

FRASERS NEWSLETTER - APRIL 2019

In this edition of our newsletter we report on the following:

- (i) New Circular guiding the restrictions on the use of **foreign exchange** in Vietnam;
- (ii) New Circular implementing Decree 63 on **Public Private Partnerships**;
- (iii) Draft amendment to the Decree on management, provision and utilization of **radio and television services**;
- (iv) New Circular regulating **lending in foreign currencies** to borrowers;
- (v) **Proposed new laws** which are going to be considered and/or enacted by the May session of the National Assembly; and
- (vi) Draft Law amending provisions of the Law on **Insurance Business** and the Law on **Intellectual Property**.

1 **New Circular No. 03/2019/TT-NHNN amending and supplementing some articles of Circular 32/2013/TT-NHNN dated 26 December 2013 guiding the implementation of provisions restricting the use of foreign exchange in the Vietnamese territory**

On 29 March 2019, the State Bank of Vietnam (**SBV**) issued Circular No. 03/2019/TT-NHNN (**Circular 03**) supplementing a number of provisions of Circular 32/2013/TT-NHNN dated 26 December 2013 of the governor of the SBV guiding the implementation of provisions restricting the use of foreign exchange within the territory of Vietnam. Circular 03 shall take effect as from 13 May 2019.

Circular 03 adds cases where non-residents are permitted to use foreign currency within the territory of Vietnam. Accordingly, foreign investors shall be able to pay a deposit or escrow deposit in foreign currency by way of bank transfer when participating in an auction in the following cases:

- Purchasing shares in a State-owned enterprise upon its equitisation as approved by the Prime Minister;

- Purchasing shares or a capital contribution portion of the State in a State-owned enterprise or in an enterprise with State capital upon divestment of the State as approved by the Prime Minister;
- Purchasing shares or a capital contribution portion of a State-owned enterprise invested in another company upon its divestment as approved by the Prime Minister.

When successful at the auction, such foreign investors shall transfer the investment capital pursuant to the foreign exchange control regulations, in order to make the payment of the purchase price of the purchased shares or capital contribution portion. When unsuccessful at the auction, such foreign investors are permitted to remit such deposit or escrow deposit in foreign currency, after deducting relevant expenses (if any).

2 **New Circular 09/2018/TT-BKHDT implementing Decree 63 on Public Private Partnerships**

On 28 December 2018, the Ministry of Planning and Investment (*MPI*) issued Circular No. 09/2018/TT-BKHDT (*Circular 09*) providing guidance on the implementation of a number of articles of Decree No. 63/2018/ND-CP dated 4 May 2018 on investment in a public-private partnership (*PPP*) form (*Decree 63*).

Circular 09 provides guidance for the preparation and assessment of pre-feasibility study reports and feasibility study reports of PPP projects, the contents of PPP project contracts, and other issues stipulated by Decree 63.

Accordingly, Circular 09 provides five appendixes for the following topics:

- (i) Appendix I: Guidance on formulating the pre-feasibility study report of PPP projects;
- (ii) Appendix II: Guidance on appraisal of the pre-feasibility study reports of PPP projects;
- (iii) Appendix III: Guidance on formulating the feasibility study report of PPP projects;
- (iv) Appendix IV: Guidance on appraisal of the feasibility study reports of PPP projects;
- (v) Appendix V(a): Basic content of PPP projects contracts (excluding the projects applying the Build-Transfer (*BT*) model); and
- (vi) Appendix V(b): Basic content of BT contracts.

In the event that there is more than one investor submitting proposals for a project, the relevant authorities shall select the proposal that is assessed to be the most feasible and efficient. The assessment shall be undertaken by the Government authorities based on the following criteria:

- (i) The project must (a) be consistent with the developmental master plan of the relevant branch or sector; and with the socioeconomic developmental master plan and plan as approved by the relevant authorities; (b) be consistent with the investment sectors; (c) not overlap with other projects for which an investment policy decision or investment decision was made; (d) be capable of capital recovery for the investor; (e) conform with the capability of balancing the State portion for participating in PPP projects; and (f) have an environmental impact assessment report as prescribed by the law on environmental protection;
- (ii) Necessity for the investment;
- (iii) Technical feasibility, including land use plans;
- (iv) Socio-economic efficiency;

- (v) Financial feasibility; and
- (vi) Capacity and experience of the investors in undertaking preparation of their pre-feasibility study report and feasibility study report.

