



Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

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Investment

Japan-Vietnam Economic Partnership Agreement

Japan has been one of the driving forces behind Vietnam's economic resurgence. The ties between the two countries are close. The Japan-Vietnam Economic Partnership Agreement (JVEPA) which came into full force on 1 October 2009, will make them even closer. The JVEPA is a comprehensive bilateral trade agreement covering a range of areas including trade in goods, trade in services, intellectual property, competition, investment, business environment issues, labour policies and co-operation in technical standards.

Ninety two per cent of Vietnamese goods and Japanese goods will benefit from a zero per cent tax rate within the next ten years. Some commodities, such as Vietnam's agricultural produce, garments and marine products, as well as Japan's electronics and car equipment, will benefit from tax reductions or exemptions when entering the other country's market.

Real estate development

In recent years Vietnam recorded a surge of foreign direct investment (FDI). Between 2005 and 2008 registered FDI increased nearly ten-fold from US\$6.8bn to US\$60bn (equivalent to about 75 per cent of Vietnam's 2008 gross domestic product (GDP)), though disbursed FDI recorded an increase of only about 500 per cent over this period. Real estate investments (and steel projects) accounted for a startling proportion of this. For 2009 preliminary figures reveal a similar story and

the trend may continue on the back of a rapidly growing population; a baby boomer generation entering the labour force, rising incomes and limited alternative investments.

Investing in real estate though remains a challenge. Land development is not at the easier end of the investment spectrum, partly because the legal goalposts do not appear to be fixed. The Land Law of 1993 was significantly amended in 1996 and 1998 and a 2003 Land Law replaced its predecessor in full. Since then separate and distinct legal regimes have popped up for residential housing, real estate, tendering, and construction. This has resulted in bodies of law that are often inconsistent and overlapping. In order to cut through the Gordian knot (or to clean out the Augean stables, depending on one's perspective) the National Assembly, on 19 June 2009, amended five laws at the same time by issuing the 'Law on amendment of a number of articles in the law on construction, law on tendering, law on enterprises, law on land and the law on residential housing' (the Law on Amendments).

The Law on Amendments disposes of the parallel regulatory regimes currently operating for legal title to land on the one hand and legal title to housing, buildings and other assets attached to the land on the other. The tortured legal distinction manifests itself as a legal requirement for land users to possess both a land use right certificate, the 'red book' for a land site, and a certificate of housing ownership, the 'pink book' for structures attached to a land site. This will now be replaced by a new single title certificate, creatively

entitled 'the certificate of land use rights and ownership of housing and other assets on the land'.

Re-registration for foreign invested enterprises (FIEs): deadline extended

A substantial number of foreign invested enterprises incorporated prior to the 1 July 2006 effective date of the Law on Enterprises were reluctant or unable to exercise a right to re-register under the new legal regime. Some firms were concerned that re-registration would adversely affect investment incentives that were commercially important to them. Other firms were unable to reach agreement with their partners or were unwilling to disturb delicately balanced corporate structures previously negotiated with partners.

Consequently a large number of foreign invested enterprises failed to meet the deadline of 1 July 2008 for exercise of their right to re-register under the Law on Enterprises. The Law on Amendments extended the deadline another three years to 1 July 2011. Failure to re-register prior to this date could result in an inability to extend the investment project in the future or to exercise relatively advantageous provisions in the new regime for expanding business activities.

Government guarantees

In light of the various economic stimuli in the past year and their effect on the Government's balance sheet, another important law passed by the National Assembly on 17 June 2009 was the Law on the Management of Public Debts (the Public Debt Law). The Public Debt Law regulates 'government debts', 'debts guaranteed by the Government' and 'debts of people's committees', all of which in other countries seem to be in vogue these days.

Of particular interest to issuers and arrangers of corporate bonds, the Public Debt Law would only permit the Government to issue a guarantee of corporate debt if amongst other things the relevant investment project is within the list of encouraged investment projects, the borrower's equity in the investment project represents at least 20 per cent of the investment capital and the enterprise is in a strong financial condition and has not suffered losses during the previous three consecutive years.

