NEWSLETTER
April 2011

Dear Readers

We hope that our newsletter finds our readers well. In this edition of the Frasers' Newsletter we examine a number of recent developments in Vietnam's legislation including:

- Circular 03 which provides much needed regulations on the implementation of Decree 108, regulating investment through build-operate-transfer projects. Circular 03 fleshes out the details of Decree 108, how investors will be selected for each project, the means by which tenders will be evaluated and the scoring requirements;
- Decree 15 on Government guarantees: the circumstances when a Government guarantee will be given and conditions for their grant: what types of loans will be eligible for Government guarantees and a brief summary of the procedural steps;
- Decree 113 which concerns damages resulting from pollution of the environment and regulates the means of determining the level of those damages: how they will be calculated and liability will be determined;
- Finally, looking outside Vietnam, we consider the UK Bribery Act 2010 and how this may impact on individuals or organisations closely connected with the UK but resident or working in Vietnam. With this legislation, the UK Government is seeking to extend its reach far outside the borders of the United Kingdom in the fight against corruption and bribery.

We trust that you will find this latest edition interesting and look forward to receiving any comments or questions arising from the articles. The address for comments or other feedback is *newsletter@frasersvn.com*.

Detailed Procedural Regulations on BOT, BTO and BT Contracts

With the current dynamic development of Vietnam, the demand for infrastructure improvements in order to continue to attract foreign investment and encourage the domestic economy is likely to become more pressing and significant than ever. A key plank in the government's strategy to improve Vietnam's infrastructure has been projects partnered with private enterprises on the build-operate-transfer (***BOT***), build-transfer-operate (***BTO***) and build-transfer (***BT***) contract models (together called **BOT projects** in this article).

Decree 108/2009/ND-CP regulates investment by means of BOT, BTO and BT contracts (***Decree 108***) and on 27 January 2011, the Ministry of Planning and Investment promulgated Circular 03/2011/TT-BKHDT (***Circular 03***) which provides detailed implementing regulations for Decree 108.

Circular 03 provides detailed regulations which focus principally on procedural aspects needed to implement Decree 108. There are some interesting points to consider as follows:

Means of selection of an investor

The selection of an investor can be conducted by means of open tendering or direct appointment. In respect of open tendering, *domestic* open tendering will apply to all projects for which two or more domestic investors register for participation and *international* open tendering will apply to projects for which no domestic investor registers for participation, or when unsuccessful domestic open tendering has been held.

The wording of this provision is unclear in a situation where one or more domestic investors and one or more foreign investors registers for participation in the same tender. Will the domestic or international tendering process apply? This seems to be a technical omission by the legislators and we wait for further official clarification on this issue.

The contents and clarification of tender invitation documents or set of requirements (collectively referred to as "tender invitation documents", unless otherwise specified)

Circular 03 states that for a BT project which takes the form of assigning other projects to the investor, the tender invitation documents must also contain a detailed construction master plan on a scale of 1/2000 of the land area proposed for implementation of such other projects. Additionally, if there are any unclear items in the tender invitation documents, an investor has the right to request clarifications from the party calling for tenders. Any clarifications or explanations will be sent to all investors and will form a part of the tender invitation documents.

English vs Vietnamese versions

Where the tender process is domestic only, documents exchanged between parties will be in Vietnamese. However, in the case of international open tendering, documents exchanged between parties shall be in English, or in both Vietnamese and English. Furthermore, if there is any difference between the two versions, the English version, not Vietnamese version, shall prevail.

This is unusual, as in other legislation it is usually the Vietnamese version which prevails. This may create favourable conditions for the participation of foreign investors in the tendering process and at least will not leave them at a disadvantage to their Vietnamese counterparts.

Method of assessment of tender documents

Tender documents are assessed on their technical merits on two systems: either a, *pass or fail* criterion, or a *point scoring* system, scored out of 100 or 1000. With the point scoring method, an investor is judged as having "passed" when it has scored at least 70% of the total points for the project. In the case of large-scale and complex projects, this requirement is raised to at least 80% of the total points, with not less than 50% scored in any one scoring category.

Establishment of new project enterprise

Pursuant to Decree 108, an investor may establish a project enterprise or amend or add lines of business to its enterprise registration certificate (in the case of an investor which has already established an economic organisation) in order to carry out the BOT project. Where the investor is successful in its bid, Circular 03 specifies that the investor must establish a new project enterprise according to procedures prescribed in the Laws on Enterprise in order to carry out the BOT project. This is an important procedural step for investors to remember and should be factored into the timetable drawn up for the implementation of the project.

