



## NEWSLETTER November 2011



### Dear Readers,

We welcome our readers to the November edition of the Frasers' Newsletter, and a range of stimulating articles covering some of the recent legislation issued by the Vietnamese authorities. This month's newsletter covers the following topics:

- further regulations developing the law relating to corporate bond issues;
- developments in intellectual property legislation in Vietnam and particularly copyright in computer programmes;
- stricter regulations, particularly in the form of penalties, imposed on businesses and individuals quoting prices or transacting in foreign currencies or gold;
- official licence requirements for the establishment of representative offices of foreign trade promotion organisations; and finally
- further regulations governing the establishment and requirements for vocational training establishments in Vietnam.

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 topics. Our address for comments is [newsletter@frasersvn.com](mailto:newsletter@frasersvn.com).

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you feel that you require further information on any of the issues in this edition of the Newsletter please contact us at the address above.

### ***Returning Faces***

We are very pleased to announce the return of Le Thi Thanh Mai and Pham Huynh Ngoc Han to Frasers after their absence in the UK to study for Masters degrees at the Universities of Leicester and Warwick respectively. Mai, a senior Vietnamese lawyer, pursued her studies in International Commercial Law, whilst Han studied International Corporate Governance and Financial Regulation, for which she received an LLM with distinction. We welcome Mai and Han back to the Frasers' team.

## **New Decree relating to the Issuance of Enterprise Bonds**

From 1 December 2011, Decree No. 90/2011/NĐ-CP dated 14 October 2011 on the issuance of enterprise bonds (**Decree 90**) will come into effect and will replace Decree No.52/2006/NĐ-CP dated 19 May 2006 on the issuance of enterprise bonds and some selected provisions of Decree No.53/2009/NĐ-CP on the issuance of international bonds.

### ***Governing scope and entities***

Decree 90 regulates the issuance of private bonds within Vietnam, and the issuance of bonds on the international market of enterprises domiciled in Vietnam. Decree 90 applies only to shareholding

## NEWSLETTER

### November 2011



companies and limited liability companies (*the Issuer*).

Decree 90 provides for two types of bonds: convertible and non-convertible bonds which may be secured or unsecured and shall be issued in the form of certificates, book entries or electronic data. It is noted that only shareholding companies (JSCs) can issue non-convertible bonds with options or convertible bonds. LLCs may only issue non-convertible bonds.

#### ***Principles for issuance of bonds and transfer bonds***

Enterprises may issue bonds for three purposes: conducting investment projects, expanding their capital and restructuring loans. Unlike the previous legislation, Decree 90 imposes no restrictions on the terms of loans which may be restructured (previously this only applied to long term loans), but states that bonds issued must comply with certain principles: not issuing bonds on the international market in order to restructure VND denominated loans and the issuer maintaining a minimum ownership of capital in an enterprise at 20% of the total capital of the investment project.

All bonds must have a minimum term of at least one year. Convertible bonds and securities right issued with bonds may not be transferred within one year of the completion of the issuance date, except where transferring bonds to or between institutional securities investors.

#### ***Currency***

Regarding the permitted currency of bond issues, Decree 90 provides bonds issued on the domestic market must be denominated in VND, but bonds issued on the international market may be issued in a freely convertible foreign currency.

#### ***Conditions of issuing bonds:***

An enterprise shall be permitted to issue bonds when it satisfies all conditions provided in Decree 90, which are:

- being in operation for at least one year (or three years if issuing bonds on the international market) from the date on which it officially commenced operations;
- being profit-making from production and/or business activities in the year (or three years, if issuing bonds on the international market) immediately preceding the year of issue;
- having filed acceptable audited financial statements;
- satisfying the conditions for adequate capital ratios and other restrictions ensuring safety during operation; and
- the proposal for the issuance of bonds being already approved by the competent authority.

As is already the case under Decree 52, Decree 90 provides that in order to make a decision to issue convertible bonds and bonds with options attached the enterprise will need authority from a General Meeting of Shareholders. For other types of bonds, this approval can be derived from the General Meeting of Shareholders, the Board of Management, the Members Council or the Chairman of the

## NEWSLETTER

### November 2011



enterprise depending on any requirements stipulated in the enterprise's charter.

For State-owned enterprises, bond issuances must be approved by the owner of the State-owned Enterprise, as follows:

- the relevant Ministry, for entities or groups established by the Prime Minister;
- the Ministry or People's Committees of provinces and cities under central authority, for entities or groups established by those ministries or people's committees; and
- The organization appointed representative of the State owned capital portion in the enterprise, for entities established in the form of shareholding enterprises or limited liability enterprise with two or more members.

