



Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

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Investment

Foreign indirect investment

The regulations governing foreign investment in Vietnam have just become more complicated. On 18 June 2009, the government issued Decision 88 on foreign investment in existing Vietnamese enterprises. Please see our briefing of July 2009 for further details.

BOT projects

Build-operate-transfer (BOT) projects are relatively common, but licensed BOT projects are rare. They are one of the few types of investment still overseen by the Ministry of Planning and Investment (MPI). To give a boost to such projects – which may play a crucial role in the development of infrastructure over the coming years – the competence to receive application dossiers for implementation of BOT projects in Vietnam has been assigned to the Foreign Investment Agency by virtue of Decision 521 of the MPI dated 16 April 2009. Decision 521 does not alter the MPI's exclusive authority to issue investment certificates for such projects.

Selection of investors in land-using investment projects

Residential and commercial land prices in Vietnam often elicit outrage from the first-time visitor or client, calm explanations of various 'social facts' from the permanent resident, consternation and sit-ins from the elderly folks often parked in front of peoples' committees adorned with (state-endorsed) revolutionary posters, and, depending on the relevant employer, cries of 'barriers to

further foreign investment' or 'obstacles to an equitable rural-to-urban transition' from the concerned corps of economists and development experts deployed in Vietnam from time to time.

Land prices, of course, are the product of, among other variables (eg regulatory powers such as zoning), supply and demand. In Vietnam, consumer demand for land is increasing as incomes rise and offshore remittances flow in; however, consumer demand remains bound by relatively limited access to credit and relatively high equity-to-debt ratios, even when credit is accessible.

The supply of land, on the other hand, is limited by a complicated regulatory situation that may require decades to resolve. A predictable demand and unpredictable supply have begotten some deformed offspring. Vietnam's major cities and popular tourist areas are littered with scars caused by investment projects (failed, languishing and imagined) that have obtained prime land parcels and created a confusion of partially constructed buildings and wild flora enclosed within otherwise empty space.

Within this context, the MPI issued Circular 03 dated 16 April 2009. This focuses its regulatory gaze on the process and qualifications of selecting investors for projects requiring substantial tracts of land or high-value land.

One mechanism, among others, employed by Circular 03 to ensure the efficient use of land is to subject high-value commercial land to tendering and to require minimum debt-to-equity ratios of those selected (not less than

15 per cent of the total anticipated investment capital for investment projects using less than 20ha of land area, and not less than 20 per cent for investment projects using more than 20ha of land).

Circular 03 provides that the selection of investors will be tendered if two or more qualified investors register an interest to carry out the investment project. It also requires investors to submit a bid bond of 1 to 3 per cent of the price indicated in the bid documents and a performance bond of 5 to 10 per cent of the total proposed investment capital.

Investment in joint venture projects

Often, one of the few assurances an investor may reasonably obtain in Vietnam is that legal uncertainties are myriad and varied and will, from time to time, require effort and expense unnecessary in jurisdictions with more consistent, predictable and stable legal institutions. An illustrative example arrived with the issuance of Official Correspondence 1752 dated 18 March 2009 of the MPI (OC 1752).

Under Decree 139 of the government dated 5 September 2007, one or more foreign investors was permitted to participate, with up to a 49 per cent charter capital interest, in a Vietnamese company without triggering the sometimes onerous requirements applicable to foreign-invested Vietnamese enterprises (eg having an 'investment project' approved by, and an investment certificate issued by, the competent state authority). In OC 1752, by contrast, the MPI requires a foreign investor contributing charter capital (of any amount) with a Vietnamese investor for the purposes of establishing a 'joint venture enterprise' to submit an application to the competent state authority for approval of the 'investment project' and issuance of an investment certificate under the investment law regime.

Corporate seal

In Vietnam, a signed contract that is unsealed risks a determination of invalidity by a Vietnamese court. The risk arises from customary practice combined with an absence of provisions explicitly dealing with the legal importance of corporate seals under Decree 58 of the government dated 24 August 2001 on seals. On 1 April 2009, the government issued Decree 31 to amend a number of the provisions in Decree 58. However, Decree

31 does not clarify the legal importance of a corporate seal on contracts. Consequently, the risks of unsealed or improperly sealed contracts remain, so lawyers and their clients face years of additional discussions about the theoretical importance, and practical necessity, of complying with an obligation arising from custom and ambiguity rather than law.

