powers?

According to Article 80.3 of the new Law on Enterprises, a decision of the President of a limited liability company with one member (***LLC1***) implementing the rights and obligations of the company owner shall take effect from the date of approval by the company owner (unless otherwise stipulated in the charter of the company).

However, Article 16.1 of the new Law on Enterprises expressly states that "all restrictions of an owner, member or shareholder (collectively referred to as ***Principals***) on the authorised representatives with respect to the performance of the rights and obligations of the Principals at the Members' Council or the General Meeting of Shareholders shall have no legal validity with respect to the rights of a third party."

It seems therefore that there is an inconsistency between the above provisions. As a result, please note that notwithstanding whether or not your company's charter provides any restriction on the validity of the President's resolutions, such restriction appears to have no legal validity with respect to the rights of a third party.

Managerial structure of an LLC1 – Is it compliant with the new law?

In line with the current Law on Enterprises if an LLC1 has more than one authorised representative, such LLC1 must be run with the managerial model based on a Members' Council.

It is also quite transparent under the new Law on Enterprises that the Members' Council of an LLC1 shall be made up of between three and seven members.

Consequently, for the purpose of compliance with the new Law on Enterprises, in case the Members' Council of an LLC1 has two or more than seven members, the owner is recommended to:

- adjust the number of the authorised representatives to be between three and seven members in order to maintain the model based on a Members' Council; or
- convert the managerial structure of the company from the model based on a Members' Council to the model based on a President (being the sole authorised representative of the owner).

Cross ownership in a group company – What is the restriction?

According to Article 189 of the new Law on Enterprises, subsidiary companies are not permitted to invest in the contribution of capital to, or to purchase the shares of, a parent company. Furthermore, subsidiary companies of the same parent company are not permitted to jointly contribute capital or purchase shares in order to achieve mutual cross ownership.

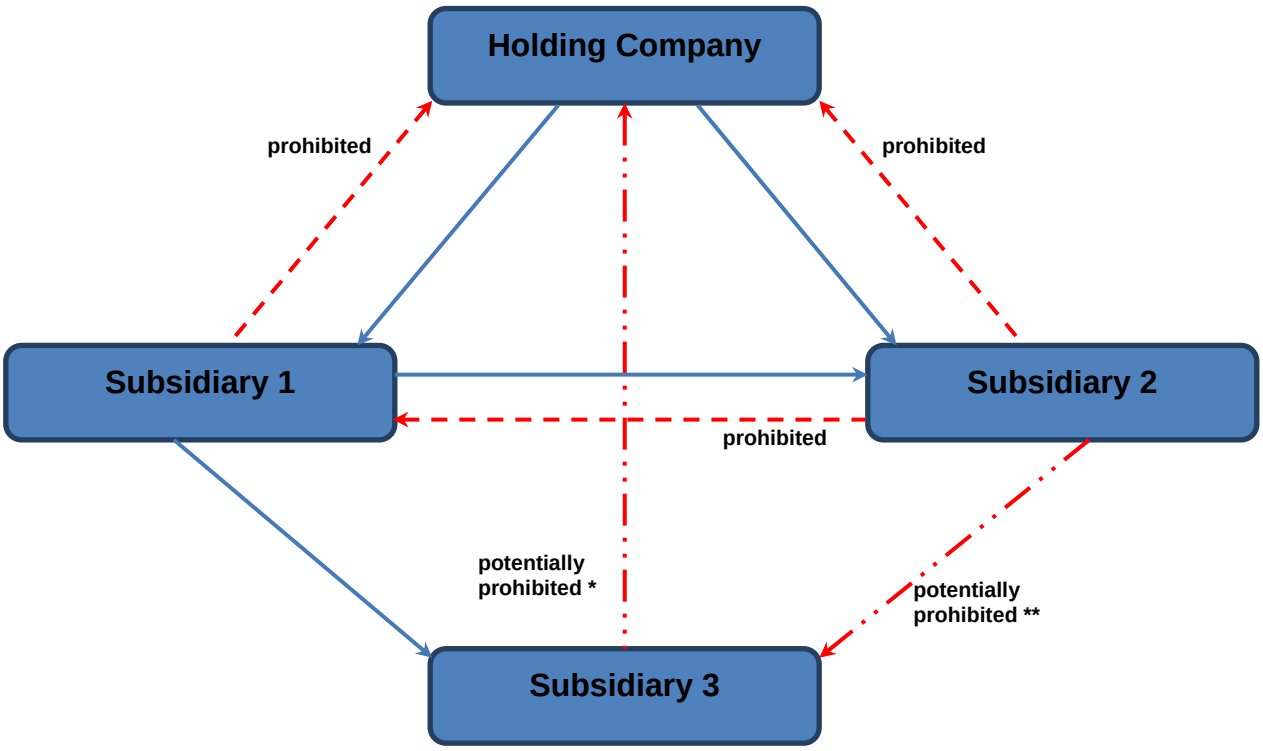
As further detailed in a recent draft Decree providing guidelines on implementing the new Law on Enterprises (***Draft Decree***), "cross-ownership" means that two or more enterprises concurrently own each other's capital contribution portions or shares.

