



& PARTNERS

Level 21, Bitexco Financial Tower
No.02 Hai Trieu Street, District 1
Ho Chi Minh City, VIETNAM

Legal Updates

July – August 2015



Disclaimer: This Briefing is for information purposes only. Its contents do not constitute legal advice and should not be regarded as detailed advice in individual cases. For legal advice, please contact our Partners.



Corporate | Dispute Resolution | Financial Services | Intellectual Property | Real Estate & Infrastructure

In this Legal Update

ISSUE IN FOCUS

New Proposals for Commercial Mediation

LEGAL BRIEFING

Corporate

New Legal Framework to Satisfy Demand for Securities Investment by Foreign Investor..

Updated Framework for Corporate Income Tax Provides Boost High Tech Sector

The First Double Taxation Avoidance Agreement between Socialist Republic of Vietnam and the United States of America

Financial Services

New Legal Framework to Streamline Licensing and Set Up of Commercial Banks

New Legal Framework For Bank Guarantee

ISSUE IN FOCUS

New Proposals for Commercial Mediation



As a matter of implementing Resolution No. 49-NQ/TQ of the Politburo dated 2 June 2005, as well as implementing Vietnam's commitments on acceding to the WTO, the State has been developing the new Decree to govern the alternative dispute resolution (ADR) for commercial disputes, called commercial mediation.

According to the draft composer, the Decree shall adopt relevant principals of UNCITRAL's Model Law, these principals are:

- The mediation process must always have the presence of a neutral third party to assist the parties in the dispute to settle.
- Mediation is a voluntary solution, except unless otherwise required by laws or the type of dispute.
- The parties in dispute participate in the process of mediation to build and to reach a mutual agreement themselves.
- Mediation creates a safe, friendly communication environment for the parties in the dispute.
- Mediation could be an independent procedure or part of court or arbitral procedure.
- Mediation is confidential.
- Mediation does not affect or prevent the parties from using other dispute resolution methods.

For a summary of the above principals, it is concluded that if mediation is successful, the parties would have another agreement to settle the dispute, called the settlement agreement. In case either party does not honor the settlement agreement, the remaining party could request that the court or arbitration make a request for honoring the settlement agreement.

Within the content of this article, we will discuss the binding effect of a settlement agreement under the draft Decree on Commercial Mediation dated 17 June 2015.

According to Articles 25 and 26 the draft Decree, it is written that a settlement agreement would have the effect of binding the obligations of the involved parties. Also, either party

has the right to request the Court to recognize the settlement agreement. The procedure and process make the request to the Court must follow the regulations of Civil Procedure Code.

Speaking of this, we are of the opinion that when drafting the Decree with the above contents, there are two issues to be discussed:

First, it is contrary to the principals of the UNCITRAL's Model Laws that mediation result is some form of a new agreement, or a new contract between the parties in dispute. The point is that, in other countries, in the event that one party breaches the settlement agreement, the remaining party can bring the settlement agreement to court or arbitration. At this stage, the court or arbitration shall not re-adjudicate the whole relationship or issues before the time the parties enter into the settlement agreement, but only review the settlement agreement as a new contract between the parties that replaces any other previous issues.

Secondly, there is currently no specific provision in both the Law on Commercial Arbitration or the Civil Procedure Code. Therefore, the Law on Commercial Arbitration and the Civil Procedure Code must be amended to be suitable for this Decree, however this solution is not possible. Moreover, there are some opinions that currently, the procedure for recognizing a foreign award or judgment is very complicated and risky, therefore, to add this issue may result in more complexity to the system.

We are of the opinions that Articles 25 and 26 of the draft Decree should be amended in the approach that the settlement agreement is a new contract that replaces all other previous issues relating to the parties, in case where one party dishonors the settlement agreement, the other party can request the court or arbitration to instigate a new case for its enforcement.



