NEWSLETTER
July/August 2011

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Dear Readers,

We welcome you to the July/August edition of our monthly newsletter, providing you this month with key information on some legal developments that have come into effect in the first half of this year. Our articles in this edition are concerned with:

- The Vietnamese government's attempt to regulate more strictly the employment of foreign workers, particularly those engaged in the fulfillment of tender packages, or engaged in projects that have been awarded to foreign contractors;
- An update on legislation concerning the protection of consumer rights;
- The Ministry of Finance's new regulations on the use of e-invoices used for the provision of goods and services;
- A much needed streamlining of the legislation concerned with the registration of secured transactions and contracts.

In addition to these updates, we also present an article about the operation of foreign pharmaceutical companies in Vietnam and the potential pitfalls when conducting operations out of representative offices, in light of recent investigations within the pharmaceutical sector by Ho Chi Minh City authorities.

Finally, we report on the new minimum wage levels issued by the Government and due to come into effect on 5 October 2011.

We trust that you find this edition of the newsletter an interesting read and welcome any feedback or comments you may have on any of our subjects.

Our address for comments is *newsletter@frasersvn.com*.

NEW AND STRICTER REGULATIONS ON FOREIGN LABOUR ADMINISTRATION

On 17 June 2011, the Government promulgated Decree No. 46/2011/ND-CP (*Decree 46*) which amends and supplements a number of articles in Decree No. 34/2008/ND-CP dated 25 March 2008 on the employment and administration of foreigners working in Vietnam (*Decree 34*). Generally, Decree 46 seems aimed at promoting the State's goal of tougher administration of foreign workers, due to the increasing number of foreigners entering Vietnam to work, particularly:

Foreign workers engaged in the fulfilment of tender packages or projects awarded to foreign contractors

One of the most notable regulations issued by Decree 46 is an entirely new provision concerning foreign workers engaged in the fulfilment of tender packages or projects awarded to foreign contractors in

Vietnam. According to this provision, the tender invitation documents, or the set of requirements, must specify the project's manpower requirements. Priority has to be given to employing Vietnamese employees for work which Vietnamese workers are able to perform.

In projects where it is necessary to employ a foreigner with the appropriate expertise required for the tender package, foreign contractors must set out a plan detailing the employment of such foreign employees. This plan must specify the number of employees and their positions; the level of expertise and experience needed; and the duration of the task's execution.

Whilst under contract, foreign contractors must request the relevant authorities for the issuance of a work permit, prior to the arrival and employment of a foreigner in Vietnam.

With respect to the reporting and compliance regime, under Decree 46, an investor undertaking the project as a whole is obliged to report to the provincial/municipal Department of Labour, Invalids and Social Affairs (***Department of Labour***) on the status of recruitment and administration of foreigners working for foreign contractors within the responsibility of such investor on a quarterly basis. Moreover, each quarter, the Department of Labour is responsible for co-ordinating with local police offices and other relevant bodies to ensure compliance with the laws of Vietnam regarding foreigners working for projects and engaged in the fulfilment of tender packages awarded to foreign contractors within the locality.

Broadening the situations where foreign workers do not require work permits

However, whilst the Vietnamese government is tightening up the circumstances where foreign employees may be employed on projects awarded to foreign contractors, in certain areas procedures are being relaxed. For the purposes of simplifying administrative procedures, and complying with Vietnam's World Trade Organisation (WTO) commitments, Decree 46 increases the cases in which foreigners working in Vietnam do not require a work permit, specifically:

- a foreigner who is head of a representative office or head of a project office, or who is appointed by a foreign non-Governmental organisation as a representative of its operation in Vietnam;
- a foreigner transferring internally within an enterprise but note only for enterprises that fall within the scope of Vietnam's WTO Commitments (which includes medical, education, transportation,
  construction, information, distribution, financial, business, tourism, culture and entertainment services);
- a foreigner coming to Vietnam to undertake tasks servicing research, formulation, evaluation, monitoring and assessment, management and implementation of a programme or project using overseas development aid (***ODA***) in accordance with provisions or agreements in an international treaty on ODA;
- a foreigner issued with an operational licence in the information and press sector by the Ministry of

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Foreign Affairs in accordance with the law;

In addition, the Prime Minister is entitled to determine any other case that has not been stipulated in Decree 46.