With respect to the issuance of bonds on the international market, apart from the criteria mentioned above, the issuer must also comply with further requirements, as follows:

- the State Bank must certify that the value of the proposed international bond issue is within the annual quota on foreign commercial borrowing, as approved by the Prime Minister;
- the enterprise must satisfy international market requirements on credit rating in order to conduct the issue, and a State enterprise must have a credit rating at least equal to the national credit rating;
- the enterprise must have completed the documentation implementing the issue correctly in accordance with the law of the issuing market applicable to each issue, for each type of issue.

Moreover, we note that an enterprise is required to wait a minimum period of six months between issuing each series of convertible bonds.

#### ***New regulations***

In addition to the three existing methods for the issuance of enterprises bonds (by means of underwriting, agents and bond bidding), Decree 90 provides for a new method, being direct sale to investors. However, this method will only be available where the issuer is a licensed credit institution.

Unlike Decree 52, Decree 90 requires the issuer to disclose information to investors who have registered to purchase the bonds. Such information disclosed must not contain items which amount to an advertisement or invitation to make an offer, and must not be publicly announced in the mass media, unless the disclosure of information is made in accordance with the Law on Securities and other relevant laws. Moreover, the issuer must, no later than 15 days after completing the entire set of issuing tranches, report the results of the issue to the authorities which approved the bond issue plan and the Ministry of Finance, and, in the case of an issue on the international market, to the State Bank of Vietnam (SBV).

#### ***Other provisions***

With respect to domestic bonds, Decree 90 provides for further regulations:

## NEWSLETTER

### November 2011



- Coupon interest rates may be defined in one of three ways: fixed rate for the whole term of the bonds, floating at market interest rate, or a combination of fixed and floating rates.
- Redemption of bonds prior to maturity and swap bonds: "Swap bonds", a new definition introduced by Decree 90, means the simultaneous purchase and sale of two bonds issued by one issuer, in order to restructure existing loans. The issuer is permitted to conduct these activities provided that the swap plan has been passed by the competent authorities and subject to agreement between the issuer and bond owner.

With respect to international bonds:

- Unlike the previous legislation, Decree 90 requires the issuer have to finalise all certifying and registering procedures with the SBV before issuing bonds.

With respect to issuance of bonds by State owned enterprises:

- The issuing plan must be passed by the owner prior to the issuance. Accordingly, a State owned enterprises can be separated into three types based on the State's ratio capital and the subject who decided to establish the enterprise. Moreover, the acceptance document for issuing bonds on the international market by State authorities does not amount to an approval to issue Government guarantees for the bond issue.

#### **Conclusion**

Decree 90 has made enterprises bonds a more attractive source of capital. Especially, the permitted use of "swap bonds" – a financial method quite common on the international market - permits more diversity and flexibility to Vietnam's securities market.

## **New Decree on Intellectual Property Rights**

Intellectual property rights continue to be a fertile area for legal development in Vietnam as technology develops and the Vietnamese economy becomes more closely integrated into the global economy. Approximately five years since the introduction of Decree 100/2006/ND-CP (**Decree 100**) providing guidelines for the implementation of a number of articles of the Civil Code and the Law on Intellectual Property (**Law on IP**) with respect to copyright and related rights, on 20 September 2011 the Government promulgated Decree 85/2011/ND-CP (**Decree 85**) to amend and supplement Decree 100. The amendments in Decree 85 came into effect on 10 November 2011.

Decree 85 aims to improve deficiencies in Decree 100 and make intellectual property protection in Vietnam easier to implement and more effective. Decree 85 adds and updates many existing definitions and provisions in order to clarify the existing laws. We highlight some relevant areas below.

#### ***Supplementing definitions to protect intellectual property rights for foreign individuals and organisations in Vietnam***

## NEWSLETTER

### November 2011



Decree 85 supplements the existing regulations by the addition of new definitions on the publication of new works by foreign individuals or organisations:

- *Work of a foreign individual or foreign organisation published for the first time in Vietnam* means a work which was unpublished in any other country prior to its publication in Vietnam.
- *Simultaneous publication* means publication of the work of a foreign individual or foreign organisation in Vietnam within thirty (30) days from the date such work was published for the first time in any other country.