Corporate | Dispute Resolution | Financial Services | Intellectual Property | Real Estate & Infrastructure

LEGAL BRIEFING

July 2015



Key contact

Mr. Hong Bui
Hong.Bui@LNTpartners.com

Mr. Huy Do
Huy.Do@LNTpartners.com

Ms. Quyen Hoang
Quyen.Hoang@LNTpartners.com

Dr. Net Le
Net.Le@LNTpartners.com

Dr. Tuan Nguyen
Tuan.Nguyen@LNTpartners.com

Dr. Vinh Nguyen
Vinh.Nguyen@LNTpartners.com

Mr. Binh Tran
Binh.Tran@LNTpartners.com

Mr. Su Tran
Su.Tran@LNTpartners.com

Corporate

Corporate - Compliance

1. New Legal Framework to Satisfy Demand for Securities Investment by Foreign Investor
2. Updated Framework for Corporate Income Tax Provides Boost High Tech Sector
3. The First Double Taxation Avoidance Agreement between Socialist Republic of Vietnam and The United States of America

Financial Services

4. New Legal Framework to Streamline Licensing and Set Up of Commercial Banks
5. New Legal Framework For Bank Guarantee

Corporate

1. New Legal Framework to Satisfy Demand for Securities Investment by Foreign Investors

Content of the new Law

On 26 June 2015 the Government issued Decree No. 60/2015/ND-CP (“**Decree 60**”) amending and supplementing certain provisions of Decree No. 58/2012/ND-CP, on the detailing and guiding the implementation of selected provisions of this, and the Law on Securities, which is considered as good news to foreign investors, since the long-awaited provisions will allow for majority ownership and control of public companies by foreign investors.

In this Decree, the foreign ownership ratio is extended to the Vietnamese securities market. Currently, a foreign investor may purchase up to 49% of total shares of a public joint stock company (JSC) or a listed company. Beginning on the 1st of September 2015, this general restriction will be removed and instead, the new restriction will be subject to the WTO commitments or other specific domestic laws (e.g., the 30% cap in the banking sector). If there is a specific restriction under domestic law that has yet to be specified, then the rule of thumb is 49%.

When there is no restriction under domestic law (e.g., for production companies, or distribution companies), then there is no limit for the foreign shareholding ratio. This rule also applies to equitized SOEs, with the aim of attracting more foreign investment in the privatization program.

As for securities companies (or investment banks), those who are eligible to establish 100% foreign owned securities companies are allowed to buy up to 100% equity of local securities companies. Those who are not eligible can acquire up to 51% total shares.

Decree 60 also lifts all restrictions to foreign investors to purchase bonds. With respect to share certificates or derivative products of stocks of JSCs, the restriction will be relaxed as mentioned above. For this purpose, open funds or securities funds that have foreign shareholding more than 51% equity will be deemed as foreign investors. Decree 60 also addresses many other functions of foreign investment in public companies, along with other key aspects related to securities investment for foreigners.

Implications for Foreign Investors

The Decree is expected to act as a catalyst for more foreign investment in the private and State-owned sectors in Vietnam. It is intended to add vitality to the Vietnam securities markets and an extra boost to the equitization of State enterprises, as part of a plan to upgrade Vietnam from “frontier” market classification to “emerging” market classification at MSCI. It is reported that the shares with strongest liquidity on the Vietnamese stock exchanges are shares of issuers for which the 49% foreign equity quota has been used up. As such, the Decree is expected to act as an impetus to further foreign investment in Vietnam’s capital markets, both in equity and in debt markets

The Decree takes effect on September 1, 2015, and replaces Prime Minister Decision No. 55/2009/QĐ-TTg (15 April 2009) on the ratio of foreign investor's participating on the Viet Nam securities market.

2. Updated Framework for Corporate Income Tax Provides Boost High Tech Sector

Circular No.96/2015/TT-BTC dated 22 June 2015 guiding changes prescribed in Decree 12/2015/ND-CP and amending three circulars of corporate income tax ("CIT") including 78/2014/TT-BTC, 119/2014/TT-BTC and 151/2014/TT-BTC.

Content of the new Law

This Circular provides considerable changes in CIT incentives, and tax deductible expenses which could bring more advantages to corporations in general and companies in the high technology sector.

The method to apply and extend CIT incentives is amended in order to be aligned with the new Law on Investment. Accordingly, new investment project stated in the list of industrial support products prioritized for development are subject to 15 years of 10% CIT rate, 4 years of CIT exemption and 9 years of CIT reduction, provided that such products support the sectors of either high technology as stated in the Law on Technology, or garment, textile footwear, information technology automobile production, and are not able to be produced in Vietnam as at 01 January 2015 or meet the EU quality standards if these products are domestically produced.

