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Frasers Announces New Upgraded Website

We are pleased to announce that we have recently upgraded our website (www.frasersvn.com), which we believe will provide our clients with greater access to information about our firm, as well as publications on legal issues which will hopefully assist you in achieving your business objectives in Vietnam.

Our website is now available in English, Vietnamese and Japanese languages. In particular, clients will also be able to more easily access previous editions of our newsletters and legal updates, as well as profiles of our senior legal team, and our experience (not only by practice group, but also by industry sector).

We have also included a Corporate Social Responsibility section providing details of our commitment to the community in which we live and conduct business (as well as certain charitable initiatives which we have undertaken as a firm); details of some of the awards which we have been awarded by leading guides to law firms in Vietnam such as the Asia Pacific Legal 500 and AsiaLaw; as well as information on current vacancies within our firm just in case you might like to join us!

We look forward to hearing any constructive feedback on our new website (www.frasersvn.com), so please feel free to contact us at feedback@frasersvn.com with any comments.

We welcome you to the second edition of our newsletter for 2013, providing you with key information on some of the most recent legal developments in Vietnam. In this edition you will find:

- an overview on the regulatory framework for publications produced by companies not engaged in publishing activities;
- a short article on new anti-spam regulations;
- a summary of new regulation under the labour laws of Vietnam which aims to support enterprises in employment management: labour outsourcing;
- certain new provisions on the administrative penalties for producing and trading counterfeit goods; and
- a brief outline of new regulations on the quality management of construction works.

We trust that you find this edition of the newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Please feel free to email us with your comments and suggestions at 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 legalenquiries@frasersvn.com or via your usual Frasers's legal advisor.

New Regulations on Publishing

On 20 November 2012, at the fourth session of the National Assembly, Law No. 19/2012/QH13 on publishing was passed (***New LOP***), and shall come into full force and effect on 1 July 2013. The New LOP shall replace previous laws on publishing, including Law No. 30/2004/QH11, as well as Law No. 12/2008/QH12 (***Current LOP***).

Explanation of terms

In general, there are not many significant changes introduced in the New LOP. In addition to definitions of words including "publishing", "printing" and "publication", the New LOP also provides a clearer distinction between 'publications' and other works such as press or journalistic works, by listing the forms of works considered to be publications:

(a) printed books;

(b) books printed in Braille;

(c) paintings, photographs, maps, posters, leaflets and brochures;

(d) calendars; and

(e) audio and video recordings used as a substitution for a book or the illustrations in a book.

We are aware that numerous companies which do not engage in publishing or journalistic activities as a commercial business activity, but do produce internal periodicals, including 'bulletins', 'newsletters' or 'magazines'. We are of the view that the publication of such materials shall be subject to the Law on Media and its implementing legislation, and not the Law on Publishing.

More than ten years ago, the former Ministry of Culture and Information provided regulations on the publication of bulletins, documents, leaflets; issuance of press releases; publication and/or transmission of bulletins on electronic screens by foreign agencies and organisations, as well as legal persons involving foreign elements, in Vietnam with Decision 28/2002/QD-BVHTT (***Decision 28***). According to Decision 28, "bulletins" are documents which are published periodically under specific stipulations on the size, number of pages, presentation form, content and mode of expression, designed to provide information on internal activities, professional guidance, results of research and application, seminars, conferences and cooperative relations of foreign agencies and organisations, legal entities involving foreign elements, in Vietnam. Under Decision 28, a relevant entity must be granted a licence for the publication of such works (***Licence***) issued by the Ministry of Information and Communication (***MIC***). Decision 28 does not specify whether a bulletin which is not printed and is only forwarded to recipients via email, such as e-newsletters, fall within the governance of Decision 28. We have discussed this matter with the MIC, and have been advised that a bulletin produced by a foreign organisation, and which is not printed, does not require a Licence.