Certificate of ownership for apartments

To address a growing number of disputes between apartment owners and the developers of apartment buildings (the developers) including title to common areas, the Ministry of Construction (MOC) issued Circular 01 dated 25 February 2009. Under Circular 01, developers may obtain certificates of ownership for each apartment only by satisfying the following conditions:

- preparation and submission of a 'basic file' for the whole apartment building after the building is accepted for use by the competent state authority;
- preparation and submission of an 'individual file' for each apartment in the apartment building, after the purchase price is paid in accordance with the apartment sale-and-purchase contract (the purchase contract); and
- a purchase contract, based on the standard form included with Circular 01.

Circular 01 also conditions the issuance of a certificate of ownership in relation to an individual apartment upon the purchase and sale of such apartment on one of Vietnam's recently established real estate trading exchanges.

Height management

On 23 February 2009, the government issued Decree 20 on the height management of aviation hazards and the management and protection of the airspace in Vietnam. Investors will have an interest in reviewing the provisions, requirements, necessary approvals and liabilities set in Decree 20 because the regulations apply to all buildings over 45m in height located within regulated vicinities for zoning of military and civilian airports. Decree 20 will have a retroactive effect and apply to construction projects and buildings constructed before its effective date.

The Ministry of Defence (MOD), which will co-ordinate with other competent authorities in preparing and approving the zoning plans for the development of airports and airspaces in Vietnam, will be the state body competent to issue approvals under Decree 20.

Buildings that exceed the permitted height requirements will have to reduce their height to fall outside the regulatory scope of Decree 20.

Aviation

In his Notice 123 dated 10 April 2009, the prime minister:

- approved in principle Vietnam Airlines' plans to sell two Fokker 70 and to purchase 10 Airbus aeroplanes and a single Boeing B787-9 in the 2011-14 period;
- approved the proposal that Vietnam Airlines join SkyTeam in 2010;
- allowed Vietnam Airlines to co-operate with enterprises of the MOD to use the land and human resources managed by the MOD for the purpose of developing aviation facilities for the aviation industry's continued growth; and
- permitted Vietnam Airlines to work with other foreign and Vietnamese corporations to deploy aviation projects.

He also issued his approval for Vietnam Airlines to carry out various tasks in accordance with the equitisation plan that he approved, including the task of selecting the most suitable time to sell and offer its shares to strategic investors.

Registration, acquisition and sale of sea-going vessels

The government has issued Decree 29 dated 26 March 2009 providing regulations on the registration, acquisition and sale of sea-going vessels. Decree 29 replaces Decree 49 of the government dated 18 May 2006 on the same subject.

Under the replaced Decree 49, the acquisition of a sea-going vessel had to comply with the Investment Law and thus the relevant entities needed to follow the investment procedures set out in the Investment Law. This required the relevant entities to obtain an investment certificate from the licensing authority approving the 'investment project'.

To simplify the purchase of sea-going vessels in Vietnam, Decree 29 specifies that as long as the capital used to acquire the vessel is less than 30 per cent funded by the state, the relevant entity, in its own discretion, can decide on the acquisition of sea-going vessels without requiring an approval from any state body.

Under Decree 29 only transactions of vessels that are more than 30 per cent funded by state capital will continue to be subject to tendering regulations.

Beer, alcohol and beverages industry

Noting that the summers are getting hotter and hotter, and that this trend will apparently continue until the next ice age, the Ministry of Industry and Trade (MOIT) is trying its best to prepare. On 21 May 2009, the MOIT issued Decision 2435, which sets out the master plan for the development of the beer, alcohol and beverages industry to the year 2015, with a view to the year 2025.

This master plan sets out specific goals, which are as follows:

- by 2010, production of beer should reach 2.5bn litres, that of industrial alcohol should reach 80m litres and that of beverages should reach 2bn litres;
- by 2015, the respective volumes should increase to 4bn litres (beer), 188m litres (industrial alcohol) and 4bn litres (beverages); and
- by 2025, the respective volumes should reach 6bn litres (beer), 440m litres (industrial alcohol) and 11bn litres (beverages).