It is noted that in the case of a foreign invested project, the investment certificate issued to the foreign investor will also be the business registration certificate of the project enterprise.

Discretion for the party calling for tenders

Last but not least, despite all the regulations and procedures described above, the government agency calling for tenders may still choose a selection criteria for investors different from those prescribed in Circular 03, provided that competitiveness is ensured and the highest efficiency of such principles. The government agency shall be legally responsible for its decision.

Decree 15: Government Guarantees

On 16 February 2011, the Government promulgated Decree 15/2011/ND-CP regulating the provision and management of Government guarantees (***Decree 15***), replacing Decision 272/2006/QD-TTg of the Prime Minister of the Government dated 28 November 2006 issuing Regulations on provision and control of Government guarantees for foreign loans (***Decision 272***).

As stated in Decree 15, Government guarantees are the highest level of guarantee in Vietnam and may only take the form of a guarantee, not cross guarantee. Unlike Decision 272, Decree 15 extends the provision and management of Government guarantees to both domestic and foreign loans, including domestic and international bond issues.

Authority and quota on Government guarantees for loans

Under Decree 15, the Ministry of Finance (MOF) is the body primarily responsible for granting Government guarantees for loans or government bond issues within the limit of foreign loans and Government guarantees approved. Where the annually approved Government guarantee limit has already been reached, but additional proposals arise for major projects, whose investment policies have been decided on by the National Assembly and/or the Prime Minister, the Ministry of Finance may apply to the Prime Minister for an adjustment of the Government guarantee limit, provided that requirements on national debt security must be satisfied.

Programmes and projects eligible to be considered for a Government guarantee

Decree 15 refers to the Law on Public Debt Management, which specifies the programmes and projects eligible to be considered for a Government guarantee, and which include the following:

(1) investment programmes or projects whose investment is decided by the National Assembly or the Prime Minister;

(2) hi-tech development programmes or projects in the sectors of energy, mineral mining and processing, or export manufacture or provision of export services in conformity with national socio-economic development orientations;

(3) programmes or projects within the sectors and geographical areas in which the State encourages investment under the Investment Law and other relevant laws; and

(4) programmes or projects funded with commercial loans associated with overseas development aid funds in the form of syndicated credit.

In addition, certain conditions apply to such programmes or projects which may be eligible for a Government guarantee, stipulated in Decree 15 and the Law on Public Debt Management, including:

(i) such programmes or projects must be in the list of programmes and projects permitted to be guaranteed by the Government as decided by the Prime Minister within each period; otherwise, it will be subject to the Prime Minister's approval on a case-by-case basis;

(ii) the enterprise implementing the programme/ project must be established and operating in Vietnam in accordance with the law, have a healthy financial status, e.g. no losses in the previous three years; owe no overdue debts to financial or credit institutions at the time of requesting the guarantee; and in the case of implementing an investment project, must have at least 20% of the total investment capital in the form of equity capital;

(iii) the value of the loan or bond issue must fall within the quota on Government guarantees approved by the Prime Minister and within the Government's annual commercial loan limits and foreign borrowing guarantee, in the case of foreign loans or the issue of international bonds;

(iv) with respect to a foreign loan, it must have a value of at least US$50 million, or at least US$100 million for an international bond issue, except for programmes or projects as prescribed at Item (4) above; the term of the loan repayment must be at least 10 years; and borrowing or issuance conditions must conform with market conditions and international practice;

(v) with respect to a domestic loan or domestic bond issue in a foreign currency, it must have a value of at least US$ 30 million and the term of the loan repayment must be at least 5 years; a loan or bonds in local currency must be valued at VND 500 billion or higher with a loan repayment term of a minimum of one year.

Level of Guarantees

The level of the guarantee may not exceed 80% of the total investment of the programme/project including all relevant loan fees, except for key projects/works or major projects of urgency and particular importance to national socio-economic development.

Guarantees for Foreign Invested Enterprises?

Unlike Decision 272 which did not impose restrictions, the Government excludes foreign invested enterprises from its guarantees.

If the enterprise seeking the Government Guarantee is foreign invested, Decree 15 states that the Government Guarantee shall only be provided for the portion of the loan capital corresponding to the liability of the Vietnamese party in the enterprise.

Furthermore, during the period of the guarantee the principal to the loan agreement may only assign its shareholding (in whole or part) or capital contribution portion to a foreign investor after complete repayment of the debt obligation to the lender (beneficiary) in respect of the outstanding debt, in accordance with the ratio of the proposed shareholding to be transferred.