It is noted that a company shall be deemed to be the parent company of another company if it:

owns more than 50% of the charter capital or the total number of ordinary shares of the other company;
has the right to directly or indirectly make decisions on the appointment of the majority or all members of the Board of Management, the director or general director of the other company; or
has the right to make decisions on amendments of, or additions to, the charter of the other company.

In addition, subsidiary companies having the same parent company being an enterprise with at least 65% charter capital owned by the State are not permitted to jointly contribute capital to establish another enterprise.

On the basis of the above provisions, the restrictions on cross ownership in a group company could be illustrated as follows:



Notes:

* If Holding Company has the right to directly or indirectly appoint the majority or all of the members of the Board of Management or the (General) Director of Subsidiary 3, it could be considered as being the parent company of Subsidiary 3. In this case, Subsidiary 3 could not hold equity in the Holding Company.

** If Holding Company is a 65% (or more) State-owned enterprise, Subsidiary 1 and Subsidiary 2 would not be permitted to establish Subsidiary 3.

Threshold of foreign ownership – Is there any change to the way it is calculated?

Pursuant to Article 4.27 of the new Law on Enterprises, the ownership ratio of foreign investor(s) means the aggregate ratio of ownership in the voting capital by all foreign investors in a Vietnamese enterprise.

However, according to Article 23.1(a) of the new Law on Investment, an enterprise would be considered as being a foreign invested enterprise where at least 51% of its charter capital is held by a foreign investor(s).

In certain joint stock companies, there are non-voting preference shares which are included in the charter capital of a company. In such cases, according to the new Law on Enterprises and the new Law on Investment, it is difficult to calculate the exact amount of foreign ownership since the basis for calculation is unclear when the charter capital is different from the voting capital. It seems therefore that we need to wait for further guidelines on how the amount of foreign ownership in a joint stock company shall be calculated.

DERIVATIVE SECURITIES AND DERIVATIVE SECURITIES MARKET

Derivative securities are commonly regarded as securities whose values are based on, and are derived from, their relationships to other securities, reference rates, commodities, indices or other types of underlying assets. At an international market level, derivative securities in particular, and derivative financial instruments in general, have become commonplace tools used by different types of market players to allocate market risks associated with their business. With respect to the derivative market of Vietnam, the regulatory framework for such a derivative market under the laws of Vietnam is at a very preliminary stage of its development when compared with developed jurisdictions.

The Government of Vietnam has planned a route to build up a regulatory market for derivative transactions, and proposes to officially commence operations in such market in 2016. In accordance with this plan, the

Government has issued Decree No. 42/2015/ND-CP dated 5 May 2015, on derivative securities and the derivative securities market (***Decree 42***), which can be considered as a major impetus for a forthcoming regulatory framework for a derivative securities market in Vietnam.

Derivative Securities under Decree 42

Notwithstanding the fact that various types of derivatives are created and exist in practice, Decree 42 directly mentions only three types of derivative securities, including (i) future contracts, (ii) options and (iii) forward contracts. Other types of derivatives shall be subject to the guidelines of the Ministry of Finance (***MOF***).

In particular,

(i) "futures contract" means a listed derivative security confirming an undertaking between the parties to conduct either of the following transactions:

  (a) buy or sell a specified quantity of a given underlying asset at a predetermined price on a certain future date; or

  (b) pay the difference between the predetermined value of the given underlying asset as at the time of signing the contract and its value on a certain future date;

(ii) "option" means a derivative security confirming the right of the buyer and the obligation of the seller to conduct either of the following transactions:

  (a) buy or sell a specified quantity of a given underlying asset at a predetermined implementing executed price on, or on a date prior to, a certain future date; or pay the difference between the predetermined value of the underlying asset as at the time of signing the contract and its value on, or on a date prior to, a certain future date; or

  (b) buy or sell a specified quantity of future contracts at a predetermined implementing price on, or on a date prior to, a certain future date;

(iii) "forward contract" means a private agreement to trade derivative securities and confirming an undertaking to buy or sell a specified quantity of a given underlying asset at a predetermined price on a certain future date;

The underlying assets embedded with the above derivative securities, pursuant to Decree 42, include securities and/or other assets used as the basis for fixing the value of the derivative securities.