Enforcement of judgments

Enforcing judgments in Vietnam has never been straightforward. Two new decrees implementing the Law on Civil Judgment Enforcement dated 14 November 2008 may help. Decree 74 dated 9 September 2009 specifies the competent state authorities for civil judgment enforcement, including the lead regulator, enforcement bodies and state officials. Decree 58 dated 13 July 2009 specifies the time limits applicable to a request for the enforcement of civil judgments, the steps to be taken to enforce a civil judgment, the application of measures for ensuring and enforcing civil judgments, as well as the responsibilities of parties for the expenses of enforcement.

Advertising – Hanoi

Some people may have experienced feelings of displeasure or annoyance with the disorder of commercial advertisements in Hanoi. Enterprises benefit from the opportunity to bombard customers, competitors and all comers with advertisements from all directions, whether on residential roofs, entire front and sides of homes or from digital lights and digital images anchored from any place that may be rented for a fee. Apparently some of the people annoyed by these practices sit in the Hanoi People's Committee that issued Decision 94 dated 24 August 2009, under which advertising will be banned in certain public areas in the city. Advertisements for cigarettes and alcohol, formula milk for infants under 12 months old and food products for infants under 6 months old, are specifically banned in all locations. Decision 94 also regulates procedures for obtaining an advertising licence and for the establishment of a representative office of a foreign advertising organisation.

Advertising – pharmaceutical products

In 2004 the Ministry of Health (MOH) was asked by the Government to amend the regulations on advertising pharmaceutical products. Five years later with a fine turn of speed, the MOH issued circular 13 dated 1 September 2009. This introduces a two-step registration process for pharmaceutical advertising. The initial stage is for 'circulation registration' and the subsequent stage is for 'advertisement registration' regulated by the MOH's Drug Administration Department (the DAD). Under Circular 13:

- prescribed medicines may not be advertised to the public in any form;
- generally non-prescribed medicines may be approved for advertising (with limitations for advertising on the television or radio); and
- advertisements whose contents have already been approved for publication in magazines, newspapers or on television or radio may be used on websites without need for a separate approval.

Tobacco

The MOH has been almost as swift with rules on tobacco advertising as it has been with pharmaceutical advertising. Five years after the Framework Convention on Tobacco Control (FCTC) became effective in Vietnam, some details have emerged. In decision 1315 dated 21 August 2009, the prime minister has detailed the steps to be taken to reduce tobacco consumption. The plan includes the following:

- from now to 2010 a roadmap will be prepared to increase the price and taxes applied to tobacco products. Higher taxes will be applied to imported tobacco products; domestic tobacco products will be subject to a minimum sales price;
- requirements on tobacco producers and importers to provide the authorities with exact information on tar and nicotine levels in these products and to co-operate with authorities in publishing this information;
- to regulate the stamping, packaging, labelling, and printing of health warnings and images on tobacco products;
- to forbid the advertisement or promotion of tobacco products and the direct or indirect sponsorship by tobacco producers and traders in any form that promotes brand awareness or the image of tobacco;
- to prepare a master plan for cigarette wholesale and retail sales, with a view to restrict the retail of cigarettes to certain permitted places; and
- to control the import of tobacco.

Equitisation

The State Capital Investment Corporation (SCIC) is the body that owns the state's interest in many former state owned enterprises (SOEs) after they have been equitised. It is the proud owner of significant interests in numerous

dud companies but does not have the manpower or expertise to help them all to raise their game. The prime minister in official correspondence 5868 dated 26 August 2009 has now authorised the SCIC to sell the state's interest in small equitised enterprises engaged in the provision of public products and services. The main limitation is that any of these enterprises that own 'large areas' of land in Hanoi, HCMC or Da Nang city must still obtain the approval of the prime minister for such divestments. Investors will be permitted to negotiate a share price with the SCIC that is lower than the par value if the target enterprise has suffered losses for the three preceding years.