#### ***Royalties and other benefits***

The Decree also supplements the regulations on the principles and the methods for payment of royalties, remuneration<sup>1</sup> and material benefits<sup>2</sup>. Pursuant to the new regulations:

- payment of royalties and remuneration and material benefits, as stipulated in the Law on IP, must guarantee the interests of the creator(s), users and the public enjoyment and be compliant with the “realities in Vietnam” (Art. 45a.1.(a) of Decree 100 as amended);
- the amount should be based on the type, form, quality, quantity or volume of work;
- co-authors must agree on a percentage share of benefits depending on their contributed level of creative activity; and
- additional benefits, by way of encouragement, should be available for those creating works for children or ethnic minorities or Vietnamese authors creating works directly in a foreign language or in ethnic minority languages.

Moreover, Decree 85 also provides detailed guidelines on the definition of “copyright in folklore and folk art works”. The legislation is, as can often be the case, unclear in its detail and what it will translate into in practice is uncertain. Royalty levels that are compliant with the “realities in Vietnam” (which is undefined in the Decree 85) suggest that considerations run wider than pure economics and that the authorities will retain a wide ranging discretion to set royalty levels at values they consider appropriate. It will be interesting to see how this is implemented in practice, and which “realities” are called into support such decisions.

#### ***Important new provisions on implementation of copyright and related rights***

##### *Copyright in computer programmes*

As provided in Article 19a of Decree 85, the author of a computer programme is entitled to the moral

1. “Royalties” are paid where the work is used by others, whereas “remuneration” is paid for broadcasting such work to the public;  
 2. “Material benefits” are the monies payable to producers of the audio or visual fixation whereas “other material benefits” means benefits to which authors, copyright holders and related rights holders are entitled. “Audiovisual fixation” means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device.

## NEWSLETTER

### November 2011



rights<sup>3</sup> in their work, save for the publishing rights (or the right to authorise other persons to publish their works). These moral rights include the rights to:

- (i) name the work;
- (ii) write their true name or pen name on the work; to raise their true name or pen name where the work is published and used; and
- (iii) protect the integrity of the work and prevent other persons from amending, altering or distorting the work in any manner which affects the honour and prestige of the author.

Organisations and individuals investing in the funding or material and technical facilities for production of the computer programmes, i.e. the owners of the computer programmes, are entitled to the publication right and exclusive property rights. The law also permits the software owner and the author of the computer programmes to enter into a production contract with respect to the rights to name the computer programmes, amendments and upgrades of the computer programmes as required. Companies involved in the production of software, or whose employees, in the course of their employment create software, should put in place detailed policies to ensure that these rights vest in the company.

Moreover, the law stipulates that a person who has a legal right to use a copy of a computer programme may make no more than one back-up copy to use as a replacement in the event that the former copy is lost, destroyed or becomes inoperative.

#### Use of broadcasts

Under Decree 85, organisations and/or individuals may use broadcasts of other broadcasting organisations to relay, re-transmit or transmit through telecommunication networks, electronic information or any technical means as agreed according to relevant laws. However, amending, editing or supplementing the broadcasts of other broadcasting organisations to re-transmit or transmit through telecommunication networks, electronic information or other technical means must have consent from the owner of the original broadcast.

#### Assignment of rights to anonymous works

Decree 85 does not deal with the ownership of anonymous works. However, it provides that the organisation or individual currently managing these works is entitled to assign rights to such work to another organisation or individual and is allowed to receive remuneration from such assignment of rights. The entity assigning the intellectual property rights shall be treated as the owner until the real owner of the work is identified.

#### Term of Copyright protection for photographic works, applied art and anonymous works

3. As provided in Article 22 of the Law on IP, computer programmes are protected in the same way as literary works.

## NEWSLETTER

### November 2011



Copyright in Vietnam lasts for varying periods of time from 25 years to 100 years from the creation of the work the date of first publication or the author's death, depending upon the nature of the work. Decree 85 also amends the regulations on the term of copyright protection in order to align the regulations with the amended Law on IP.

Decree 85 provides that the term of protection as provided in the Law on IP (amended) will apply to photographic works, photos, applied art works and anonymous works with a residual term of copyright protection. As at 1 January 2010, being the date the amended Law on IP came into effect.

#### **Conclusion**

Notwithstanding that the new provisions of Decree 85 do not cover all of the unresolved issues besetting IP legislation (such as the definition of "co-authors" or "copy of a work" to name a couple), It is hoped that Decree 85 will assist authors (and other IP rights owners) to enforce their rights particularly in relation to copyright and related rights, and especially the provisions on copyright in computer programmes.