Please note that, pursuant to Decree 42, the MOF is going to provide guidelines on listing and arranging the trading of derivative securities whose underlying assets are securities only. With respect to derivative securities underlined by other types of assets (which are not securities), the issuance of the procedures for listing and trading such derivative securities shall be subject to the requirements and conditions for market development and to the Prime Minister's decisions.

Investment in derivative securities in Vietnam

For the time being, Decree 42 does not refer to any restrictions on foreign investment into derivative securities in the Vietnamese securities market. Moreover, Article 8.1 of Decree 42 even provides in general that organisations and individuals are permitted to freely invest in derivative securities on the derivative securities market (except for certain special types of finance entities, being securities companies, fund management companies, insurance companies, credit institutions and State owned companies).

Notwithstanding such provision, the matter of foreign ownership limitations and restrictions available under the laws of Vietnam should be taken into serious consideration, especially when, as an entitlement under the derivative securities, the foreign investors shall have the right to purchase, and then own, securities being shares in a Vietnam-domiciled company. For example, the foreign ownership limitation provided in Decision 55/2009/QD-TTg of the Prime Minister, dated 15 April 2009 (i.e. 49% of shares of public companies), would be applicable since its scope governs any types of securities, including derivative securities. At the moment, in accordance with Decree 42, it is not clear how existing foreign ownership restrictions/limitations will be applied to derivative securities transactions.

In order to transact listed derivative securities, an investor will have to liaise with a registered trading member (which is normally a securities company) and a registered clearing member (which is normally a securities company or commercial bank) to open a derivative securities trading account and pay an escrow deposit. Pursuant to Article 29 of Decree 42, an investor is also issued with a reference denomination investor code number, and derivative securities are also issued with trading codes and International Securities Identification Number (ISIN) codes. However, the procedures for issuance of such codes are not yet available.

For the time being, Circular No. 213/2012/TT-BTC of the Ministry of Finance, dated 6 December 2012, has set out procedures for foreign investors investing in the securities market of Vietnam (including, amongst others, for the issuance of securities trading codes and for opening indirect investment accounts), which are also applicable to most types of securities, including derivative securities. It seems that, as a result of Decree 42,

there will be additional procedures applicable to derivative securities investment to be issued by the MOF in the near future.

With respect to the management of a derivative securities trading account, an investor is responsible for fully maintaining the escrow deposit as required by the clearing member, and to supplement its escrow deposit at the request of the clearing member if the value of the assets deposited in escrow falls below the level at which it is required to be maintained. In the case where an investor fails to maintain such escrow deposit and fails to promptly supplement it at the request of the clearing member, the clearing member is entitled to (i) require the investor itself to close, or the clearing member may close or compulsorily liquidate, any open position of the investor, or (ii) use, sell or transfer escrow deposited assets of the investor in order to purchase or create security assets for loans in order to discharge any payment obligations of any open positions of the investor.

Organisation and Management of Derivative Securities Market

The stock exchange shall be the authorised market place for the trading of derivative securities. Participants of this market (typically, trading members and clearing members) must satisfy certain conditions and requirements stipulated in Decree 42.

Derivative securities to be traded on the derivative securities market comprise:

(i) futures contracts;

(ii) options;

(iii) forward contracts with underlying assets being securities traded on the stock exchange; and

(iv) other listed derivative securities, and unlisted derivative securities traded pursuant to a private agreement with their underlying assets being securities traded on the stock exchange.

We understand that the above derivative securities to be traded on the stock exchange include not only listed derivative securities, but also non-listed securities.

With respect to listed derivative securities, according to Article 9.1 of Decree 42, no organisation or individual apart from the stock exchange is permitted to arrange trading of the listed derivative securities. Investment in and trading of listed derivative securities shall be implemented in accordance with the provisions of Decree 42.

In the case of unlisted derivative securities which are referred to in Article 6.1 of Decree 42, an investor must provide written notice to the Vietnam Securities Depository (***VSD***) both before and after the execution of, and the performance of, the contract. Trading, clearing and enforcing unlisted derivative securities contracts shall be implemented as agreed between the relevant partners and in compliance with the relevant laws. If or when the stock exchange and VSD arranges trading and clearing of unlisted derivatives, this shall be required to be implemented in accordance with the provisions of Decree 42.