Circular 09 came into effect as from 15 February 2019 and replaced Circular No. 02/2016/TT-BKHDT dated 1 March 2016 of the MPI providing guidance on the same matters.

3 **Draft amendment to Decree No.06/2016/ND-CP on management, provision and utilization of radio and television services (Draft version no. 5)**

On 13 February 2019, the Ministry of Information and Communication (**MIC**) has released a new Draft Decree amending and supplementing some of articles of the current Decree No. 06/2016/ND-CP dated 18 January 2016 (**Decree 06**) regulating the management, provision and utilisation of radio and television services (**Draft Decree**).

This Draft Decree broadens the definition of radio and television services, which now includes the following:

- (i) domestic programme channels;
- (ii) foreign programme channels;
- (iii) **domestic programmes;**
- (iv) **foreign programmes;** and
- (v) value added contents on technical infrastructure for radio and television transmitting and broadcasting to users.

While Decree 06 used to classify radio and television services into five groups (being terrestrial television service, cable television service, satellite television services, mobile television service and radio and television service on the internet), the Draft Decree still maintains such five categories of radio and television services, but it further adds the category of “internet applications to broadcast to service subscribers”.

Among other things, the Draft Decree also provides that all domestic programme channels of paid radio and television services in Vietnam must be edited and managed to ensure that the programme contents comply with the laws of Vietnam. The Draft Decree therefore removes the exception, currently provided under Decree 06, according to which live shows of sport competitions, opening ceremonies and closing ceremonies in Vietnam and abroad do not need to be edited before broadcasting.

The Draft Decree also amends the term of validity of the foreign programme channel editing licence, reducing it to a maximum of 5 years from the date of issuance (instead of the current 10 years, as provided for under Decree 06).

4 **New Circular No. 42/2018/TT-NHNN regulating Lending in Foreign Currencies to Borrowers**

The State Bank of Vietnam recently issued Circular No. 42/2018/TT-NHNN dated 28 December 2018 (**Circular 42**) amending and supplementing the current Circular No. 24/2015/TT-NHNN dated 8 December 2015 regulating lending in foreign currency by credit institutions and foreign bank branches to resident borrowers, as amended from time to time (**Circular 24**). Below are some noteworthy developments contained in Circular 42 as compared to the current Circular 24.

- (i) **Narrowing the capital requirements permitted for foreign currency loans by credit institutions and foreign bank branches**
 - Under Article 3.1 of Circular 24, credit institutions and foreign bank branches are allowed to make foreign currency loans for short-term, medium-term and long-term loans in order to make offshore payments for the import of goods and services; and

- Under Circular 42, such short-time loans are only permissible if they are used for implementing plans on production and trading of goods to be exported. Otherwise, if such short-time loans are used for implementing plans on production and trading of goods to serve domestic demand, credit institutions and foreign bank branches may only provide loans in foreign currency for this purpose until 31 March 2019.

As for medium-term and long-term loans, the timeline thereof shall be until 30 September 2019.

(ii) Removal of the time limit for loans to meet domestic capital demand for implementing plans on production and trading of goods to be exported

Circular 42 continues to allow credit institutions and foreign bank branches to provide short-term loans to meet domestic capital requirements to implement plans to produce and trade goods to be exported via Vietnam's bordergates if the borrower has sufficient foreign currency revenue from exports to repay such loans. This was previously only permitted until 31 December 2018 under 3.1(c) of the Circular 24.

(iii) Facilitate the purchase of foreign currency

- Under Circular 42, a borrower, in certain circumstances, may now buy foreign currency not only from the lender, but also from another credit institution or foreign bank branch; and
- Circular 42 also expressly provides, in certain circumstances, for the obligation of the lender to sell foreign currency to the borrower in the event that the borrower needs to buy foreign currency from the lender.

(iv) Timing

The implementation of credit agreements executed before 1 January 2019 shall not be governed by Circular 42.

With respect to any master credit facility agreement executed before 1 January 2019 but that has specific loan agreements signed on or after 1 January 2019, the implementation of such master credit facility agreement and its specific agreement thereof shall be governed by Circular 42.