Guarantee Fee

Guarantee fee rates shall be determined by the MOF after appraisal of the programme/project, and will depend on the level of risk assessed, but are capped at 1.5% per annum of the outstanding balance of the guaranteed loan.

Security

Apart from loans or bond issues of State policy banks (being banks created by the Government for specific policy purposes) which the Government guarantees, assets created with Government guaranteed loan capital may be used, in the ratio at which the loan capital was used to create such assets, as mortgage security for discharge of the repayment obligations of the borrower to the MOF.

However, these assets may not be used as security for the discharge of other civil obligations, nor may the assets be sold without the agreement of the MOF.

Procedures

Decree 15 also provides specific procedures for applying and appraising the provision of Government guarantees:

(1) The application dossier for the provision of Government guarantees will be submitted to the MOF for appraisal.

(2) The MOF will appraise the financial plan of the investment programme/project and, on completion of the appraisal, report thereon to the Prime Minister for his decision.

(3) Upon receipt of the Prime Minister's approval in principal for the provision of a Government guarantee, the parties will negotiate the contents of the loan agreement or bond issue agreement, of the letter of guarantee and of the legal opinion, with participation from the MOF (and the Ministry of Justice (***MOJ***), if necessary).

With respect to the letter of guarantee, after agreement is reached on the contents of the letter of guarantee, the MOF shall submit it to the Prime Minister for approval.

With respect to the loan agreement or bond issue agreement, after being signed, they must be submitted to the MOF in order to complete the application dossier for the guarantee.

(1) The Prime Minister will issue the approval.

(2) If approved, the MOF will issue the letter of guarantee.

(3) The MOJ will issue the legal opinion regarding the foreign loan or international bond issue and the principal shall register the foreign loan or international bond issue with the State Bank of Vietnam as required by law.

Decree 113: Regulations on determination of damages to the environment

With global events such as the oil spill in the Gulf of Mexico to the forefront of the media recently, we are all aware of the potentially high economic cost of damage to the environment.

Whilst increased industrialisation in Vietnam is a positive driver for the economy it may also bring with it an increased risk of environmental damage. The Vietnamese government has sought to address the potential for such events and on 3 December 2010, it promulgated Decree No. 113/2010/ND-CP regarding the determination of damages with respect to the environment (***Decree 113***) which contains clear and specific guidelines for determining the quantum of damages as a result of environmental pollution or damage.

Decree 113 provides a framework for the calculation of damages and determination of liability for payment of damages as compensation for pollution and/or degradation of the environment (by a company or individual). Decree 113 also legislates for damages payable to the State of Vietnam by the entities causing pollution and/or degradation of the environment. However, liability for damages and compensation with respect to health, life, assets and the legitimate benefits of organisations or individuals arising as a result of pollution or environmental degradation by third parties is not subject to the scope of this Decree and continues to be governed in accordance with the provisions of civil law.

The liabilities under Decree 113 also arise in addition to administrative fines, and/or criminal penalties under the existing laws of Vietnam.

Therefore, where an entity causes pollution and/or degradation of the environment, (subject to the degree of violation), the following sanctions may be applied:

- compensation to the State for damages to the environment in respect of investment required to overcome the pollution and/or degradation and to improve the environment of the polluted/degraded areas (Decree 113);
- compensation for damages to organisations and/or individuals suffering from the consequences of the polluted/degraded environment with respect to their health, life, assets and legitimate benefits (dealt with under the Civil Code);
- prosecution for administrative offences; and
- prosecution for criminal liability.

Pursuant to Decree 113, in order to determine whether the environment has been damaged or polluted, the competent state authorities will collect and appraise data and evidence; calculate damages; and determine the liability for compensation for damages to environment. The competent authority (***Collecting Authority***) to conduct this assessment will be determined according to the geographical location of the polluted/degraded environment area.

This will be the people's committee at district level, where the environmental pollution/degradation is limited to one district; the provincial people's committee in respect of environmental pollution/degradation in two districts or more and the Ministry of Natural Resources and Environment in respect of environmental pollution/degradation in an area of two provinces/cities under central authority or more. Decree 113 also promulgates specific technical provisions for the determination of damages caused by practices resulting in environmental pollution and degradation.