Publication of non-commercial works

However, it appears that reference books or booklets published by an entity other than a publishing company are subject to the Law on Publishing. The New LOP defines a non-commercial publication as a work which is not used for trading purposes. The New LOP also expresses that where a non-commercial work is published through an entity other than a publishing house, the relevant entity must acquire a publishing permit from the State authorities. Central agencies and foreign organisations will receive their licence from the MIC. All other agencies and organisations will receive their licence from the relevant provincial-level People's Committee. Furthermore, the New LOP provides details of compulsory

information to be recorded in all publications, as well as the obligation to submit the publications to the Vietnam National Library.

Importation of non-commercial publications

Whilst the New LOP reiterates that a permit from the State authorities must be granted for the importation of a non-commercial publication, the New LOP provides certain cases in which a permit shall not be required, particularly as follows:

(a) documents for international seminars and conferences which are permitted to be held in Vietnam by competent Vietnamese authorities;

(b) publications being assets of organisations, families and individuals for private use;

(c) publications included in the personal effects of people on entry and for personal use only; and

(d) publications as gifts to agencies, organisations and individuals which are delivered by post and have a value not exceeding the duty-free level prescribed by law.

New Anti-spam Regulations

Taking a firm stand against the use of electronic systems to send unsolicited bulk messages, or spam, the Government has issued Decree 77/2012/ND-CP dated 5 October 2012 (***Decree 77***), amending and supplementing Decree 90/2008/ND-CP dated 13 August 2008 (***Decree 90***).

According to Decree 90:

(a) *Advertising electronic mail* means an electronic mail (***email***) sent to consumers and aimed at introducing organisations and individuals engaged in business or social activities, goods or services, including services provided for profit and not for profit; and

(b) *Spam* means an unsolicited email or text message. Spam mail is classified into two types, including emails and text messages for the purposes of deception, harassment or spreading computer viruses and harmful software or violating regulations on the protection of social values and State security; and advertisements in violation of the principles of sending advertising emails or text messages stipulated in Decree 90.

Notable points of Decree 77 include:

(a) Broadening prohibition provisions, including: (i) exchanging and trading lists of email addresses without the owners' consent; (ii) providing information-related content via messages inconsistent with users' request; (iii) hiding senders' names or their electronic addresses, or illegally using names or email addresses of other organisations or individuals when sending messages and e-mails, and (iv) imposing service charges without informing users;

(b) New provisions on the principles for sending advertising messages and emails. Accordingly, advertising messages and emails:

  (i) may only be sent after obtaining clear prior consent from a recipient and such advertisements must be immediately terminated upon receiving an unsubscribe request from a recipient (Decree 77 does not specify what type of consent is required, but following a discussion with the authorities, we understand that the consent may be obtained from a "subscribe" button on a website or a "sign up" form on a website);

  (ii) are not permitted to send more than one item bearing the same contents to a single email

address/telephone number within any 24 hours period, and advertising messages are only allowed to be sent between 7:00 and 22:00 every day, unless having the consent of recipients;

(iii) may only be sent from valid email addresses and systems in accordance with MIC regulations, and the service providers must concurrently send copies of the contents of their advertisements to the technical branch of MIC.

(c) Supplementing regulations on unsubscribing, there must be an instruction on how to unsubscribe from advertising messages in the unsubscribe section of an email or text message. Immediately subsequent to receiving a request to unsubscribe, an advertiser or a provider of advertising services must send a confirmation message acknowledging receipt of the request to unsubscribe, and then permanently remove the contact details of that person from the list of recipients.

(d) Although the maximum potential fine has not been increased, Decree 77 extends the scope of violations in respect of anti-spam, and amends and includes additional penalties and remedies such as revoking identification names and confiscating the proceeds earned from violations.

Decree 77 has been in effect since 1 January 2013.

