
Newsletter May 2015

# FRASERS NEWSLETTER

In this edition of our newsletter we report on:

- legislation currently under consideration by the Vietnam National Assembly;
- a draft decree in relation to securities, expected to be issued in 2015;
- recent implementing legislation in relation to unemployment insurance and the retirement regime; and
- new legislative provisions relating to the notarisation and authentication of documents.

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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## LEGISLATION UNDER CONSIDERATION BY THE VIETNAM NATIONAL ASSEMBLY

As you may be aware, the 9th session of the XIIIth National Assembly of Vietnam is taking place in Hanoi from 20 May 2015 to 25 June 2015 (the ***9th Session***), with a focus on the development of laws and socio-economic issues. During the course of the 9th Session, 11 draft laws are expected to be reviewed and passed, and 15 draft laws are expected to be proposed for discussion and consideration for passing at the next session of the National Assembly. The following is a list of the draft laws proposed to be reviewed and passed at the 9th Session:

(1) Law on Organisation of the Government (amended);

(2) Law on Organisation of Local Authorities;

(3) Law on Vietnam Fatherland Front (amended);

(4) Law on Election of Delegates to the National Assembly and Delegates to People's Councils;

(5) Law on State Budget (amended);

(6) Law on State Audit (amended);

(7) Law on Promulgation of Legal Documents;

(8) Law on Military Service (amended);

(9) Law on Sea and Island Natural Resources and Environment ;

(10) Law on Veterinary Medicine; and

(11) Law on Occupational Safety and Hygiene.

The draft laws expected to be discussed and proposed for review and passing at the next session of the National Assembly are as follows:

(1) Civil Code (amended) (second discussion);

(2) Criminal Code (amended);

(3) Civil Procedures Code (amended);

(4) Criminal Procedures Code (amended);

(5) Law on Administrative Procedures (amended);

(6) Law on Organisation of Criminal Investigative Agencies;

(7) Law on Temporary Detention and Internment;

(8) Law on Supervisory Activities of the National Assembly and of People's Councils;

(9) Law on Obtaining Opinions from Citizens;

(10) Law on Demonstrations;

(11) Law on Amendments to Law on Accounting;

(12) Law on Statistics (amended);

(13) Law on Safety of Information;

(14) Law on Fees and Charges; and

(15) Law amending the Maritime Code of Vietnam.

We will keep you informed of any developments in relation to the issuance of the above draft laws in our upcoming newsletters.

## DRAFT DECREE ON SECURITIES

The State Securities Commission (***SSC***) has circulated a draft decree (***Draft***) amending and supplementing a number of articles of Decree No. 58/2012/ND-CP of the Government, dated 20 July 2012, with respect to detailed guidelines for the implementation of a number of articles of the Law on Securities[1] (***Decree 58***). According to the Draft, numerous provisions of Decree 58 are proposed to be amended. In this article, we present certain significant amendments as set out in the Draft.

**Introduction of the term "investor with foreign capital"**

The Draft makes significant amendments to the definition of the term "maximum foreign ownership ratio". According to Article 1.1 of the Draft, "maximum foreign ownership ratio" means the <u>total</u> securities ownership ratio which <u>investors with foreign capital</u> are permitted to hold as a maximum in any public enterprise and investment fund. This article notably introduces a new term "investor with foreign capital" that is worth taking into account.

According to Article 2 of the Draft, "an investor with foreign capital" includes:

(i) a foreign individual not having Vietnam citizenship;

(ii) an organisation established in accordance with foreign laws and conducting investment and business in Vietnam or a branch in Vietnam of a foreign-established organisation;

(iii) an organisation established and operating in Vietnam in which the foreign investor as specified in items (i) and (ii) above holds at least 51% of its charter capital, or which, in the case of a partnership, the majority of unlimited liability partners are foreign individuals; and

(iv) an organisation established and operating in Vietnam in which the foreign investor as specified in items (i) and (ii) above, and the organisation as specified in item (iii) above, hold at least 51% of its charter capital.

Comparing the concepts of "*foreign investor*" and "*organisation with foreign owned capital*" as provided in Article 23 of the Law on Investment (which will come into effect as from 1 July 2015), we find that they are not the same. The concept of "an investor with foreign capital" under this Draft does not include an organisation having at least 51% of its chapter capital held by an economic organisation, in which at least 51% of its chapter capital is held by a foreign investor(s), or which is a partnership with a majority of partners being foreign

[1] Law No. 70/2006/QH11 on Securities passed by the Legislature XI of the National Assembly of the Socialist Republic of Vietnam at its 9th session on 26 June 2006, as amended by Law No. 62/2010/QH 12 dated 24 November 2010.

individuals in respect of economic organisations being a partnership.