After calculating the level of damages caused to the environment, the competent State authority (***Authority Requesting Compensation***) shall require the responsible entity to compensate for such damages. Generally, the Authority Requesting Compensation will be the Collecting Authority except that the people's committee at commune level shall be the Authority Requesting Compensation in respect of environmental pollution and degradation in an area of a commune, ward and town.

Level of Compensation

Regarding the scale of compensation, Decree 113 affirms that organisations and individuals causing environmental pollution and degradation must compensate all damages in full; in addition, they will be liable for payment of any expenditure incurred in assessing damages and requesting compensation. Where two or more organisations or individuals are the cause of the pollution and degradation of environment, the liability to compensate damages to the environment shall be determined based on the proportion of damages over total damages to the environment. The compensation after deducting expenditures shall be invested to overcome environmental pollution and degradation and improve the environment at the polluted and degraded area.

UK Bribery Act 2010: Will this impact your business in Vietnam?

If you are a UK national working in Vietnam (or even a non-UK national but working for a UK related entity in Vietnam) you need to be aware of the provisions of the new Bribery Act 2010 (***the Bribery Act***). The Bribery Act received Royal Assent in April 2010 and will come into force on 1 July 2011 and with it will come some potentially far reaching (literally) consequences.

Background

The Bribery Act replaces the UK's existing bribery and anti-corruption laws and is intended to modernise and simplify existing laws which were widely considered to be anachronistic and inconsistent.

The Bribery Act also recognises the international nature of today's business environment and seeks to extend its reach internationally, much as the influence of the United States' Foreign and Corrupt Practices Act extends far beyond its borders.

Principal Provisions

The Bribery Act establishes the general criminal offences of bribery (section 1 and 2 offences), combining two essential elements of: (1) the *act* of bribery (giving or receiving) and (2) the *intention* to induce or reward improper conduct. We do not intend to go into a detailed examination of all of the provisions of the Bribery Act and we focus in this article on those offences that are likely to be most pertinent to Frasers' newsletter readers in Vietnam.

The two offences that our readers should take particular note of are: 1. bribery of a foreign public official (section 6 offence) and 2. failure of a commercial organisation to prevent bribery (section 7 offence).

A section 6 offence is committed when a person (P) offers, promises or gives a financial or other advantage to a foreign public official (F) in circumstances where:

- it is P's intention to influence F in his capacity as a foreign public official; or
- it is P's intention to obtain or retain business or an advantage in the conduct of business; and
- F is neither permitted nor required by the law applicable to him to be influenced in his capacity as a foreign public official by the offer, promise or gift.

The offence will also be committed where the advantage is offered to someone other than F, at F's request, or with his consent.

Failure of commercial organisations to prevent bribery (section 7)

Under this provision a commercial organisation (C) will be guilty of an offence where a person (A) who performs services, for and on behalf of C, bribes another person with the intention of:

- obtaining or retaining business for C; or
- obtaining or retaining an advantage in the course of business for C.

Defences

There is no defence to the offence of giving or receiving bribes (section 1 and section 2 offences) or bribing a foreign public official (section 6 offence), but an organisation will have a defence to a section 7 offence if it can demonstrate that it had in place adequate procedures designed to prevent bribery by persons performing services for it, or on its behalf.

Senior Officers

Senior officers (for example, directors company secretaries and senior managers) of an organisation can also be convicted of an offence where they are deemed to have given their consent, or connivance, to giving or receiving a bribe or bribing a foreign public official.

Unlike the section 7 corporate offence, there is no defence of adequate procedures.

Territorial Reach

The Bribery Act has significant extraterritorial reach. Under the Bribery Act proceedings may be taken in the UK even where the act of bribery took place outside the UK, provided that it would have been an offence if done within the UK **and**

the person committing the offence has a 'close connection with the UK'.

A person will have a close connection with the UK if that person falls into one of the following (non-exhaustive) categories:

> A British citizen, a British overseas territories citizen, a British national (overseas), a person who is a British subject, an individual normally resident in the UK, an organisation incorporated under the law of any part of the UK (but not including the Isle of Man, British Virgin Islands, the Channel Islands, the Cayman Islands or other British influenced territories).

Therefore, for example, UK citizens living in Vietnam would be liable for prosecution in the UK should they commit an offence under sections 1, 2 or 6 of the Bribery Act even if all relevant acts or omissions take place outside the UK. This would also include representative or branch offices of UK incorporated organisations.

However, it should be noted that where an offence (which takes place *outside* the UK) under sections 1, 2 or 6 of the Bribery Act and is committed by an organisation incorporated under UK legislation, the senior officer liability will only apply where the senior officer of the organisation has a close connection with the UK him/herself.