In addition, investment projects which were not, in general, entitled to any CIT incentives previously or located in areas where such are not encouraged in the past, will be allowed to apply for the new and favourable CIT incentives regime in the remainder of phases from the tax year 2015.

The circular also modifies regulations of tax deductible expenses. Consequently, the caps on business trip per-diems are abolished; documents to prove expenses arising from renting individual's assets is now simpler; certain expenses related to staff training are fully deductible for tax declaration; and the calculation method applied to non-deductible interests on debt corresponding to the portion of charter capital not yet contributed is regulated in detail.

Some other changes and supplements related to losses carried forward to the next year of real estate conveyance, tax-exempted income and dossier of CIT declaration and payment are prescribed in detail in this circular.

Implications for Business

From the aforementioned points, the circular is expected to support corporations in circumstances of new investment law. In order to assist companies in applying such circular, the Ministry of Finance issued dispatch 2512/TCT-CS to briefly summarize the new contents in this Circular.

The simpler application to calculate the CIT and the lifting of caps on trip expenses for tax are to bring a business-friendly environment for corporations when it comes to tax expense management. As a result, this is expected to lead to more active investment in Vietnam, and contribute to the country's investment climate.

The Circular 96/2015/TT-BTC will come into effect from 6 August 2015.

3. The First Double Taxation Avoidance Agreement between Socialist Republic of Vietnam and the United States of America

On 7 July 2015, The Socialist Republic of Vietnam (Vietnam) and The United States of America (US) signed the first income tax treaty – Double Taxation Avoidance Agreement (DTAA or the Treaty) – and adopted a Protocol between the two countries for the avoidance of double taxation and prevention of fiscal evasion of taxes on income. This Treaty will take effect after being ratified by each country and exchanged the instrument of ratification by the two jurisdictions. According to Deputy Minister Do Hoang Anh Tuan, Ministry of Finance, the ratification period will take approximately one year.

DTAA aims to eliminate the double taxation of income or gains arising in one contracting state and paid to the other contracting state and prevent the fiscal evasion regarding income taxes of any persons or companies from the contracting states.

For Vietnam, the applicable taxes shall include personal income tax and business income tax, likewise, the applicable taxes in the US are the Federal income taxes imposed by the Internal Revenue Code and the Federal taxes imposed on the investment income of foreign private foundations.

The DTAA also provides a number of key provisions on how to avoid the double tax.

1) The broader definition of “resident status of a contracting state” and “permanent establishment”

The Treaty provides similar manners to determine a resident of a country to Vietnam’s provisions. Notably, the term of “residence of an individual” is also defined as the established and maintained place of the pension fund or organization that his incomes or gains are derived from.

Under the Treaty, permanent establishment consists of building sites, construction, exploration, assembly or installation of project, supervisory activities which last more than 06 months in a contracting state. The definition is expanded to encompass the place of providing consultancy services for the same and connected project within a contracting state for a period or periods computing more than 06 months within any twelve - month period by an enterprise of the other contracting state.

2) The maximum allowable tax rates of dividends, interests and royalties

The Treaty regulates the maximum allowable tax rates of dividends, interests and royalties as follow:

- The maximum tax rate on dividends is 5% if the beneficiary is a Vietnamese company owning directly at least 25% of the voting stock of an American distributing company or an American company owning directly at least 25% of the capital of a Vietnamese distributing company. Such dividends are taxed in the country of which the distributing company is considered as resident. All other cases are taxed 15% of the gross amount of dividends.

The Treaty also provides that dividends paid by an American Regulated Investment Company (RIC) have maximum tax rate at of 15%. However, the dividends paid by an

American Real Estate Investment Trust (REIT) or Vietnamese Real Estate Investment Fund (VREIF) are subject to a maximum tax rate of 15% if only the specific thresholds are met.

- Article 11 of the Treaty provides that the maximum allowable tax rate of interest is at 10% of the gross amount. However, if interest payments are determined with references to receipts, sales, income, profits or other cash flow of the debtor, to any change in the value of any property of the debtor or to any dividends, partnership distribution or similar payment made by the debtor, the maximum rate can increase up to 15%.
- Under the Treaty, royalties are sourced to the residence of the payer. The payments specified in the Article 12.3(a) of the Treaty are taxable at a maximum rate of 5%. Royalties paid for the use of or the right to use any copyright of literary, artistic, scientific or other work or any patent, trademark, design or model, plan, secret formula or process will be subject to a maximum allowable 10% tax rate.