**Foreign ownership ratios in Vietnam's securities market**

Decision No. 55/2009/QD-TTg of the Prime Minister, dated 15 April 2009 (***Decision 55***), on foreign ownership limits for portfolio investments in the Vietnamese securities market, sets a foreign ownership limit in a public shareholding company of 49% of the total number of shares.

With respect to the Draft, it distinguishes between voting shares and non-voting shares in terms of setting forth regulations on foreign ownership in public companies.

As regards voting shares, according to Article 2a of the Draft, such limitation shall be determined in accordance with the provisions of the charter of the company, laws of Vietnam and international treaties. In other words, in certain cases, the foreign ownership limitation may be more than 49%. However, it should be noted that in cases where a public company conducting any business lines in which the foreign ownership ratio is not specified by the laws of Vietnam or international treaties, the foreign ownership ratio shall comply with the provisions of the charter of such company (if any), and shall not exceed the ownership ratio as specified in the Prime Minister's decisions. The Draft does not specify which Prime Minister's decisions, whether or not there are any other Prime Minister's decisions to be issued, or whether it is referring to the current Decision 55.

As regards non-voting shares issued by public companies, if the Draft will be issued with the same contents as has been currently drafted, investors with foreign capital are allowed to invest in non-voting shares without any limitation[2].

Moreover, Article 2a of the Draft also clearly stipulates that in the case of investment into fund certificates of securities investment funds, shares of securities investment companies and deposit certificates, the investor with foreign capital shall not be subject to any ownership restrictions. In line with the above article, Article 71.9 further states that an investor with foreign capital is permitted to acquire shares or capital contribution of securities business organisations[3] without any limitation. Additionally, Article 77.4 of Decree 58 is also going to be repealed, and therefore there is no ownership restriction applicable to foreign investment into securities investment companies. However, in order to hold at least 51% of the charter capital of a securities business organisation, an investor with foreign capital must satisfy certain conditions which are the same as the conditions applicable to a foreign investor owning 100% of the capital of a securities business organisation as currently specified in Decree 58.

**Private and public placement of shares**

The Draft has removed all provisions in respect of private placements conducted by non-public companies since the conditions and procedures for such placement have been specifically provided for in the new Law on Enterprises. As such, the Draft now only covers the conditions and procedures for private placement by public companies, whether listed or unlisted, and securities business organisations for the purposes of (i) capital mobilisation; (ii) debt conversion; (iii) conversion of shares/capital contribution of other enterprises; or (iv) private placement by securities business organisations for the purposes of conversion into joint stock companies.

The procedures for the private and public placement of shares by public companies have been amended to include further requirements. For example, during the course of a private placement, the Draft once again reiterates the requirements specified in Circular No. 01/2015/TT-BTC of the Ministry of Finance, dated 5 January 2015, stating that any public company which proposes to conduct the private placement of shares

2 The Draft also refers to the other cases as follows:

(a) With respect to public companies converted from foreign directly invested enterprises, the maximum foreign ownership shall comply with the decision by the relevant government authority when issuing approval for conversion of a foreign directly invested enterprise into a joint stock company; and

(b) With respect to a state owned enterprise (SOE) conducting a public offering for the purposes of an equitisation, the maximum foreign ownership ratio shall be implemented in accordance with the Plan for enterprise restructuring, arrangement and renovation as approved by the relevant government authority on the basis of criteria for classification of state owned enterprises and the equitisation legislation.

3 There does not appear to be any express definition of "securities business organisations" under the laws of Vietnam. Nonetheless, the Law on Securities defines "securities business" as the conduct of professional activities of securities brokerage, securities self-trading, underwriting issues of securities, securities investment consultancy, securities depository, securities investment fund management and securities investment portfolio management. Therefore, it can be construed that securities business organisations are those which conduct any activities classified as securities business under the Law on Securities.

must have been registered with Hanoi Stock Exchange for conducting transactions via UpCom, or have been listed on any stock exchange in Vietnam. Furthermore, the issuing organisation must open an escrow account in order to receive deposits and proceeds for the purchase of privately placed shares. The proceeds transferred to the escrow account shall not be released until the relevant placement tranche is completed and reported to the SSC. In case of an offer of shares for sale to strategic partners in the same public offer tranche of securities, according to Article 9 of the Draft, the lock-up period for the transfer of shares is a minimum of one year from the date of completion of the offer tranche.