Labour Outsourcing

One of the most significant changes introduced by Vietnam's new Labour Code is the recognition by Vietnamese law of the concept of labour "outsourcing". This concept will already be familiar to business people in numerous other jurisdictions, where it is common for an end-user company to hire, on a temporary basis, the employees of a company that supplies temporary labour. For businesses, making use of outsourced labour enables them to: (i) respond to short term labour requirements; and (ii) take on staff with particular skillsets to assist with specific tasks. Where such an arrangement is used, the benefit to the end-user company is that no employment relationship (with the ensuing duties and obligations owed by an employer to an employee) is created between the end-user company and the outsourced employee, and labour recruitment costs are reduced.

This article explains the concept of labour outsourcing in more detail and addresses the key issues that will affect businesses making use of outsourced staff in Vietnam.

According to a report by the Ministry of Labour, Invalids and Social Affairs (***MOLISA***), labour outsourcing has been used in the United States of America, the United Kingdom and several other European countries, from as far back as 50 years ago. In Asia, labour outsourcing arrangements have been recognised and regulated by law in Japan, since 1985, Korea, since 1998, and China, since 2007.

In Vietnam, labour outsourcing services have a long history of being used, without legal regulation. According to MOLISA, by the end of 2010, over 200 companies were providing labour outsourcing services to around 300 businesses in the southern part of Vietnam alone, despite the lack of a regulatory framework for such arrangements. Without a regulatory framework, the relationships, rights and obligations of the relevant parties involved in labour outsourcing arrangements were uncertain.

Under the new Labour Code, an official definition of labour outsourcing has been provided. Labour outsourcing occurs where an employee (***a Labour Hire Employee***) of an enterprise licensed to conduct labour outsourcing services (***a Labour Hire Company***) is assigned to work for, and be subject to management by, another entity (***a Labour Hire Customer***[1]). However, the employment relationship between the Labour Hire Employee and the Labour Hire Company remains intact throughout the assignment and no employment relationship is created between the Labour Hire Employee and the

[1] Often referred to as the "end-user" or "hirer".

Labour Hire Customer. This means that the Labour Hire Company continues to owe employer obligations towards the Labour Hire Employee (and the Labour Hire Employee continues to owe employee obligations towards the Labour Hire Company) for the duration of his or her assignment to the Labour Hire Customer. The Labour Hire Employee's employee rights as between him or her and the Labour Hire Company (and the Labour Hire Company's employer rights as between it and the Labour Hire Employee) also continue throughout this period.

Recently, a draft decree providing guidelines for the implementation of the labour outsourcing provisions (***Draft Decree***) has been issued. According to the Draft Decree, labour outsourcing is prohibited for the following Labour Hire Customers:

- customers who are involved in an outstanding employment dispute or strike;
- customers who wish to outsource labour to replace employees who are on strike;
- customers who wish to replace employees who have been retrenched due to economic conditions, organisational or technological restructuring, a merger, consolidation or division; or
- customers wanting to assign Labour Hire Employees to work in locations which are in the list of "areas with severe living conditions" stipulated by MOLISA and MOH, unless such Labour Hire Employee has been living in that location for 3 years or more.

The Draft Decree also provides a list of jobs permitted for labour outsourcing, including: translator, secretary and administrative assistant, receptionist, tour guide, promotion assistant, project assistant, office IT assistant, accountant, electrician and technician, professional facility manager and cleaner, teacher, business assistant, marketing assistant, and security guard.

Labour outsourcing contract

The Labour Hire Company and the Labour Hire Customer must enter into a labour outsourcing contract in writing. The contract must contain the following particulars:

- the place of work, the Labour Hire Employee's job title, the job description, any specific tasks that the Labour Hire Employee must undertake as part of the job, and any specific qualifications or experience required for the job;
- the term of the labour outsourcing arrangement (which cannot exceed 12 months), and the Labour Hire Employee's date of commencement;
- working hours, rest breaks, and provisions relating to occupational safety and hygiene at the workplace; and
- the obligations owed to the Labour Hire Employee by both the Labour Hire Company and the Labour Hire Customer.

The provisions of the labour outsourcing contract cannot confer rights and benefits on the Labour Hire Employee that are less favourable than those in the Labour Hire Employee's labour contract with the Labour Hire Company.

