



Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

Investment
Infrastructure
Banking and capital markets

Investment

New BOT Decree

Infrastructure is creaking in Vietnam. A staggering 95 per cent of respondents to a recent survey named it as the biggest obstacle to investment in Vietnam.

Unfortunately the recent amendments to the legal framework applicable to investments in the form of contracts for Build–Operate–Transfer, Build–Transfer–Operate and Build–Transfer (collectively BOT), will do little to improve the situation. Decree 108 of the government dated 27 November 2008 contains no significant developments and does not address the significant legal issues bedevilling foreign investors in BOT projects. Decree 108 contains new requirements on levels of equity capital, new approvals to be obtained from the Prime Minister for the investment project report, new rules applicable to performance bonds and a new set of approvals to be obtained from the Ministry of Planning and Investment (MPI) for an array of issues including amendments to the BOT contract and new bidding requirements.

Further details in relation to Decree 108 will be contained in one of our forthcoming *Sector Updates*.

SOE reform

The state-owned enterprise (SOE) reform leitmotiv of the last 15 years is welling up again. In Decision 1715 dated 26 October 2009 the Prime Minister, attempting yet again to bring order to disputing factions in Valhalla, waived his baton over the ‘reform plan for the management and adjustment to the management

and operations of SOEs with a view to improving their efficiency’.

Like prior Wotanic pronouncements, the nobility of the policy statements is only slightly tarnished by the thinness of details. But if one grants the composer a bit of artistic licence, there are no ‘distinctions’ in Vietnam in relation to the treatment of enterprises based on whether the form of ownership is state, foreign or private, and equality exists between enterprises with different forms of ownership.

Decision 1715 stipulates the development of a concrete wall separating state ownership from state regulatory agencies. Relevant state agencies are to identify enterprises providing public utility services, which should be interesting.

In addition to general policy mandates, Decision 1715 contains more specific provisions relevant to SOE reform, including a requirement for specified ministries and state agencies to complete the drafting and issuance of legal instruments relating to the re-organisation, dissolution and bankruptcy of SOEs. Given the onerous nature of this task, Decision 1715 kindly does not contain any timelines for completion. Nor does it elaborate upon:

- the identity of the state authorities competent to determine that an SOE should be dissolved or enter bankruptcy;
- whether insolvency would qualify an SOE for dissolution or bankruptcy; or
- whether an actual bankruptcy filing or liquidation decision would be required prior to the prohibition or financial support becoming effective.

Given the absence of a timeline, the ambiguous assignment of responsibility and the complexity of the unresolved issues, the leitmotiv will no doubt reappear in fine fettle in the future.

Taxation of employee stock bonuses and options

Bonuses may have come under attack on Wall Street but in the halls of the Ministry of Finance (MOF), the rewards that await those that endeavour to push boulders up mountains are beginning to demonstrate that Sisyphus may have been too weak-willed.

Official correspondence 14169 of the MOF dated 7 October 2009 (OC 14169) provides 'guidance' on the personal income tax (PIT) obligations of individuals that receive stock bonuses and options from onshore or offshore employers. Under OC 14169 an employee's PIT liabilities in relation to stock bonuses and options will only arise when the employee transfers the stock (or transfers stock of the same class). The amount of taxable income will be determined by reference to the book value of the stock at the time the bonus or option was awarded to the employee. Upon transfer of the stock an employee's liability for two separate and distinct tax obligations will be triggered.

- First the employee will be liable for PIT on employment income, taxed at progressive rates. Generally an employee's payment of the tax due will be deferred from the date of transfer until the year end, with the exception that employees that transfer stock option rights will be subject to PIT at the time of transfer.
- Second the employee will be liable for PIT on securities transfers payable at the time of the transaction and calculated as follows:
 - for stock bonuses as either 0.1 per cent of the total transfer value or 20 per cent of the difference between the transfer value and book value; and
 - for stock options as 20 per cent of the difference between the transfer value and the arm's length purchase price.

Minimum salary levels

Meanwhile away from the ratified world of bonuses, the one-two punch of continued inflation and periodic currency devaluations has affected many families. The government has responded with another increase of minimum salary levels.