The Draft is expected to be issued in 2015. We will keep you updated on the issuance of the Draft.

## NEW PROVISIONS ON UNEMPLOYMENT INSURANCE AND RETIREMENT REGIME

Statutory insurance schemes play an important role in the stability of any society, especially in terms of protecting employees. Each country has different statutory insurance schemes developed to fit the requirements of that particular country. In Vietnam, the statutory insurance schemes include social insurance, health insurance, and unemployment insurance, and play an essential role in achieving the sustainable development of the country. In 2015, certain new pieces of legislation and guidance have been introduced resulting in certain significant changes to the statutory insurance schemes in Vietnam.

Certain new provisions on statutory insurance scheme in Vietnam are provided below, in particular:

- new guidance on unemployment insurance; and
- new retirement regime for social insurance.

**New Guidance on Unemployment Insurance**

For the purpose of overcoming the difficulties in implementing the regulations on unemployment insurance, the Government of Vietnam issued Decree No. 28/2015/ND-CP on 12 March 2015, providing guidelines on the implementation of Law on Employment No. 38/2013/QH13 dated 16 November 2013 regarding unemployment insurance (***Decree 28***). Decree 28 provides numerous changes in the procedures on participation in and payment for unemployment insurance.

In general, there are not many significant changes in relation to unemployment insurance policies specified in Decree 28, except for the changes in procedures, as referred to above, and new regulations on support to an employer for training, fostering and raising the vocational skills levels of its employees in order to maintain jobs for its employees.

In order for an employer to receive such support, the following conditions must be satisfied:

- the employer has paid full unemployment insurance premiums as required by law;
- the employer encounters difficulties due to economic recession or force majeure events requiring a structural change or a change in the production and business technology resulting in the risk of having to reduce the number of employees;
- there is a lack of funds for organising training and re-training to improve occupational skills for the employees; and
- the employer has a plan for training and maintaining jobs for its employees which has been approved by the relevant State agency.

The level of funding support for training purposes shall be a maximum of VND1 million per person per month. The specific level of support shall be calculated in accordance with the actual time or months of study for each trade or study course but shall not exceed six months.

Regulations specified in Decree 28 came into effect as from 1 January 2015.

**New Retirement Regime – A Constant Matter of Debate**

The social insurance system in Vietnam is currently governed by Law No. 71/2006/QH11 dated 29 June 2006 on social insurance (***Current LSI***) and its implementing legislation. As from 1 January 2016, Law No. 58/2014/QH13 of the National Assembly, dated 20 November 2014, on social insurance (***New LSI***) shall come into effect, replacing the Current LSI, and providing a new scheme for social insurance in Vietnam.

The New LSI contains fundamental changes as compared with the current social insurance system, especially in relation to social allowance benefits for employees upon retirement. There was an industrial strike among the workers of Pou Yuen Vietnam Co. Ltd., a foreign-owned company located in Binh Tan District, Ho Chi Minh City, in March 2015 in relation to this change.

Being one of the largest strikes to occur in Vietnam, this strike was unusual in its nature since it related to a national policy rather than a dispute between employer and employees.

***Lump sum social insurance benefit***

According to the Current LSI, when an employee retires, one of the following payments would be made by the social insurance authority:

(i) monthly payment paid until such employee dies. This kind of allowance is subject to certain conditions such as the employee having reached the retirement age (i.e. 60 years old for men and 55 years old for women); and the employee has contributed to the social insurance scheme for 20 years or more (***Retirement Salary***); or

(ii) lump sum payment which will be paid one time only to an employee upon leaving a job (***Retirement Package***).

The level of a lump-sum social insurance benefit is computed based on the number of contribution years to the social insurance fund, for each year, he/she shall be entitled to one and a half months of the average wage on which social insurance premia are based.

Pursuant to the current system, where an employee does not satisfy the requirements to enjoy the Retirement Salary, the employee shall be entitled to receive the Retirement Package upon leaving his/her job in certain circumstances, including, but not limited to, the situation whereby the employee discontinues paying social insurance after one year of ceasing to work and requests a lump sum social insurance benefit, but has paid social insurance for less than 20 years.

In this regard, where an employee resigns from his/her job and the period of having paid social insurance is less than 20 years, such employee has the right to choose to either:

(i) reserve the period he/she has paid social insurance with respect to the previous job and add this to the period of paying social insurance with respect to the new job; or

(ii) receive the Retirement Package in accordance with the number of contribution years to social insurance in the previous job.