However, one category has been removed from the exempt list, being foreign spouses of people entitled to diplomatic or consular immunity. If they want to work for a Vietnamese entity during their spouse's posting to Vietnam, they will be required to obtain a work permit unless they fall into one of the above categories.

Shortening the time for processing work permits

Decree 46 shortens the processing time of certain aspects of work permits. Particularly, the Department of Labour has reduced the time-limit for the first time issueance or extension of a work permit; from fifteen (15) business days, as previously specified in Decree 34 and its implementing legislation, to ten (10) business days from the receipt of a complete and valid application file. Furthermore, the time-limit for the re-issuance of a work permit has been reduced from fifteen (15) days to three (3) business days from the date of receipt of a complete and valid application file. These are ambitious targets, especially the latter, and we shall watch with interest to see whether they are met in practice.

Supplementing an employer's obligation to register their requirements on the recruitment and employment of foreigners

For the purpose of improving and strengthening the State authorities' administration of foreign labourers, Decree 46 supplements an employer's obligation to register annually their requirements for the recruitment and employment of foreigners, specifically that they must include the number of workers, level of expertise and experience, salary, and duration of implementing the work of each working position, with the local Department of Labour. If there are any changes to its requirements, the employer must register an amended document 30 days prior to announcing its requirement to recruit foreigners.

A NEW LAW ON PROTECTION OF CONSUMER RIGHTS

In recent times, violations of consumer rights have been increasing in both their number and severity, whilst the relevant regulations still contained many inadequacies and entanglements, thus obstructing the process of detecting and dealing with violations of consumer rights. In practice, there have been a growing amount of cases in which consumers are subject to losses and damages. In light of this, on 17 November 2010, the National Assembly promulgated Law No. 59/2010/QH12 on the protection of consumers' rights (*Law on PCR*), which has been in force from the beginning of July 2011. The Law on PCR replaces preceding legislation, Ordinance No. 13/1999/PL-UBTVQH10 on the protection of consumer rights (*Ordinance on PCR*).

In general, the Law on PCR contains certain noteworthy regulations on consumer protection as follows:

Contracts entered into with consumers and general trading conditions

With respect to the interpretation of consumer contracts, the Law on PCR states that if there are different ways to interpret the contents of a consumer contract, the organisation or individual with authority to resolve the dispute must interpret the contract in favour of the consumer. Also, due to the fact that many enterprises, especially those in monopoly sectors, apply unreasonable and unfavourable terms to consumers when entering into transactions with them, the Law upholds consumers' interests by determining that in limited contractual circumstances, contracts entered into directly between trader and consumer or standard trading conditions, a provision of the contract will be invalid in certain circumstances, as follows:

- it excludes the statutory liability of the trader;
- it restricts or excludes the right of consumers to lodge a complaint or to institute legal proceedings;
- it allows the trader unilaterally to change contractual conditions previously agreed with the consumer;
- it allows the trader to impose its own interpretation of a contract containing contractual clauses which may be interpreted in different ways; or
- it allows the trader to assign its rights and obligations to a third party without the consent of the consumer.

Furthermore, in reality, consumers are commonly at a disadvantage when entering into a transaction with a trader under a standard form contract or under general trading conditions, due generally to the trader drafting more favourable terms for itself. To create balance in such situations, the Law on PCR includes regulations requiring that a trader, prior to entering into a transaction with a consumer, must provide a reasonable period of time for the consumer's review of its standard form contract, or must publicly announce its general trading conditions.

Protection of Information about Consumers

Under the Law on PCR, consumers' information is closely protected. The new provisions will limit situations in which a consumer's information is provided to others without prior consent. Accordingly, any transfer of a consumer's information to a third party can only be completed with the consumer's consent, unless otherwise provided by the law. If businesses want to collect and use a consumer's information, they must provide clear and public notification to the consumer in advance, obtain adequate consent, and only use such information appropriately in accordance with stated purposes. In addition, traders must ensure the safety, accuracy and completeness of the information collected, transferred or used. In cases where the information is inaccurate, businesses have the responsibility to update and amend such information or to take measures to enable consumers to do so.