In the beer industry, the focus is to be on building new factories with annual capacity of 100m litres or more and on enhancing international co-operation by establishing joint ventures or other co-operation agreements for the purpose of manufacturing high-grade beer to meet domestic and export demand.

Decision 2435 anticipates that the combined need for capital investment in beer, alcohol and beverages would amount to:

- approximately \$700m in 2008-10;
- approximately \$1.28bn in 2011-15; and
- approximately \$2.2bn in 2016-25.

The master plan requires that investment projects in beer production:

- with a capacity above 50m litres must obtain consent from the MOIT; and

- with a capacity of over 200m litres must obtain an opinion from the prime minister. Let's hope he enjoys good beer.

Infrastructure

Minerals

On 22 January 2009, the government issued Decree 7 implementing the Mineral Law. This Decree 7 increases the fees applicable to exclusive exploration rights in Vietnam. From 9 March 2009, the annual fees for exclusive exploration rights are increased as follows:

- VND50,000/ha (\$2.8), ie VND5,000,000 per square km (\$280) for the first year;
- VND80,000/ha (\$4.5), ie VND8,000,000 per square km (\$449) for the second year; and
- VND100,000/ha (\$5.6), ie VND10,000,000 per square km (\$561) for the third and fourth years.

This represents roughly a 15 to 20-fold increase compared with the fee levels set out in the previous Decree. Decree 7 is silent on whether the new fee levels would apply to new exploration projects only, or whether they would apply across the board to exploration projects licensed before Decree 7's effective date.

In addition, Decree 7 revises certain approval mechanisms:

- the export of minerals in general is delegated to the MOIT, but oversight of exports of minerals for construction and cement is delegated to the MOC; and
- the power to approve the tendering area for mineral exploration and mining is delegated to the Ministry of Natural Resources and Environment (or the provincial People's Committee) after obtaining the comments from the MOIT and MOC. This power was previously with the prime minister.

Banking and capital markets

National Finance Supervisory Council

Regulatory developments during the past few months have been marked by some tightening on foreign exchange derivatives and by the long-awaited regulations on the operation of the National Finance Supervisory Council (NFSC).

In the July 2008 edition of *Indochina notes* we reported on Decision 34 of the government establishing the NFSC as a type of 'super-regulator' with potentially broad powers. It has taken more than a year since the issue of Decision 34 for the implementing regulations on the NFSC to be issued. It now appears clearer that the NFSC will act in an advisory role to the prime minister with little direct authority. In particular, article 12(4) of the implementing regulations on the NFSC (which are dated 18 May 2009) provides that the NFSC's broad supervisory powers over the operation and licensing of credit institutions are to be exercised on a 'remote' basis and 'ensuring the principle of not changing the functions and powers of specialized branch State administrative bodies'.

Also noteworthy is the fact that the NFSC has been charged with the duty to 'analyse, make forecasts and provide warnings on the safety levels of the financial system and on the level of risks applicable to the national financial market and to propose solutions for promptly dealing with the same' – something that the financial regulators of almost every G7 economy have conspicuously failed to do in recent years.

Anti-Money Laundering Steering Committee

Continuing the theme of establishing advisory bodies, on 13 April 2009 the prime minister issued Decision 470 establishing the Anti-Money Laundering Steering Committee, which, like the NFSC, appears to have no power to intervene directly in the operations of credit institutions.

Foreign exchange

On the foreign exchange front, the State Bank of Vietnam (SBV) seems to be continuing the policy of managed depreciation of the VND. On 23 March 2009 it widened the permitted trading band for US dollar/VND spot transactions to 5 per cent. But at the same time, it clamped down on more exotic corners of the foreign exchange market. Market hearsay would have it that, during periods of low US dollar liquidity, various banks have used 'creative' structures to effectively do VND/US dollar spot transactions outside the trading band. The SBV had previously expressed its displeasure at this practice and had specifically banned the practice of doing US dollar/VND trades via a third currency. Then, on 18 March 2009, the SBV issued Decision 1819, which

generally prohibits the use of ‘derivatives’ to evade the trading band for US dollar/VND spot transactions.

The extremely general language of Decision 1819 (there is no guidance on which types of ‘derivatives’ are prohibited) will no doubt save the SBV the trouble of having to issue specific new prohibitions every time a clever bank thinks of a new way to evade the band. However, it is at least clear that for now one of the prohibited derivatives is a VND/US dollar option. Vietnamese law generally allows options only between two foreign currencies, and not between VND and a foreign currency. Nevertheless, the SBV had started issuing official approvals allowing certain banks to do VND/foreign currency options on a ‘pilot basis’.