## **Stricter Penalties for Administrative Offences in the Monetary and Banking Sectors**

It has been a common sight in Vietnam to see prices listed in foreign currencies, and traditionally items, especially land, valued in gold rather than money. However, with the erratic fluctuations in the financial markets, with the devaluations of the Vietnamese Dong (**VND**) and the sharp increase in the price of gold, the State of Vietnam has been trying to exert stricter control over the financial markets and particularly the widespread use of foreign currencies and gold pricing on the domestic market.

In an attempt to eliminate this parallel pricing system and halt further inflation and VND devaluation, on 20 October 2011, the Government promulgated Decree No. 98/2011/ND-CP (**Decree 95**) amending Decree No. 202/2004/ND-CP dated 10 December 2004 on penalties for administrative offences in the monetary and banking sectors (**Decree 202**).

Decree 95 develops the enforcement of the laws established in the Ordinance on Foreign Exchange Control dated 13 December 2005, and Decree 160/2006/ND-CP dated 28 December 2006, which provide that all transactions, payments, listings and advertisements by residents and non-residents carried out in Vietnam must be conducted in VND, except in certain limited cases.

Decree 95 focuses on violations of the regulations controlling foreign exchange and gold trading as follows:

#### **Increasing severity of penalties**

There has been a steep increase in the fines for violations of foreign exchange and gold trading control, which have increased approximately eight fold:

- A fine of VND50 million to VND100 million (approximately US\$2,500 to US\$5,000) applies to any of

## NEWSLETTER

### November 2011



the following acts:

- lending, providing finance leasing or repaying debts domestically in foreign currency, contrary to the law;
- remitting or carrying foreign currency into or out of Vietnam contrary to the law (save that the carrying of foreign currency or gold into or out of Vietnam through border checkpoints by individuals or organisations shall be dealt with under customs regulations and penalties, see Fraser's September 2011 Newsletter for further details);
- buying or selling goods or making payments in foreign currency or gold, contrary to the law.
- A fine of VND300 million to VND500 million (approximately US\$15,000 to US\$25,000) shall apply to any one of the following acts:
  - engaging in foreign exchange activities without a forex licence from the competent authority, or with a forex licence which has expired or is suspended;
  - providing forex services for Vietnamese residing overseas without a licence from the competent authority;
  - importing or exporting foreign currency or gold without a licence from the State Bank;
  - listing prices, or advertising goods or services or land use rights in foreign currency or gold, contrary to the law.

It is notable that, in respect of the last breach, the applicable fine has increased about *fifty* times from a range of VND5 million to VND12 million (approximately US\$250 to US\$600) to a range of VND300 million to VND500 million (approximately US\$15,000 to US\$25,000). As the practice of denominating prices in foreign currency and/or gold has not been uncommon up to this point, we urge all businesses to review their policies for compliance as the fines may be heavy, and indicates a heightened awareness by the authorities on this matter, and suggests a new resolve to penalise offenders.

#### ***Supplementing additional forms of penalty***

Besides confiscation of the exhibit (i.e. the item evidencing the breach), Decree 95 provides for two new additional forms of penalties:

- loss of the right to use the certificate of registration as a foreign exchange agent; and
- loss of the right to use the licence to conduct business in gold.

The period of such deprivation shall be 12 months for an initial offence, and an unlimited period in the case of repeat offences.

Decree 95 came into force with immediate effect as from 20 October 2011 (normally decrees do not come into effect until 15 days subsequent to publication in the Official Gazette) which also reiterates the authorities heightened level of priority given to this matter.



## **Official legal-foundation for establishing and operating representative offices of foreign trade promotion organisations in Vietnam**

As the Vietnamese Government seeks to promote ever greater trade links and expand inward investment by overseas investors, on 28 October 2011, the Government issued Decree No. 100/2011/ND-CP on the establishment and operation of representative offices (**ROs**) of foreign trade promotion organisations (**FTPO**) (**Decree 100**). FTPOs exist to promote trade links between foreign invested enterprises and domestic enterprises, provide useful marketing information to foreign investors who are conducting projects or intend to enter the Vietnamese market, amongst other advantages.

This is the first such official recognition of these bodies, and Decree 100 clearly includes governmental and non-governmental organisations or associations which are set up for the purpose of commercial enhancement activities.