Consumer Protection Activities by Social Organisations

The Law on PCR also contains regulations on the participation of social organisations in consumer protection. In particular, social organisations may act as the representative of a consumer in instituting proceedings, or they may themselves institute proceedings in the public's interest. Additionally, when a social organisation participating in consumer protection implements a task assigned to it by a State authority, the State shall provide assistance for funding and for other conditions in accordance with law.

Diversifying methods for resolution of disputes between consumers and traders

Until now, disputes between consumers and traders have been resolved according to the current general law on civil procedures. However, since many such disputes are of low value, many consumers whose rights and interests have been violated by traders have not brought their cases to court, due to the complicated, costly and time-consuming procedures that would arise from the resolution of their cases. Trying to resolve this difficulty, the Law on PCR provides four clear and specific options for dispute resolution, which are via negotiation, mediation, arbitration or court action.

With respect to negotiation, a consumer who considers that his or her lawful rights and interests have been infringed shall have the right to send a request to the trader to conduct negotiations, and the trader must accept the request and commence negotiations with the consumer within seven business days from the date of receipt of the request.

Regarding court procedures, the Law on PCR states that *a simple civil procedure* will be applied when a consumer (being an individual) brings a dispute with his or her direct supplier to court, provided that the value of the transaction is below one hundred million dong, the case is a simple one and the evidence is clear. However, and rather surprisingly, the *simple civil procedure* has not been defined in the civil procedure law or the Law on PCR, currently rendering this provision of dubious worth. New regulations will be required to make this regulation effective and we will keep abreast of and report on regulations in respect of such procedure as they develop.

Furthermore, in a civil consumer protection case, the Law on PCR states that the onus is on the trader to prove that it was not at fault in causing the loss and/or damage, and the consumer, being the plaintiff, shall not be required to pay court fees and charges in advance.

In brief, the Law on PCR contains provisions that are designed to be more detailed and more practical than previous regulations, therefore having a greater ability to protect the rights of consumers. The Law on PCR intends to be a progressive step in protecting the interests of consumers, and a transitional step for a new period of a fairer marketplace for consumers and traders alike. However, in order to make the provisions of the Law on PCR more feasible in reality, a clear responsibility regime and the close coordination of authorised State bodies and social organisations, as well as the effective implementation of legal instruments, are necessary.

REGISTRATION OF SECURED TRANSACTIONS AND CONTRACTS

On 16 February 2011, the Ministry of Justice issued Circular 05/2011/TT/BTP (***Circular 05***) providing guidelines on the registration of and provision of information about secured transactions and contracts, including contracts for purchase on instalment or by deferred payment which reserve the seller's ownership; asset lease contracts, finance lease contracts, and contracts assigning debt recovery rights. Circular 05 also provides guidelines on the notification of seizure of assets to execute a judgment, and the provision of information about seized assets directly, by post, fax or email at the Registration Centres of the National Office for Registration of Security Transactions under the Ministry of Justice (***Registration Centres***).

Circular 05 has been in force since 20 April 2011, and guides the implementation of Decree 83/2010/ND-CP dated 23 July 2010 on the registration of secured transactions (***Decree 83***) and replaces the following Circulars:

- Circular 06/2006/TT-BTP dated 28 September 2006 (***Circular 06***) regarding the registration of, and
  provision of information on, secured transactions at Registration Centres;
- Circular 03/2007/TT-BTP of the Ministry of Justice dated 17 April 2007 amending and supplementing the above Circular 06;
- Circular 04/2007/TT-BTP dated 17 May 2007 (***Circular 04***) on the registration of, and provision of information on, contracts for purchase by deferred, or instalment, payments, property lease contracts, finance lease contracts, and contracts assigning rights to reclaim debts; and
- Circular 07/2007/TT-BTP dated 9 October 2007(***Circular 07***) on the notification of seizure of assets to execute a judgment, and about seized assets at Registration Centres.

In order to minimise the confusion created by having a variety of legal documents with different guidelines, Circular 05 has consolidated the above guidelines into one piece of legislation. Circular 05 merges these former regulations, creating a document with guidelines relating to the registration of, and provision of information on, transactions that are registrable with the Registration Centres. Moreover, Circular 05 also includes some new and detailed provisions based on the practicalities of applying and implementing the regulations stipulated in these former circulars.