Who is an Associated Person under section 7?

Guidance on section 7 offences was recently issued by the UK Ministry of Justice with guidelines for commercial organisations about procedures that can be put in place to prevent persons associated with themselves from committing bribery (***the Guidance***).

The definition of an associated person is broad and intended to encompass the "whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf". This would include agents, suppliers, contractors, lawyers (heaven forbid!), joint venture parties . . .

However, the Guidance makes it clear that it will be determined by all relevant circumstances and not merely by reference to the nature of the relationship. So someone who is simply supplying goods is unlikely to be considered an 'associated person', but if that person/organisation also performs services for the organisation it may be an 'associated person' in that capacity.

Mergers and Acquisitions

There is no concept of successor liability, therefore if a UK corporate acquires (for example) a local company, it will not have liability for any acts that have taken place prior to its acquisition. However, if the target is discovered to have been involved in corruption it may have a reputational cost attached to it and may also impact on the value of the target company, for example:

- a prosecution of the target company could result in significant fines;
- future revenues of the target may depend on continued corrupt practices, contracts and licences obtained through improper payments may be lost, to consider just two scenarios.

Furthermore it could be an offence under section 7 (associated persons) if a potential target committed an act of bribery at the behest of the acquiring company, if the intention was to benefit the acquirer.

Joint Ventures

The risks associated with a joint venture is similar to the risks associated with an acquisition where there has been potential involvement in corrupt practices. As well as damage to the joint venture company's (**JVC**) reputation, the UK incorporated party to the venture may suffer reputational damage by association with the venture and the value of the JVC's assets may also be diminished. If, when committing the act of bribery, the JVC is

providing services to the UK JV party then an offence will have been committed by the UK JV party under the Bribery Act, section 7.

Interestingly, the Guidance suggests that a bribe made by a JVC for the benefit of the JVC will not trigger liability for the members of the JVC simply by virtue of the members benefiting indirectly from the bribe through their investment in the JVC.

Hospitality and Gifts

Hospitality and gifts form accepted parts of business practice across the world and especially in Asia. But when do hospitality and gifts transform from an acceptable part of the business networking relationship into the unacceptable and dark arena of bribery (particularly section 6, bribery of a foreign public official offence)?

Lunches and dinners are given the world over, in Vietnam at Tet presents are routinely exchanged and it is not uncommon for international organisations to take officials on 'fact finding' missions. Under the Bribery Act reasonable and proportionate hospitality and promotional or other business expenditure, intended to promote the image of a commercial organisation or market its goods and services is legitimate. The Guidance clarifies that an offence will only be committed where the gift or hospitality is intended to influence the foreign public official in his/her decision making process. Generally, the greater and more lavish the hospitality or gift the greater the inference that it is intended to influence.

For example a trip to visit a factory overseas to verify an organisation's manufacturing practices or safety procedures will fall outside the Bribery Act (according to the Guidance). However, an all expenses paid trip for a foreign official and partner to a destination outside the organisation's activities is more likely to give rise to an inference that the trip was intended to influence.

There will be grey areas, and in this circumstance it is likely that a prosecutor would look at the nature of the expenditure, the laws and norms of the country where the act took place and consider whether a prosecution was in the public interest.

Penalties

The penalties for offences under the Bribery Act are severe. Individuals will be liable for up to ten years in prison and/or an unlimited fine. For an organisation the maximum penalty will be an unlimited fine. Fines for offences are likely to be substantial, running into millions of pounds.

A director convicted of a bribery offence is likely to be disqualified from holding a position as a director for up to 15 years.

What should companies do?

Clear anti-corruption procedures and safeguards should be established, not only for employees, but also for associated parties: contractors, joint ventures and the like. Anti corruption/bribery clauses should be included in contracts with associated parties where possible and clear policies created internally providing guidance to staff on how to deal with instances of bribery, or potential offences under the Bribery Act.

When conducting an acquisition or going into a joint venture, due diligence should be used to ascertain whether there exists a current and adequate anti-bribery programme within the target and to ascertain that there has been no bribery in the past. Clear evidence of corruption may be difficult to uncover but might be indicated by: abnormal cash payments, lavish gifts being received, missing documents or records, unusual payment patterns or payment of unusually high commissions.

Warranties and indemnities in the sale and purchase agreement or joint venture agreement may also be appropriate as well as formulating a post integration programme to put into place robust procedures, if they do not already exist.

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