Labour Hire Companies

Pursuant to the new Labour Code, the business of labour outsourcing can only be carried out by a company in possession of the permits required by the new Labour Code, and with a labour outsourcing function specified in its registered scope of permitted business activities. The rights and responsibilities of Labour Hire Companies are set out in Article 56 of the new Labour Code, including but not limited to:

(a) executing labour contracts with Labour Hire Employees in accordance with the provisions of the New Labour Code;

(b) providing the résumés of relevant Labour Hire Employees to the Labour Hire Customer, together with any specific requirements of the Labour Hire Employees;

(c) discharging all of its employer obligations towards the Labour Hire Employees, including having responsibility to pay normal wages, wages for public holidays and annual leave, termination payments, severance allowances, social insurance payments, health insurance and unemployment insurance;

(d) paying Labour Hire Employees' wages at a level not lower than the wage of an employee of the Labour Hire Customer, with the same professional qualifications, the same job title or carries out similar or identical work ; and

(e) disciplining a Labour Hire Employee, when the Labour Hire Employee has been rejected by the Labour Hire Customer because of misconduct with disciplinary consequences (refer to the section below for further information).

Labour Hire Customers

The rights and obligations of the Labour Hire Customer are set out in Article 57 of the new Labour Code. Article 57 states that the Labour Hire Customer must:

(a) guide Labour Hire Employees through the internal labour regulations and any other regulations of the Labour Hire Customer;

(b) not discriminate against Labour Hire Employees compared to the employees of the Labour Hire Customer;

(c) reach an agreement with Labour Hire Employees in respect of night or overtime work that is out of the scope of the labour outsourcing contract;

(d) not transfer Labour Hire Employees to another employer;

(e) reach an agreement with Labour Hire Employees and the Labour Hire Company if the Labour Hire Customer would like to recruit directly any Labour Hire Employees, before the expiry of the labour contract between the relevant Labour Hire Employees and the Labour Hire Company;

(f) return to the Labour Hire Company any Labour Hire Employees who do not satisfy the agreed requirements; and

(g) provide evidence of misconduct with disciplinary consequences by any relevant Labour Hire Employees, in order for the Labour Hire Company to deal with such misconduct and enforce necessary disciplinary action.

Accordingly, it would appear that Labour Hire Customers are not required to deal with labour discipline in respect of Labour Hire Employees. Disciplining an employee in Vietnam is not a straightforward process and in order to do so lawfully, an employer must comply with complicated disciplinary procedures. Under the new Labour Code, a Labour Hire Customer can pass responsibility for disciplining a Labour Hire Employee back to the Labour Hire Company. It will, however, be the Labour Hire Customer's internal labour rules that determine whether the Labour Hire Employee's behaviour amounts to misconduct for disciplinary purposes.

Labour Hire Employees

Pursuant to Article 58 of the New Labour Code, the rights and responsibilities of Labour Hire Employees are, among others, to:

(a) comply with the instructions, internal regulations, labour discipline, and the collective labour agreement of relevant Labour Hire Customers;

(b) receive wages not lower than the wages of an employee of any relevant Labour Hire Customer who has the same professional qualifications, the same job title, or carries out work being identical or similar to that of the Labour Hire Employee;

(c) be entitled to reach an agreement to sign a labour contract with the Labour Hire Customer after the expiration of the labour contract with the Labour Hire Company, or after lawfully and unilaterally terminating the labour contract with the Labour Hire Company.

The implementation of the outsourcing provisions of the new Labour Code is a significant step in developing the business of labour outsourcing services in Vietnam. The recognition and regulation of labour outsourcing will provide a flexible staffing option for foreign investors and enterprises doing business in Vietnam.