Under Decree 97 dated 30 October 2009 (applicable to labourers working for Vietnamese companies), minimum monthly salary levels were increased to VND980,000 (previously VND800,000), VND880,000 (previously VND740,000), VND810,000 (previously VND690,000), VND730,000 (previously VND650,000) for employees in zones 1, 2, 3 and 4 respectively.

Under Decree 98 dated 30 October 2009 (applicable to labourers working for foreign-invested companies), the minimum monthly salary levels were increased to VND1,340,000 (previously VND1,200,000), VND1,190,000 (previously VND1,080,000), VND1,040,000 (previously VND950,000), and VND1,000,000 (previously VND920,000) for employees in zones 1, 2, 3, and 4 respectively.

Aviation

There is a looming danger that airline passengers in Vietnam arriving at the airport on time will no longer be amused by a series of random explanations for the delays that they encounter. Under the provisions of Circular 26 of the Ministry of Transport dated 28 October 2009, airlines will be required to provide delayed passengers with certain 'minimum levels' of service and treatment, which will no doubt be equally amusing in practice. Circular 26 also requires:

- airlines in Vietnam to issue standard terms and conditions of service and register the same with the Vietnam Civil Aviation Authority (CAAV);
- approval by CAAV of contracts relating to the use by an airline of names, International Civil Aviation Organisation (ICAO) or International Air Transport Association (IATA) codes, or other trademarks of another airline in Vietnam, for the promotion, sale and operation of flights;
- airline forwarding companies to register secondary bills of lading with the CAAV before providing services at an airport in Vietnam;
- approval by CAAV of aircraft leases, as well as reports to CAAV of any breach or earlier termination of such leases; and
- for foreign ownership calculation purposes, shareholdings of all affiliates will be grouped together.

Real estate

In our November issue of *Indochina Notes* we discussed the five-in-one-go law (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 of Amendments)). We outlined the overlapping legal regimes that had resulted in separate regimes for legal title to land on the one hand and legal title to housing on the other hand. In summary, under the Law of Amendments the 'red book' title for land sites and the 'pink book' title for structures attached to land, will be replaced by a single 'Certificate of Land Use Rights and Ownership of Housing and Other Assets on the Land' (the Certificate).

The government has since moved swiftly to provide further details relating to the issuance of the Certificate. Decree 88 of the government dated 19 October 2009 provides that the Certificate will replace not only the 'red book' and the 'pink book', but it will also replace the certificate of construction work ownership.

Tenders

The tendering regulations seem to change as regularly as irregularities are identified. Some of the more significant differences between Decree 85 dated 15 October 2009 and its predecessor, Decree 58 dated 5 May 2008, are found in provisions that purport to 'ensure the competitiveness' in the tendering process (a euphemism for 'avoiding the most obvious conflicts of interest' in the tender award). Decree 85 includes criteria to be employed to make determinations of whether bidders are independent from each other, as well as whether the project owner is independent from the bidders. Under Decree 85 bidders will not be deemed independent unless they are independent under Vietnam's enterprise laws, or if the bidders belong to a single governing body such as a state corporate group, or if a bidder holds more than 30 per cent of the share in the other.

Paradoxically Decree 85 expands the criteria for tender packages that are immune from competition and that may proceed with the direct appointment of contractors. Direct appointment can now be used, amongst other things, for the following:

- consultancy services of VND3bn or less (previously VND500m);
- the procurement of goods of VND2bn or less (previously VND1bn);
- construction and installation of VND5bn or less;
- projects that are state secrets or involve emergency

circumstances (eg epidemics, serious environmental pollution); and

- the favourite catch-all, other special projects as decided by the Prime Minister.

Infrastructure

Ninh Thuan nuclear power project

Nuclear energy is enjoying a resurgence of popularity around the world. Never slow to jump when a bandwagon is sighted, the National Assembly has passed Resolution 41 dated 25 November 2009 (Resolution 41) approving two nuclear power plants in Ninh Thuan province on the coast of south central Vietnam. The National Assembly anticipates that, based on current foreign currency rates, the total investment capital to establish the two nuclear power plants (combined capacity 4000MW), will be about \$11bn. Resolution 41 establishes 2014 as the target for commencement of construction on the first plant and 2020 as the target date for the first turbine to come into operation.