On 18 March 2009, the same date as Decision 1819, the SBV also issued Decision 1820. In this Decision it backtracked and ordered all banks that were previously allowed to do VND/foreign currency option trades to cease performing them from 23 March 2009. Decision 1820 does contain a hint that future legislation to replace the currently applicable Decision 1452 on foreign exchange will contain a framework for VND/foreign currency options.

Meanwhile, it must be assumed that US dollar/VND forwards not within the trading band are still legal, given that the trading band has always been expressed to apply to US dollar/VND spots only and forwards are by definition not a spot.

Issuance of international bonds

The past several years have seen a spate of legislation developing the capital-raising options for Vietnamese entities, most notably the securities law and its implementing regulations (but also separate pieces of legislation covering non-public issuances of bonds by enterprises and banks, respectively). Until now, a missing piece in this mosaic has been a framework for issuances and listings by Vietnamese entities in offshore markets.

Although media focus has been mainly on the possibility of Vietnamese entities listing shares on offshore stock exchanges (something that has yet to take place), on 4 June 2009 the government passed Decree 53 on the issuance of international bonds. Decree 53 aims to be a comprehensive piece of legislation, covering offshore bond issuances by the government, state-owned

enterprises and private enterprises. This is certainly a welcome development, because non-state-owned enterprises have never before had a legal framework for issuing debt in offshore markets. Furthermore, the only legislation on international bond issuances by the government and state-owned enterprises (including state-owned banks) was Decree 23 of the government, which dated from the pre-Asian Crisis dark ages of 22 March 1995 and, at approximately four pages in length, was slightly short on detail.

Decree 53 imposes a restrictive approval process. The basic principle is that government bonds must be approved by the government and bonds issued by state-owned enterprises (as well as private enterprise bonds benefiting from a government guarantee) are subject to an approval process that begins with an application with the Ministry of Finance (MOF) and ends with the MOF forwarding the application (with an MOF report) to the prime minister for ultimate approval.

Although private enterprise bonds are not subject to the potential delays inherent in this multi-tiered approval process, they suffer from their own potential bottleneck. Though the only ‘approval’ required is the enterprise’s internal corporate approval process, following such internal approval the enterprise must submit the bond issuance plan to the SBV for its ‘certification of the compliance of the loan with the total national annual limit of commercial foreign loans’. This is a consequence of Vietnamese law treating the issuance of international bonds as a form of foreign borrowing subject to the control of the SBV. However, this certification requirement goes beyond what is otherwise required of private enterprises when they borrow offshore loans. Loan agreements are not subject to certification; they must simply be registered within a fixed period after signing and before drawdown.

Under Decree 53 the SBV is required to liaise with the MOF and then ‘give notice to the enterprise certifying that the value of the issue is within the total national limit of commercial foreign loans’ within 15 working days. It is possible that the SBV will in practice sometimes take longer than 15 days. This has the potential to introduce frustrating delays into the bond issuance process. After this certification the issuer must still register the bond as a foreign loan with the SBV.

Decree 53 contemplates the issue of convertible bonds in broad terms, but in this regard 'provisions of applicable laws must be complied with'. Unfortunately, the current legislation on convertible bonds issued within the Vietnamese market suffers from a lack of implementing regulations to stake out adequately the rights of convertible bond holders and it is not clear how that legislation would apply to conversion into shares listed offshore.

The foreign exchange treatment of international bonds is another issue that is skated over in Decree 53. Issuing enterprises are required to comply with regulations on foreign exchange control, but also required to make 'direct transfer of money to paying agents under the signed agreements for payment of principal and interest of corporate bonds to the bondholders upon maturity'. Unfortunately it is not entirely clear how an issuing enterprise could make such payment while complying with regulations on foreign exchange control. A purchase of bonds issued by Vietnamese enterprises is best categorised as a form of foreign indirect investment in Vietnam; however, draft regulations on the foreign exchange treatment of indirect investment in Vietnam circulated by the SBV earlier this year did not cover the purchase of Vietnamese bonds issued in international markets.

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