In practice, to comply with the provisions of the New Labour Code, Labour Hire Companies and Labour Hire Customers will have to cooperate closely with one another, and share certain information. In order to ensure that the Labour Hire Company pays the Labour Hire Employee the correct wage, the Labour Hire Customer will have to provide information about the wages of its employees with the same professional qualifications, the same job titles, or who are carrying out identical or similar work. In some cases, it may not be clear cut whether or not an employee of the Labour Hire Customer is carrying out similar work. Until further guidance is provided on the matter, it is unclear which of the Labour Hire Company or the Labour Hire Customer will determine whether “similar work” is being undertaken. As it is the Labour Hire Company’s obligation to ensure the correct wage is paid, it is likely that in any event Labour Hire Companies will wish to determine this question themselves, or include appropriate protective provisions in applicable labour outsourcing agreements. It seems to us, therefore, that Labour Hire Customers will need to be prepared to share with Labour Hire Companies all relevant information about the work undertaken by their employees and the wages of such employees.

We look forward to receiving guidance from the Government in the form of implementing legislation issued under or pursuant to the new Labour Code, which will, we hope, resolve some of the uncertainties referred to in this brief summary.

Consolidated Legal Instrument Regarding Administrative Sanctions on Counterfeit Goods

On 10 January 2013, the Government promulgated Decree 08/2013/ND-CP on administrative penalties for producing and trading counterfeit goods (***Decree 08***) which consolidates and replaces various regulations on dealing with counterfeit goods specified by particular types of goods spreading in a number of other decrees.

Definition of counterfeit goods

Pursuant to Decree 08, counterfeit goods are classified into four categories as follows:

(a) "useless goods" are goods for which the use is inconsistent with the purpose or name of the item; goods for which the use is inconsistent with the announced or registered use;

(b) goods using counterfeit labels and packaging;

(c) goods having counterfeit intellectual property rights; and

(d) counterfeit stamps, labels, and packaging.

Administrative fines for producing and trading counterfeit goods

As a general proposition, Decree 08 stipulates a stricter fine level for the activities of producing and trading counterfeit goods, particularly:

(a) fines of up to VND70 million (equivalent to approximately US$3,500) shall be imposed for acts of trading in counterfeit useless goods;

(b) fines of up to VND100 million (equivalent to approximately US$5,000) shall be imposed for acts of manufacturing counterfeit useless goods;

(c) fines of up to VND60 million (equivalent to approximately US$3,000) shall be imposed for acts of trading in goods with counterfeit labels and packaging;

(d) fines of up to VND90 million (equivalent to approximately US$4,500) shall be imposed for acts of manufacturing goods using counterfeit labels and packaging;

(e) fines of up to VND40 million (equivalent to approximately US$2,000) shall be imposed for acts of trading in counterfeit stamps, labels, and packaging; and

(f) fines of up to VND60 million (equivalent to approximately US$3,000) shall be imposed for acts of manufacturing counterfeit stamps, labels, and packaging.

Notably, the regulations on administrative fines in relation to goods with counterfeit intellectual property rights currently stipulated in various decrees implementing the intellectual property law remain unchanged.

Additional penalties and remedies

In addition to administrative fines, additional penalties of confiscation of exhibits and instruments for committing violations and revocation of practising certificates or licences and remedial measures, shall be applied for particular violations.

Furthermore, it is noted that in case the violations contain signs of crimes as prescribed by the applicable criminal law, their files shall be forwarded to criminal proceedings agencies to consider criminal prosecution.

Decree 08 came into full force and effect on 1 March 2013, replacing all previous regulations of the Government on counterfeit goods and the administrative penalties for the production and trade of such goods.

New Decree on Quality Control for Construction Works

On 6 February 2013, the Government issued Decree No.15/2013/ND-CP on quality control for construction works (***Decree 15***). This Decree came into effect as from 15 April 2013 and replaces Decree No. 209/2004/ND-CP of the Government (as amended by Decree No.49/2008/ND-CP) (***Decree 209***) and certain relevant provisions of the Government's Decree No.12/2009/ND-CP.