Although the track record suggests that plans for multi-billion dollar projects are not always accurate indicators of actual activity, Resolution 41 represents a serious policy objective of the government. On 3 December 2009 the International Atomic Energy Agency (IAEA) announced that it would send two integrated nuclear infrastructure review (INIR) missions to Vietnam to review the preparations for introducing nuclear power. The INIR missions will collaborate with Vietnam's Atomic Energy Commission and other relevant agencies to evaluate the status of nuclear infrastructure in Vietnam and identify areas where further work is required. The INIR mission will also carry out a comprehensive assessment of Vietnam's ability to plan nuclear power programmes, as well as Vietnam's safety regulations, security issues and safeguards.

Resolution 41 indicates that the National Assembly is aware that human resources may be a constraint. Current estimates suggest Vietnam will need more than 1,000 highly-trained technicians by 2020 to operate the plants and 6,000 to 10,000 specialised labourers by 2015 to construct them. With a current nuclear power workforce of only 800 at the Vietnam Atomic Energy Commission there is a need to train domestic technicians and, perhaps more realistically, recruit foreign technicians.

The problem here is that although beautiful beaches in Ninh Thuan province are sometimes sufficient to attract the occasional lawyer for an extended weekend, the medical, educational and entertainment infrastructure of Ninh Thuan province is unlikely to lure too many expatriate experts.

Oil and gas – windfall tax

During the 2008 rise in global commodity prices, the price of a barrel of oil surged in July 2008 to about \$147 before plummeting to about \$30 a few months later. At the same time the MOF was fighting an indigenous inflation and currency crisis that pre-dated the pre-global financial recession. It was desperately in need of additional revenue, particularly foreign exchange. The MOF seized the opportunity of surging oil prices to increase taxes sharply on oil exported from Vietnam. The new tax rates were several times higher than the tax rates set out in the Investment Certificates of oil companies already producing in Vietnam and therefore led to significant objections.

New investors will take little solace from the lessons apparently learned from this episode. With the issuance of Decree 100 of the government dated 3 November 2009 on surcharge fees applicable to profits on oil in cases of increases in the oil price (Decree 100), the government has established in law a mechanism to share in ‘windfall profits’ resulting from increases in the price of crude oil. Decree 100 will only apply to Petroleum Contracts entered into after 1 January 2010. Under Decree 100 if there is an increase of between 20 to 50 per cent of the average oil price in a particular quarter, then the surcharge will be:

$$\text{Payable surcharge} = 50\% \times \left[\text{Average sales price of oil in the relevant quarter} - 1.2 \times \text{The base price of the relevant year as indicated in the yearly approved field development plan} \right] \times \text{The volume of profit oil allocated to the relevant investor in the relevant quarter}$$

If the oil price increases by more than 50 per cent then the surcharge will be:

$$\text{Payable surcharge} = 60\% \times \left[\text{Average sales price of oil in the relevant quarter} - 1.5 \times \text{The base price of the relevant year as indicated in the yearly approved field development plan} \right] \times \text{The volume of profit oil allocated to the relevant investor in the relevant quarter}$$

Mining

The MOF is also looking to the mining sector for a fillip to the state budget.

Environmental protection fee

More entities will now have to pay environmental protection fees. In the July 2008 edition of *Indochina Notes*, we discussed Decree 63 of the government dated 13 May 2008 relating to the environmental protection fees applicable to organisations exploiting certain kinds of minerals, including stone, feldspar, gravel, sand, earth, coal, natural mineral water, ilmenite, metal minerals, apatite, crude oil and natural gas. With Decree 82 dated 12 October 2009, the government has amended Decree 63 to include organisations exploiting coal gas and other types of minerals. The environmental protection fee for natural gas (and the newly-added coal gas) is reduced from VND200 per ton to VND50 per ton. For natural gas exploited during the process of crude oil exploitation, the applicable environmental protection fee is VND35 per ton.