Significant regulations remain unchanged

Many of the fundamental regulations remain unchanged under Circular 05. Firstly, with respect to the categories of contracts to be registered, as under Circular 04, such contracts comprise the following types:

- Contracts for purchase by deferred, or instalment, payments in which the seller reserves its ownership rights;

- Contracts for the lease of assets with a term of one or more years;
- Finance lease contracts; and
- Contracts assigning the right to recover debts.

We note that not all of the above mentioned categories of contracts are required to be registered , subject to their specific regulations. For example, finance lease contracts are required to be registered under the regulations on finance leasing. However, there may be benefits to registration of all secured transactions, particularly when it comes to enforcing the security against third party rights. More specifically, for example, the registration of a contract with a Registration Centre can create a priority for payment for the parties involved in such a contract. Therefore, while it is not compulsory to register all contracts, it may be in the interests of the parties, particularly the party taking the security.

With regards to the registration of secured transactions, as in Circular 06, Circular 05 stipulates that secured transactions (excluding guarantees and fidelity guarantees) to be registered shall comprise:

- Mortgages of assets including assets to be formed in the future, pledges of assets, and making deposits, escrow deposits and collateral agreements;
- Changes in or corrections of errors in, or de-registration of any of the secured transactions; and
- Written notification of realisation of security assets where the secured transaction itself was registered.

It is noted that under Decree 83, only registrations of mortgages of land use rights; mortgages of planted production forests; pledges or mortgages of aircraft; and mortgages of seagoing ships are compulsory, whilst all others are voluntary. However, for the purpose of obtaining priority of payment in the event of default, it is recommended that all registrable transactions should be registered with the Registration Centres.

Pursuant to Circular 05, a judgment execution officer is required to notify the Registration Centre when issuing a decision to "attach" (defined in Vietnamese law as seizing a property to enforce a judgment or decision of the court) the 11 categories of assets stipulated in Circular 05, except for the following cases:

- the relevant assets have been handed over to an individual or entity who will keep them in good condition, or are kept in storage by the enforcement body; or
- the total value of the assets is less than the equivalent of 30 months' minimum wage salary.

Compared to Circular 07, Circular 05 supplements certain kinds of assets whose seizure must be made known to the Registration Centre such as: Vietnamese and foreign currencies; dividends, and rights to receive insurance proceeds on security property or other benefits collectable secured property; and assets fixed to land not within the registration authority of land use right registration offices of central provinces and cities or of the district level. In addition, Circular 05 increases the total value of the

"attached" assets at which the Registration Centre should be notified from 10 months minimum wage to 30 months.

New regulations

Circular 05 particularly focuses on the implementation of regulations on the duration of the validity of the registration of secured transactions stipulated in Decree 83. According to Circular 05, if a secured transaction, contract or notification of seizure of assets was registered prior to 9 September 2010 (the effective date of Decree 83) and was still effective at such date, then the entity concerned need not register an extension, but such registration or notification shall be valid up until the entity lodges an application for de-registration. Previously registrations (Decree 08/2000/ND-CP dated 10 March 2000 on registration of secured transactions) were only valid for five years but could be renewed for further five year periods, however, Decree 83 changed these rules so that registrations are now valid until they are de-registered.

Point of time of registration is another significant change introduced by Circular 05. The point of time of registration of secured transactions, contracts, and notification of seizure of assets to execute a judgment shall be the time when the contents of the application for registration have been recorded in a database, and not the time the Registration Centre has received a completed request for registration as provided in Circular 06. This new regulation is likely to extend the time in which the registration becomes effective, and it is foreseeable that problems may arise as delays in registration may occur in the event that there are technical problems with the database, not to mention human errors such as mislaid applications and slow processing. Beneficiaries of security interests should take a keen interest in the implementation of this new provision to see how it works in practice.

Circular 05 also provides more detailed guidelines on the procedures for completion of the application form requesting registration. Circular 05 clarifies the distinction between a situation in which the application must contain complete signatures and seals (if any) of all parties involved, and a situation in which the application need only be signed and sealed by one of the parties involved in the security transaction or contract, or their proxies.