Effect of eliminating double taxation in Vietnam

Individuals or companies who are considered as Vietnamese residents are granted the benefits of a credit for income taxes paid on income, profits and gains in the US. Moreover, Vietnamese companies owning at least 10% of the voting rights of a company which is a resident of the US can obtain an indirect tax credit in the US.

Financial Services

4. New Legal Framework to Streamline Licensing and Set Up of Commercial Banks

The Content of the new Framework

On June 30th, 2015 the Government issued Circular No. 08/2015/TT-NHNN (**Circular 08**) in lieu of Circular No. 40/2011/TT-NHNN (**Circular 40**) for the issuance of licenses and the organization and operation of commercial banks, foreign bank's branches, representative offices of foreign credit institutions, other foreign organizations that have banking activities (**Commercial Banks**) in Vietnam.

This Circular 08 has formulated a full and basic legal framework on procedures for, and dossiers on amendments, supplementation regarding operation contents of Commercial Banks. Furthermore, the formality of proposal dossiers for operational licensing and new establishment license template of Commercial Banks are also regulated in such a new circular.

Besides the new licensing issuance procedure in Circular 40, Circular 08 is expected to add three more new licensing procedures for Commercial Banks, including license replacement issuance, supplementation issuance of operation content to present license and supplementation issuance of operation content associated with license replacement issuance. With respect to the principle of building licensing dossiers, the non-notarized counterpart of documents are duly accepted, provided that those are obtained along with original copy for reference; while the referring person shall sign for confirmation and shall be responsible for the documents' accuracy. The new establishment license template has the operation content part specifically noting that all banking functions which Commercial Banks are entitled to conduct are in

accordance with Law on Credit Institutions and others activities approved by the State Bank.

Business implications

With respect to changes in the State Bank's licensing activities applied to Commercial Banks in Vietnam, the impact on business will specifically be in banking sector. Accordingly, all approval for changes in registration for the operation of credit institution shall be noted in the Operation License by license replacement issuance. In the event of an amendment or supplementation in the operational content without need for a replacement license, Commercial Banks shall still conduct the proposal procedure on supplementing operation content via the approval instruments of the State Bank. Approval for non-notarized documents in the application dossier shall benefit from a more prompt and efficiently implemented licensing procedure. The more detailed and obvious the licensing procedures is, the more conveniently credit institutions can implement their business.

Our Recommendation

In light of this, we would recommend that commercial banks, branches and representative offices of foreign banks should update their Operation License by implementing the license replacement issuance procedure. The above-mentioned action shall result in owning a kind of detailed and unique valid instrument as a basis of banking operation. With efforts to comply with such new provisions, Commercial Banks shall benefit from good, efficient performance that will positively develop their business.

The Circular No. 08/2015/TT-NHNN will come into effect on August 13th, 2015.

5. New Legal Framework for Bank Guarantee

Circular No. 07/2015/TT-NHNN on Bank guarantee

The Content of the new Framework

On 25 June 2015, the State Bank of Vietnam issued Circular No. 07/2015/TT-NHNN on bank guarantee which is considered as one of the most important documents regulating bank guarantee applied to domestic credit organizations, branches of foreign banks for foreign customers. The Circular is to replace the previous one, namely Circular No. 28/2012/TT-NHNN on 03 October 2012 issued by the State Bank of Vietnam on bank guarantee.

The Circular No. 07 has formulated a full and basic legal framework on procedures for, and dossiers on activities of bank guarantee of credit organizations and branches of foreign banks.

The Circular is also expected to create a new legal framework to ensure that the international standards on bank guarantee are met as well as to help appropriately synchronize with other relevant laws and to minimize limitations and weaknesses of the current operations on bank guarantee. Furthermore, the Circular is to enhance the effectiveness, safety and smooth operations of bank guarantee activities of credit organizations and branches of foreign banks operating in Vietnam.

The Circular has a number of progressive contents. First of all, it supplements the definition of “symmetry guarantee party” and “guarantee confirming party” in order to specifically regulate those parties, including foreign credit organizations. In addition, the Circular gives the definition of “customer” to determine clearly which party customers are in guarantee relationship. From that, it is easier to calculate guarantee issuing balance, symmetry guarantee, guarantee confirming and as basis for considering conditions and requirements to customers for accepting bank guarantee.