Fees for mineral licences

The official fee for issuance of mineral licences has been increased by Circular 184 of the MOF dated 15 September 2009. The chart below provides a comparison of a number of official fees for issuance of mineral licences under Circular 184 against the official fees under the previous Circular 20 dated 16 March 2005:

Types of fee	Under previous Circular 20	Under the new Circular 184
Issuance of a new prospecting licence	VND1,000,000 per licence	VND2,000,000 per licence
Issuance of a new exploration licence	VND2000,000 per licence	if the exploration area is less than 100 ha: VND4,000,000 per licence; if the exploration area is from 100 ha to 50,000 ha: VND10,000,000 per licence; if the exploration area is more than 50,000 ha: VND15,000,000 per licence
Issuance of mining licence	VND4,000,000 per licence	The fee ranges from VND1,000,000 to VND100,000,000 depending on different types of minerals and the expected mining quantity per year.
Issuance of processing licence	VND2,000,000 per licence	VND10,000,000 per licence
Issuance of mineral salvage exploitation licence	VND500,000 per licence	VND5,000,000 per licence

Fee for usage of state data and information

The government does not want to subsidise the gathering and use of information and data for mineral prospecting and exploration activities. Accordingly the MOF and the Ministry of Natural Resources and Environment have issued joint Circular 186 dated 28 September 2009 guiding the calculation of fees for use of state data and information in mineral prospecting and exploration activities.

Banking and capital markets

Money laundering

Vietnam introduced its first money laundering legislation in 2005. Shortly afterwards Decision 1002 of the State Bank of Vietnam (SBV) dated 8 July 2005, established the pugnaciously-named 'Centre of Prevention of and Fighting Against Money Laundering'. However, for almost a year the fight was somewhat shadowy because the centre was not officially staffed. Four years later, a less belligerent body, the Anti-Money Laundering Department under the Banking Inspectorate, has been established by Decision 1654 of the SBV dated 14 July 2009.

The SBV also issued Circular 22 dated 17 November 2009 setting out specific anti-money laundering measures that must be undertaken by credit institutions including:

- to have internal rules on anti-money laundering covering the following issues:
 - procedures for accepting customers;
 - procedures for confirming customer identification and updating client information;
 - reporting of suspicious transactions;
 - contacting and dealing with suspicious customers;
 - information storage and confidentiality;
 - application of temporary measures;
 - co-ordination with money-laundering fighting authorities;
 - training; and
 - internal audits.
- to report to the Anti-Money Laundering Department customers with cash deposit and withdrawal transactions with a value of more than VND200m per day; and those depositing and withdrawing more than VND500m per day from a savings account; and
- to identify and report suspicious transactions if:
 - the telephone number provided by the customer is not contactable or does not exist;
 - a customer regularly changes low denomination money into high denomination money, with each transaction valued over VND200m;
 - a monetary transaction is carried out by a customer who has been reported by the media as being involved in illegal transactions;

- information on the source of capital is not clear or transparent; or
- information on the source of the secured assets is not clear or transparent.

- for the public offering with the State Securities Commission; or
- the most recent public offer price of the shares of the public company.

Tender offers for shares

The circumstances in which tender offers for shares are required have been clarified by new regulations on public offers of securities set out in Circular 194 of the MOF dated 2 October 2009. This Circular requires a tender offer for shares in the following circumstances:

- organisations and related persons who are holding less than 25 per cent of shares of a public company wish to acquire additional shares resulting in an ownership of 25 per cent or more of the voting shares of the public company;
- organisations and related persons holding 25 per cent or more of the shares in a public company wish to make an additional acquisition of shares in such public company resulting in an ownership level of 51 per cent, 65 per cent or 75 per cent; or
- a public company purchases its own shares to reduce its chartered capital in accordance with a plan approved by its shareholders.

Under Circular 194 the following are not subject to the tender offer requirements:

- acquisition of newly-issued shares resulting in an ownership of more than 25 per cent of the shares of a public company in accordance with an approved plan of the general meeting of the shareholders;
- an investor acquires shares from an existing shareholder and the transfer is approved by the general meeting of the shareholders; or
- an intra-group transfer between affiliates.

Circular 194 also sets out restrictions on the offer price of the tender:

- if the shares of the public company are listed, then the offer price cannot be less than the average listed price of the shares over the period of 60 consecutive days prior to the public offer; and
- if the shares are not listed, then the offer price must not be less than either:
 - the average price of shares that are published by at least two securities companies over the period of 60 consecutive days prior to the registration date

For further information please contact

HANOI
Tony Foster
T +84 4 3824 7422
F +84 4 3826 8300
E tony.foster@freshfields.com

HO CHI MINH CITY
Milton Lawson
T +84 8 3822 6680
F +84 8 3822 6690
E milton.lawson@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.