Criminal law

In all countries businessmen have to ensure that their conduct complies with criminal laws. In Vietnam, where many acts can have criminal consequences, this is especially the case. The Law on Amendments and Supplements to the Penal Code (the Amended Penal Code), that will take effect from 1 January 2010, contains several amendments of relevance to business:

- the number of criminal offences subject to the death penalty has been reduced from 29 to 21 but the National Assembly rejected a proposal to drop the death penalty for bribery;
- as a result of inflation and Vietnamese Dong deflation, the Amended Penal Code increases various monetary thresholds that trigger liability for a number of criminal offences;
- to comply with obligations in the World Trade Organisation's (WTO) agreement on trade-related intellectual property services, the Amended Penal Code establishes criminal liability for persons violating protected copyrights or industrial property rights on a 'commercial scale';
- the Amended Penal Code includes new provisions establishing criminal liability arising from misleading disclosures, insider trading and price manipulation of securities; and
- recent well-publicised violations of the environmental regulations may have caused law-makers to assume a tougher stance against pollution, which is reflected in the Amended Penal Code's provisions on 'environmental crimes' that may arise from mismanagement of hazardous waste and other regulations designed to prevent pollution.

Compulsory health insurance

While the debate on healthcare in the US continues, the reforms in Vietnam suggest to the author that he is more likely to be found in his dotage in the Vietnam-Cuba Friendship Hospital than in the Mayo Clinic. The reforms introduced by the 2008 Law on Health Insurance were covered in our April issue of *Indochina Notes*.

Further developments relating to Vietnam's mandatory health insurance (HI) regime have been revealed by Decree 62 of the Government dated 27 July 2009 and Circular 9 of MOH dated 14 August 2009 implementing the Law on Health Insurance:

- foreign employees are now included within the national mandatory HI scheme. Foreign employees will be required to make the same mandatory HI contributions as Vietnamese employees (and will be entitled to the same 'benefits');
- HI contribution rates will initially be 3 per cent of salary from 1 July 2009 to 31 December 2009 and will rise to 4.5 per cent from 1 January 2010 onwards. Two thirds of the contribution will be an employer obligation and one third will be contributed by the employee. The salary subject to HI contributions is currently capped at 20 times the minimum salary, with the current cap being VND22m.
- HI coverage will be 100 per cent, 95 per cent or 80 per cent of the expenses incurred, depending on various parameters. For example, employees using 'high technology services' with 'high costs' will have covered costs capped at 80 per cent, with total benefits capped at no more than 40 months of minimum salary.

Infrastructure

Electricity sector restructuring

Vietnam announced the restructuring of its electricity sector about 5 years ago but the details are still being debated. In notice 232 of the Government Office dated 31 July 2009, the prime minister requested:

- the restructuring of the electricity sector to be carried out in a manner that would attract investors into the electricity sector with state owned enterprises (SOEs) playing the leading role;
- the Ministry of Industry and Trade (MOIT) to examine the implementation of Electricity Master Plan No. VI. Projects that current investors are unable

to initiate should be assigned to other investors.

Investors should be sought for projects that do not have investors yet. Priority should be given to EVN, PetroVietnam and Vinacomin;

- the electricity sales price regime should be adjusted towards a market-based mechanism so that investors could cover their investment cost and earn a reasonable profit;
- a working committee on electricity price negotiations should be set up to negotiate the price at which investors sell electricity to EVN; and
- MOIT to issue regulations on the content of and the procedures to appraise and approve, electricity sale and purchase contracts.

Electricity master plan VI

In notice 302 dated 25 September 2009 the deputy prime minister reviewed the Electricity master plan no. VI and requested:

- MOIT to direct investors to implement the power projects assigned to them so that 42 current power projects can be put into operation at the scheduled time; to speed up the evaluation and appraisal of electricity generation centres to prepare for the Electricity master plan no. VII; to finalise the master plan and strategy on development of new energy sources to submit to the prime minister for approval; to prepare the Electricity master plan no. VII to submit to the prime minister for approval in 2010; and to review the implementation of small hydro electricity plants and withdraw investment licence of unfeasible projects, to issue regulations on electricity sale and purchase contracts and finally to negotiate build, operate, transfer (BOT) contracts for Nghi Son II, Vung Ang II, Vinh Tan I, and Hai Duong IPPs;
- EVN to negotiate with contractors of the Vinh Tan II project in respect of the Duyen Hai 1 power project and carry out necessary preparation for the implementation of the Duyen Hai 3 thermal power project. EVN to negotiate and enter into sale and purchase contracts with other electricity producers;
- PetroVietnam to agree on gas sale and purchase contracts from Block B as the basis for implementation of power projects in the O Mon electricity generation centre and prepare for the feasibility study of Long Phu 1 and Thai Binh 2 power projects for the approval of the National Assembly;

- Vinacomin to speed up the site preparation work for the Vinh Tan electricity generation centre so as not to affect the implementation of power projects; and
- other investors, including Song Da Construction Corporation and Lilama to speed up implementation of their power projects.

Banking and capital markets

Organisation and operation of commercial banks

On 16 July 2009 the Government issued Decree 59 on the organisation and operation of commercial banks. The bulk of Decree 59 deals with the management structure of commercial banks, including requirements applicable to management personnel of commercial banks and various rules applicable to shares of joint stock commercial banks. However Decree 59 also touches on the topics of special control and bankruptcy of commercial banks. Freshfields Bruckhaus Deringer will provide an analysis of Decree 59 in one of our forthcoming *legal briefings*.

Participation of joint stock banks on UPCOM

On 24 September 2009 the State Bank of Vietnam (SBV) issued official correspondence 7430, which appears to provide that joint stock banks may register on the unlisted public companies' securities market without having to obtain the approval of the SBV. By contrast, listing on the Hanoi Stock Exchange or the Ho Chi Minh City Stock Exchange requires SBV (and State Securities Commission (SSC)) approval.

Valuable paper

On 11 August 2009 the SBV issued Circular 16 loosening the regulations on issuance of valuable papers by credit institutions. Previously one of the conditions for a credit institution to issue long-term valuable paper was total pre-tax return on equity in the immediately preceding year of 10 per cent or more and profitability as at the most recent date. Circular 16 now only requires the credit institution to be profitable in the immediately preceding year and as at the most recent date.

Similarly the requirement that a credit institution have an SBV Category A rating as a condition to issuance of convertible bonds has been abandoned. Instead credit institutions are now required to have profitability in the

immediately preceding year and as at the most recent date and a ratio of bad debts to total outstanding debts, of no more than 5 per cent.

The circular has extended the time limit for SBV decisions on issuance of convertible bonds or bonds with options, from 20 business day to 45 business days from the date of receipt of a complete application file from a credit institution. The time limit for consideration and decisions on issuance of long-term valuable paper remains 15 business days.

Storage of banking documents

On 7 September 2009 the SBV issued Circular 20 regulating document retention in the banking sector. Previous 1993 regulations did not cover modern day documents. Under Circular 20 banking documents have to be kept for between one year to eternity, depending on the content.

State Securities Commission

The Hanoi Stock Exchange (HNX), the Ho Chi Minh City Stock Exchange (HOSE) and the Vietnam Securities Depository (VSD) used to be professional service entities under the direct management of the SSC. HOSE was converted into a limited liability company in 2007, VSD was converted in 2008 and HNX was converted in early 2009. In September 2009 the prime minister issued Decision 112 dated 11 September 2009 to reflect this change in the structure of the SSC.

The SSC remains the body within the Ministry of Finance (MOF) with the function of providing state supervision of securities activities and securities market operations, including preparing legal documents in the securities sector and issuing permits for securities operations.

Insurance

Insurance contracts of SOEs are still determined on occasion by administrative order. Official correspondence 4069 of the Government Office dated 17 June 2009 requests the MOF to instruct SOEs not to give instructions in respect of the insurance deals of their member units. Regulations on bidding in insurance should instead be followed. The deputy prime minister also instructed the MOF to prepare draft regulations on competition and tenders in insurance business with a view to preventing unhealthy competition and monopolies in the insurance sector.

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