Secondly, the Circular abolishes the provision that required the acceptance by the State Bank of Vietnam in bank guarantee.

Relating to supplying forex services, in order to conform to Circular No. 21/2014/TT-NHNN, Circular No. 07 has amended the relevant content. Accordingly, branches of foreign banks are not allowed to give guarantees in foreign currencies for customers operating overseas, except in case of that customers are guaranteeing party and symmetry guaranteeing party that are overseas credit organizations and guaranteed party doing business in Vietnam.

Business implications

In real estate business, the Circular has clarified the Law on real estate business and Law on residential housing in terms of bank guarantee that are assigned the authority for detailing to the State Bank. To be more specific, the Circular requires the investor of a real estate project to undertake that the guarantee for selling, leasing future residential houses will be effective at least 30 additional days since the date of the delivery of the houses, basing on the agreement between the investor and customer. However, Mr. Tran Thai Binh, Lawyer of LNT & Partners, on an article published on Vietnamnet Online Newspaper, believes that many questions are not appropriately answered. For instance, such questions are; whether banks pay penalties for customers, if the housing sales and purchase agreement mentions; Or according to the Circular No. 07, guarantee agreement comes into effect to the time of at least ending 30 days since the date of the delivery of housing, but the customer is still awaiting (or not bawaring), leading to that those 30 days are overdue, then, this customer loses his/her rights for claiming guarantee. Many people say that a period of 30 days is short.¹

In light of this Circular, there are a number of side-effects arising. Therefore, understanding provisions are necessary to avoid unfavorable consequences in doing business in general.

The Circular will come into effect on 09 August 2015 and replaces the Circular No. 28/2012/TT-NHNN granted on 03 October 2012. Hopefully, after its promulgation, the Circular will establish a solid legal framework for all domestic credit organizations, branches of foreign banks and customers in bank guarantee activities.

¹ Real Estate Guarantee: Questions awaiting guidance, <http://vietnamnet.vn/vn/bat-dong-san/258241/bao-lanh-bds-ban-khoan-cho-huong-dan.html>, retrieved on 25 August 2015.

For more information about any of these legal briefs, please contact the authors:



Mr. Hong Bui

Corporate
Hong.bui@lntpartners.com

Dr. Net Le

Financial Services, Real Estate
Net.le@lntpartners.com

Ms. Quyen Hoang

Corporate
Quyen.hoang@lntpartners.com

Dr. Tuan Nguyen

Competition, IP
Tuan.nguyen@lntpartners.com

Dr. Vinh Nguyen

Dispute Resolution
Vinh.nguyen@lntpartners.com

Mr. Huy Do

Intellectual Property/ TMT
Huy.do@lntpartners.com

Mr. Su Tran

Dispute Resolution
Su.tran@lntpartners.com

Mr. Binh Tran

Real Estate & Infrastructure
Binh.tran@lntpartners.com

Ms. Huong Dao

Corporate/ Dispute
Bichhuong.Dao@lntpartners.com

www.lntpartners.com

For further information, please contact:

Ho Chi Minh City Head Office

Unit 03, Level 21, Bitexco
Financial Tower
No.02 Hai Trieu Street, District 1
Ho Chi Minh City, VIETNAM
Tel: +84 8 3821 2357
Fax: +84 8 3910 3733

Hanoi Office

Level 12, Pacific Place Building,
83B Ly Thuong Kiet Street, Hoan
Kiem Dist.
Hanoi, VIETNAM
Tel: +84 4 3824 8522
Fax: +84 4 3824 8580

LNT & PARTNERS (“LNT”) is a full-service independent Vietnam law firm, which focuses on advisory and transactional work in the areas of corporate and M&A, competition, pharmaceutical, real estate, infrastructure and finance as well as complex and high-profile litigation and arbitration matters. The firm is among Vietnam’s most prominent, representing a wide range of multinational and domestic clients, including Fortune Global 500 companies as well as well-known Vietnamese listed companies.

For more information about any of these legal briefs, please contact the individual authors or your usual LNT contact.

Disclaimer: This Briefing is for information purposes only. Its contents do not constitute legal advice and should not be regarded as detailed advice in individual cases. For legal advice, please contact our Partners.