The new Decree provides clear orders throughout the stages of construction. For example, there are seven steps relating to the quality control for construction surveys, six steps for construction designs, and eight steps for the execution of a construction project. The responsibilities of investors and related constructors in each stage are determined and the relevant parties will be held responsible. Below are some notable changes contained in Decree 15:

Disclosure of information on capabilities

Decree 15 states that organisations and individuals send to State construction authorities, information relating to their capabilities in the construction sector. Within 30 working days as from the date of receipt of such information, those authorities are responsible to consider and publish such information on their websites.

It is unclear whether the above provision of information is compulsory. However, since Decree 15 states that the provided information would serve as the basis for selection in examination of the construction design works, construction specialised tests, supervision of quality of construction works, examination and appraisal of construction works quality, as well as survey, design and execution of construction works of Special Grade, Grade I and Grade II which are funded with the State Budget (applicable to main contractors), it seems that such provision of information could be considered as a right of the entities involved in construction activities.

Management of construction works' quality

Decree 15 provides stricter regulations for the quality control of construction works, especially in (i) verification of design; and (ii) inspection during the acceptance of construction works.

Previously, Decree 209 provided a right for the investor in hiring construction consultants for verifying the design, subject to the nature, scope and requirements of the construction works. However, under Decree 15, the investor is obliged to send the designs to the State construction authorities for verification where the relevant construction work are one of the following types of construction works categories:

(a) apartment buildings of Grade III and above, private residences of 7 stories and above;

(b) public works of Grade III and above;

(c) industrial works: power grids, hydro-power plants, thermo-power plants, metallurgy factories, alumina production factories, cement factories of Grade III and above; petrochemical refineries, gas processing plants, depots and pipelines of petrol, oil, liquefied gas; production factories and depots of dangerous chemicals; production factories and depots of industrial explosion materials of all grades;

(d) transportation works: bridges, tunnels, and roads of Grade III and above for works funded by the State, and Grade II and above for works funded with other capital sources; works of railways, urban railways, runways, seaports, piers, docks, ports for ships, and ropeways of all grades.

(e) agriculture and rural development works: reservoirs, dams, dykes, docks, canals, closed water pipes, pumping stations and other irrigation works of all grades;

(f) technical infrastructure works: Grade III and above for works funded by the State, Grade II and above for works funded with other capital sources; toxic solid waste processing works of all grades,

(collectively, ***the List***).

Design verification time shall not exceed 40 working days in respect of works of Grade I and above, and

30 working days in respect of other works from the date of receipt of a complete and valid file.

Previously, the necessary documents for the process of construction work acceptance and the list of items to be checked and accepted were stipulated by Decree 209. Decree 15 provides a more flexible view on this matter, and accordingly, such items to be checked and accepted, hand-over as well as the basis, conditions, procedures, timeline, documents, forms, minutes and attendants participating in the process of checking and acceptance, can be agreed upon in the construction contract.

However, in respect of construction works falling within the List, the process of checking and acceptance must be inspected by construction State bodies. Those authorities must issue a written conclusion on the inspection contents within 15 working days (for works of Grade III and Grade IV) and 30 working days (for facilities of Special Grade, Grade I, and Grade II) since receipt of the dossiers. If investors do not receive inspection results from the authorised state bodies within this timeframe, they are entitled to organise the process of checking and acceptance in order to put works into use.

Managing construction accidents

Decree 15 provides that immediately subsequent to the occurrence of a construction accident, an investor must report to the People's Committee at community-level and to the investors' senior agencies where the building breakdown occurred. Within 24 hours, the investors must submit reports on an accident to district-level and provincial People's Committees where the accident occurred; to the Ministry of Construction and other competent State authorities if there have been any injuries or fatalities.

Investors and construction contractors shall be responsible for promptly taking measures to search for, rescue, and ensure the safety of all relevant people and property; they will also be responsible for limiting and preventing further danger, protecting the accident scene and preparing reports as required by law. The dismantling and clearance of accident scenes must be conducted in accordance with and subject to the approvals of relevant competent authorities.

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