Lastly, to streamline the operations of Registration Centres in the future, Circular 05 stipulates detailed provisions on the order and procedures for registering secured transactions, contracts and notifications of seizure of assets; and provision of information about secured transactions, contracts and seized assets.

NEW REGULATIONS ON INVOICE ISSUANCE AND ELECTRONIC INVOICES

In the January 2011 edition of Frasers' newsletter we reported on Decree 51/2010/ND-CP ***(Decree 51)*** and Circular 153/2010/TT-BTC ***(Circular 153)*** relating to invoices issued on the sale of goods or services**.** Decree 51 and Circular 153 have now been supplemented by further legislation refining the law in this area. On 8 February 2011, the Ministry of Finance issued Circular 13/2011/TT-BTC (***Circular 13***). Circular

13 amends Article 6 Circular 153 of and while both provide rules governing the qualifications applied to enterprises in order to be eligible to print invoices independently, in comparison to Circular 153, the issuance of Circular 13 marks two significant changes as follows:

- An enterprise is allowed to print its own VAT invoices if it has a charter capital of VND at least 1 billion, instead of VND 5 billion as previously regulated by Circular 153;
- An enterprise which has not been sanctioned for tax-related violations; or an enterprise that has been sanctioned for tax-related violations with total paid fines of less than VND 50 million within 365
  consecutive days up to the date of notifying the first issuance of self-printed invoices is now allowed to print invoices independently, instead of VND 20 million as previously provided for under Circular 153.

Circular 13 came into effect on 25 March 2011.

New guidance on the creation, issuance and utilisation of e-invoices for the provision of goods and services

On 14 March 2011, the Ministry of Finance issued Circular 32/2011/TT-BTC which provides guidance on the creation, issuance and usage of electronic invoices for the sale of goods and the provision of services (***Circular 32***).

Taking effect as from 1 May 2011, Circular 32 applies particularly to:

- Users of e-invoices for the provision of goods and services;
- Intermediary e-invoice solution providers, who provide solutions for the creation, transmission, receipt, storage and recovery of safe messages of e-invoices between goods sellers and buyers; and
- Tax administrations of all levels, as well as organisations and individuals involved in the creation, issuance and use of e-invoices.

Circular 32 also lists the conditions required for applicable entities to create, issue and use e-invoices, and
provides some related standard forms.

As defined under Circular 32, an e-invoice is a compilation of e-data messages on the provision of goods and services, which are created, billed, sent, received, stored and managed electronically. An invoice is legally valid when it fully satisfies the following conditions:

- The reliability of the integrity of information contained in the e-invoice is assured;
- The information contained in an e-invoice can be accessed and used in complete form when necessary.
- Notably, a goods and services provider may convert an e-invoice into a paper invoice to prove

the origin of tangible goods in the process of circulation, but this conversion may only occur once per e-invoice. Although it appears that this provision aims to regulate the number of copies of an e-invoice in circulation, it is unclear whether or not copies made of a paper invoice once it has been converted would hold any validity. In addition, buyers and sellers may also convert an e-invoice into a paper invoice for storage of accounting documents in accordance with accounting legislation.

In both cases, an e-invoice that is converted into a paper invoice must meet certain requirements, such as:

- fully presenting the contents of the original e-invoice;
- having a specific symbol showing that it is converted from an e-invoice; and
- having the signature and full name of the person who converted it from an e-invoice.

It should also be noted that such paper invoices must also contain the signature of the legal representative and the seal of the goods and service provider. In practice therefore, it seems unlikely that it will be common for e-invoices to be converted into paper invoices as the formalities required are significant.

OPERATION OF FOREIGN PHARMACEUTICAL COMPANIES IN VIETNAM

Representative offices of multi – national pharmaceutical companies

Recently, Ho Chi Minh City authorities have conducted various investigations into the operations of representative offices (***RO***) of foreign pharmaceutical companies in Ho Chi Minh City.

This has raised the question of what an RO can or cannot do in the Vietnamese pharmaceutical industry.

As a general rule under the current laws of Vietnam, conducting business activities as an RO of a foreign business entity in Vietnam gives rise to certain limitations.