However, under the New LSI (i.e. Article 60), the Retirement Package shall no longer be paid where the employees, upon their termination of employment, do not meet the age requirement. In other words, as from 1 January 2016, when resigning from a job, an employee who has not reached the retirement age has to wait until such time to receive the Retirement Package or the Retirement Salary (if relevant conditions are satisfied) without being able to choose to receive immediately the Retirement Package as provided for under the Current LSI.

This change in the retirement regime under the New LSI has led to disagreement and strikes amongst workers. The implied reasons for such debate are due to differing perspectives from the Government and the employees, in relation to the employees' ability to receive the Retirement Package when their employment is terminated.

***From the Government's perspective***

The new provision under the New LSI, as explained by certain representatives of the Government, does not aim to narrow the scope of employee eligibility to receive the Retirement Package but to increase the quantity of employees eligible to receive the Retirement Salary. In other words, the new law aims to encourage workers to accumulate their payments of social insurance so that they can receive the Retirement Salary when they retire, instead of receiving a Retirement Package every time they change jobs.

From this perspective, the new regime is intentionally designed to ensure the long-term stability and security of society as well as the benefits for the employees since the amount received under the Retirement Salary, as a stable monthly payment, should be much more than that of the Retirement Package.

***From the employees' perspective***

Contrary to the expectations of the Government, even before the policy takes effect, the intended positive aspects of the new retirement regime appear to be unwelcome by certain employees, especially those employees with unstable jobs. Instead of waiting until retirement age to receive the Retirement Package or Retirement Salary (provided respective conditions are satisfied), many workers expect to receive the Retirement Package immediately after leaving a job, so as to enjoy the benefits without delay.

From their perspective, it is not easy for them to wait until retirement age to receive the Retirement Package or to continue to pay social insurance until they satisfy the conditions to receive the Retirement Salary in accordance with the New LSI. Therefore, from this viewpoint, the new retirement regime may do more harm than good, especially for those who have uncertain jobs.

***Possible changes to the new retirement regime***

In reaction to the industrial action (i.e. strikes undertaken by workers), the Government made some initial attempts to reconsider the new retirement regime under the New LSI. Accordingly, representatives from the Ministry of Labour, War Invalids, and Social Affairs, Vietnam General Confederation of Labour, and the Government have agreed to suggest that the National Assembly reconsider the retirement regime in order to meet the practical needs of employees, and to allow them to choose whether to receive one lump sum payment when they leave their job or to receive their benefits upon retirement.

STOP PRESS: According to media reports, it would appear that the National Assembly on 27 May 2015 has reached an agreement that the New LSI should be re-considered. Members of the National Assembly will consider this issue and vote on whether or not Article 60 of the New LSI is amended. We will follow up on this issue and review the amended New LSI (if any and once available), and will update our readers on this issue in a future edition of our newsletter.

## NEW DECREES GUIDING LAW ON NOTARISATION 2014

In order to provide the necessary guidelines to implement Law on Notarisation No. 53/2014/QH13, which was passed on 20 June 2014 at the 7th session of XIIIth National Assembly of the Socialist Republic of Vietnam (***New Law on Notarisation***), the Government has issued two decrees being Decree No. 23/2015/ND-CP of the Government, dated 16 February 2015, on granting copies from original books, certifying the copies from originals, certifying the signature and certifying contracts and transactions (***Decree 23***); and Decree No. 29/2015/ND-CP of the Government, dated 15 March 2015, providing detailed guidelines for the New Law on Notarisation (***Decree 29***).

Decree 23 reconfirms and provides further detailed provisions in relation to one new provision contained in the New Law on Notarisation being that notaries have the authority and responsibility for the following:

- to certify true copies from originals of papers, documents issued or certified by Vietnamese authorities, foreign authorities, or Vietnamese authorities in association with foreign authorities; and
- to authenticate signatures on papers and documents except signatures of translators.

With this new regulation, apart from the authority of the Department of Justice and the People's Committee of Communes on the certification of copies from originals, now a registered notary office can provide such certification. Decree 23 took effect as from 10 April 2015.

Decree 29 provides numerous provisions in relation to the operation and management of notary offices, such as the conversion of public notary offices into private notary offices; mergers, acquisitions and the transfer of private notary offices; as well as professional liability insurance for notary organisations. Decree 29 took effect as from 1 May 2015.

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