Decree 42 shall take effect as from 1 July 2015. Any derivative securities which were traded pursuant to private agreements prior to the effective date of Decree 42 shall continue to be implemented in accordance with the contract between the relevant parties. Any transactions or contracts regarding derivative securities entered into after the effective date of Decree 42 must comply with the provisions of Decree 42. As contemplated in Decree 42, there will be implementing legislation issued by the MOF for the purposes of implementation of Decree 42.

NEW GUIDANCE FOR THE LAW ON CONSTRUCTION

Recently, the Government has issued three decrees to guide the implementation of the new Law on Construction No. 50/2014/QH13 dated 18 June 2014 which came into effect on 1 January 2015 (***Construction Law***), including:

(i) Decree No. 37/2015/ND-CP dated 22 April 2015, on Construction Contracts (***Decree 37***);

(ii) Decree No. 44/2015/ND-CP dated 6 May 2015, on Construction Planning (***Decree 44***); and

(iii) Decree No. 46/2015/ND-CP dated 12 May 2015, on Quality Control and Maintenance of Construction Works (***Decree 46***).

By replacing the existing decrees and by adding some innovative amendments, these decrees, particularly Decree 37, are intended to support the expansion of the real estate market.

Decree 37

Decree 37 introduces adjustments to the minimum level of advance payments (***MLAP***). With respect to consultancy agreements, the MLAP will become 20% of the value of the agreements having a value of up to VND10 billion (approximately US$465,000), and 15% of the value of the agreements having a value in excess of VND10 billion. Under Decree No. 48/2010/ND-CP dated 7 May 2010 (***Decree 48***), which will be replaced by Decree 37, this ratio was 25% regardless of the value of the consultancy agreements. No change has been made in relation to construction contracts.

With respect to partnership contractors, the division of the workload in the partnership agreement shall be in compliance with the operational capacity of each member of the partnership. For foreign primary contractors, a commitment to hire domestic subcontractors to perform tasks under the agreement must be included when such subcontractors are capable of meeting the requirements of the bid package. The investors or the investor's representatives are allowed to enter into contracts with one or more primary contractors to perform the work, provided that the contents of these contracts must ensure uniformity and comprehensiveness. The general contractor and the primary contractor may enter into contracts with one or more subcontractors, but such subcontractors must be approved by the investor.

Decree 37 came into effect on 15 June 2015.

Decree 44

Decree 44 stipulates that inter-provincial regions (including large urban regions), special purpose zones, areas along expressways, and inter-provincial economic corridors shall be allowed to prepare the construction planning as decided by the Prime Minister on the basis of proposals made by the Ministry of Construction. Such planning shall be in compliance with the socio-economic development strategy and master plans and must ensure the management requirements and effective allocation of national resources.

There is one other notable provision as regards the collection of opinions on construction planning. The organiser of construction planning shall now cooperate with multi-level People's Committees in collecting ideas from the related agencies, organisations and representatives of communities during the preparation of the construction planning. Reports on the collection of ideas shall be part of the dossier submitted for the approval of the construction planning.

Decree 44 shall take effect as from 30 June 2015, and will replace Decree No. 08/2005/ND-CP dated 24 January 2005.

Decree 46

Decree 46 introduces a few very important amendments in respect of a warranty of construction works in relation to maintenance following completion of construction works. Under Decree 46, the warranty period is a compulsory item which the investor and the contractor are required to specify in the construction agreement together with other pre-regulated items such as the rights and responsibilities of the parties in the warranty, the amount of the warranty deposit, the retention, use and refund of the warranty deposit. Furthermore, the warranty deposit may be substituted by a letter of warranty issued by a bank for an equivalent amount. In addition, it is clearly stated that warranty deposits or equivalent letters of warranty may only be refunded or released after the expiry of the warranty periods and after receipt of a confirmation on the completion of the warranty period by the investor.

Moreover, with respect to work items having defects in terms of quality, or whose defects during the construction process were resolved by the contractors, the warranty period of such work items may be extended according to the agreement between the investor and the construction contractor before such items are accepted.

Decree 46 shall take effect as from 1 July 2015, and will replace Decree No. 114/2010/ND-CP dated 6 December 2010 and Decree No. 15/2013/ND-CP dated 6 February 2013.

Ho Chi Minh City

Unit 1501, 15th Floor, The Metropolitian
235 Dong Khoi Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84 8 3824 2733

Hanoi

Unit 1205, 12th Floor, Pacific Place
83B Ly Thuong Kiet Street, Hoan Kiem District
Hanoi, Vietnam
Tel: +84 4 3946 1203

Email: legalenquiries@frasersvn.com

Website: www.frasersvn.com