Firstly, Article 16 of Decree 72/2006/ND-CP of the Government dated 25 July 2006, which provides detailed regulations on the implementation of the commercial law with respect to ROs and branch offices of foreign entities in Vietnam (***Decree 72***), specifies that the scope of activities that can be performed by an RO on behalf of the foreign entity that it represents is limited to the following:

- acting as a liaison office;
- accelerating the formation of co-operative projects in Vietnam;
- conducting market research to promote opportunities for the supply of goods and/or commercial services by the foreign entity;
- monitoring the performance of contracts that the foreign entity has signed with Vietnamese

parties or that relate to the Vietnamese market; and

- such other activities permitted by the law of Vietnam.

Secondly, the Commercial Law stipulates that an RO is not allowed to operate business activities for profit-making purposes.

However, notwithstanding the above limitations, an RO's chief representative may sign contracts with Vietnamese parties on behalf of the foreign entity provided that he/she is duly authorised by the foreign entity by a written power of attorney. An RO is also able to open a local bank account, purchase office equipment and enter into labour contracts with both Vietnamese and foreign employees.

There is a not inconsiderable grey area operating between the activities of a RO and the activities of a foreign trading company in Vietnam particularly where the RO is marketing on behalf of the parent company and the chief representative (who may also hold a position in the parent company) signs contracts of behalf of the parent, albeit under a power of attorney. Foreign owned pharmaceutical companies are by no means the only foreign companies to get into hot water with the Vietnamese authorities regarding misuse of RO status and allegations of trading from them, however, since the pharmaceutical industry is still a sensitive sector in Vietnam, ROs of foreign pharmaceutical companies are closely monitored by Vietnamese authorities and must be cautious of their activities in order to avoid any sanctions that could be imposed by the authorities.

Trading and Distribution by foreign invested pharmaceutical companies

Upon its accession to the World Trade Organisation (***WTO***) in 2007, Vietnam agreed to extend its trading rights to pharmaceutical products. In accordance with Decree 23/2007/ND-CP dated 12 February 2007 of the Government on providing detailed regulations for implementing the Commercial Law relating to enterprises with foreign-owned capital specialising in the purchase and sale of goods and activities directly related to the purchase and sale of goods in Vietnam (***Decree 23***), and Decision No. 10/2007/QD-BTM dated 21 May 2007 announcing the roadmap for implementation of trading and distribution activities (***Decision 10***), as from 1 September 2009, a foreign invested company may import various pharmaceutical products in accordance with Appendix 2 of Decision 10. However, the importation of pharmaceutical products is also subject to specific guidelines from the Ministry of Health/Drug Administration (***the MOH***). In particular, Circular 47/2010/TT-BYT dated 29 November 2010 providing guidelines for importation and exportation of pharmaceutical products, states that the importation and exportation of pharmaceutical products by foreign invested enterprises (not for manufacturing activities) will be governed by the MOH under separate guidelines. However, as at present the MOH has not released any such guidelines and therefore the importation and exportation of pharmaceutical products by foreign invested enterprises is restricted in practice.

Under the current applicable law, foreign owned companies are not allowed to distribute pharmaceutical products which are imported for distribution or manufactured by other Vietnamese incorporated pharmaceutical companies (excluding nourishing products in the form of pills, bars, crystal or powder and other medicines from HS Code 3002, 3005 and 3006, etc.).

BREAKING NEWS: INCREASE IN NATIONAL MINIMUM WAGE

The Government of Vietnam issued Decree 70/2011/ND-CP dated 22 August 2011 (***Decree 70***) stipulating the region-based minimum wages for employees working for companies, enterprises, cooperatives, cooperative groups, farms, households, individuals and other organisations employing workers.

Introduced earlier than expected, Decree 70 provides for significant increases in salary levels but does not differentiate between foreign invested or domestic enterprises and creates a single minimum wage level for all employees based on the location of the employment. Below is a table showing the new minimum wage levels:

Region	**New Minimum Wage (VND)**
Region I	2,000,000
Region II	1,780,000
Region III	1,550,000
Region IV	1,400,000

Decree 70 also provides that skilled workers must be paid at least 7% more than the relevant minimum wage for the region of the employment.

Decree 70 takes effect from 5 October 2011.