5 Proposed new laws which are going to be considered and/or enacted by the May session of the National Assembly

From 20 May 2019 to 17 June 2019, the 7th session of the National Assembly will take place in Hanoi. In this session, the following laws and resolutions are expected to be passed by the National Assembly, including:

1. Law on Public Administration;
2. Law on Architecture;
3. Law on Prevention of Harmful Effects of Beer and Spirits;
4. Law on Tax Management (amendment);
5. Law Amending the Law on Enforcement of Criminal Sentences;
6. Law Amending the Law on Public Investment; and
7. Resolution on the Legislative Program for Year 2020.

The following nine (09) projects will also be submitted to the National Assembly 7th session for its consideration and opinion:

1. Labour Code (amendment);

2. Law on Medical Diagnosis and Treatment (amendment);
3. Law Amending the Law on Land;
4. Law Amending the Law on Investment and the Law on Enterprises;
5. Law on Securities (amendment);
6. Law on Libraries;
7. Law on Reserve Forces;
8. Law on Defence Militia (amendment); and
9. Law on Entry and Exit of Vietnamese Citizens.

6 **Draft Law amending provisions of the Law on Insurance Business and the Law on Intellectual Property**

The Ministry of Industry and Trade of Vietnam (**MOIT**) is currently drafting a law (**Draft Law**) amending and supplementing the following laws:

- Law No. 24/2000/QH10, entitled the Law on Insurance Business, passed by the National Assembly on 9 December 2000, as amended by Law No. 61/2010/QH12 passed by the National Assembly on 24 November 2010 (collectively, **Law on Business Insurance**);
- Law No. 50/2005/QH11, entitled the Law on Intellectual Property, passed by the National Assembly on 29 November 2005, as amended by Law No. 36/2009/QH12 passed by the National Assembly on 19 June 2009 (collectively, **Law on Intellectual Property**); and
- Annex 4 of Law No. 67/2014/QH13, entitled the Law on Investment passed by the National Assembly on 26 November 2014, as amended by Law No. 03/2016/QH14, passed by the National Assembly on 22 November 2016 (collectively, **Law on Investment**);

in order for Vietnam to comply with the provisions of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTTP**), which has been recently ratified by the National Assembly, and with the commitments of Vietnam upon its accession to the World Trade Organisation.

Below are some highlights under the Draft Law as compared to the current Law on Business Insurance, Law on Intellectual Property, and Annex 4 of the Law on Investment.

- **Amendments regarding the Law on Insurance Business and Annex 4 of the Law on Investment**
 - ◇ The Draft Law defines and creates a legal framework for insurance auxiliary services, being consultancy, risk assessment, actuarial, loss inspection, and claim settlement. In the current Law on Insurance, there are no definitions and no clear legal framework applicable to these types of services.
 - ◇ Under the Draft Law, an organisation shall be entitled to provide insurance auxiliary services if:
 - (i) it is a legal entity which is duly and properly established;
 - (ii) it is financially secured in providing insurance auxiliary services by professional liability insurance, bank payment guarantee, guarantee insurance, escrow, or owner equity; and

- (iii) its personnel who is directly providing insurance auxiliary services to clients shall:
 - (a) be 18 or more years of age and having full capacity for civil acts; and
 - (b) adhere to the standards of the relevant degree or certificate of insurance issued by a duly and properly established foreign or local training facility and other standards pursuant to the applicable laws.
- ◇ The Draft Law provides that the provision of insurance auxiliary services shall be subject to further guidance of the Government in the future.
- ◇ Insurance auxiliary services are also added to the list of conditional business lines provided in Annex 4 of the Law on Investment.
- **Amendments regarding the Law on Intellectual property**
 - ◇ The Draft Law provides a more favourable time limit for the novelty preservation of a patent, which is filed in Vietnam, after such patent is publicly announced. In particular, pursuant to the Draft Law, a patent will remain novel if such patent application is submitted within 12 months as from the date of the patent being published. The current time limit for such novelty preservation is only 6 months according to the Law on Intellectual Property.
 - ◇ The Draft Law also states that trademark license agreements are not required to be registered with the National Office of Intellectual Property (**NOIP**) for effectiveness with respect to third parties, whereas, under the current Law on Intellectual Property, generally all types of industrial property (including trademark) license agreements are required to be registered with the NOIP in order to be effective against a third party.

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 legalenquiries@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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