### Organisation and operation of the FTPO RO

Decree 100 sets out the functions that the RO of a FTPO may conduct in Vietnam, including:

- exercise of the function of a liaison office;
- conducting activities which enhance trade from overseas to Vietnam or vice versa;
- supporting foreign enterprises to penetrate into and operate in Vietnam;
- researching and supplying economic, trade and market information to foreign enterprises and organisations;
- promoting foreign trade and cross-border trading activities with Vietnam;
- activities promoting useful trading links between foreign enterprises and enterprises in Vietnam;
- liaising with agencies and organisations in Vietnam which have a commercial enhancement function in order to carry out activities involving commercial enhancement; and
- performing other commercial enhancement activities, in accordance with the laws.

However, a RO of a FTPO may not conduct direct profit-making activities in Vietnam.

An RO of a FTPO will have many of the same rights and obligations as the RO of a commercial enterprise. It will be able to lease premises; recruit employees; register and use its seal; and open bank accounts in both Vietnamese Dong and foreign currencies for the purposes of managing its operations. The RO will be required to nominate a head of the RO who will be the RO's legal representative in Vietnam. As head of the RO for a FTPO, such person may not hold a position of head of an RO of any other business or foreign organisation in Vietnam.

### Procedures for establishment of RO of FTPO

Before being entitled to operate, a RO of a FTPO must be granted a licence of establishment. The

## NEWSLETTER

### November 2011



Vietnam Trade Enhancement Agency under the Ministry of Industry and Trade shall be the authority to consider application dossiers and issue licences.

The application dossier shall comprise, amongst other information:

- an application for issuance of a licence for establishment of the RO;
- a document issued by competent official body in the originating country, permitting the FTPO to set up the RO in Vietnam;
- licence of establishment of the FTPO certified by such official body;
- charter of the FTPO and proposed charter of the RO of the FTPO in Vietnam;
- operation status report of the FTPO for the last year and a plan of operation in Vietnam;
- curriculum vitae and letter of appointment of the proposed head of the RO.

Under Decree 100, a licence for the establishment of a RO of FTPO in Vietnam should be issued within 20 days from receipt of a valid dossier and may have a maximum duration of five years, but may not exceed the duration of the residual term of the establishment licence of the FTPO.

Decree 100 comes into force on 15 December 2011. Any ROs of FTPO's previously established in Vietnam will be permitted to continue to operate, but are required to apply for the re-issuance of their licence as provided in Decree 100 within six month from this date, i.e. by 15 June 2012.

## New Upgraded Regulations on the Registration of Vocational Activities

On 24 October 2011, the Ministry of Labour, Invalids and Social Affairs (**MOLISA**) issued Circular 29/2011/TT-BLDTBXH on vocational training registration (**Circular 29**). Circular 29 focuses on the administrative management of vocational activities and establishments in order to ensure the quality and lawfulness of such activities.

Circular 29 focuses on regulating the competence, order and procedures required to register vocational training activities and grant vocational training registration certificates for vocational colleges, intermediate and elementary schools; additional registration of vocational training activities; and the withdrawal of vocational training registration certificates. Circular 29 applies to public and private vocational colleges, vocational intermediate and elementary schools, universities, colleges, professional secondary schools, other forms of educational institutions and enterprises, cooperatives, production, business and service establishments.

### **Requirements for facilities offered and teaching groups**

Under Circular 29, in order to obtain a vocational training registration certificate, the vocational establishment must have suitable and adequate physical facilities and infrastructure, have sufficient lecture rooms to match the level of training offered, and to meet the requirements for practice rooms

## NEWSLETTER

### November 2011



and workshops under vocational training programmes. Circular 29 also requires vocational establishments to ensure that the number of students per lecture class does not exceed 35 and the number of students per practical class does not exceed 18.

The ratio of students to trainers permitted is a maximum of 20 students per trainer. Full-time trainers must constitute at least 70% of the teaching body, for public vocational colleges, universities, colleges, and vocational and professional secondary schools; 50% for private vocational colleges, universities, colleges, and vocational intermediate and professional secondary schools.

#### ***Timescale for Registration***

The Vocational Training Directorate is the body responsible for licensing, evaluating and regulating vocational training establishments with respect to vocational colleges, universities and colleges engaged in vocational activities. For such institutions, the regulations stipulate that the Vocational Training Directorate shall evaluate the application dossier and grant the vocational training registration certificate, within 20 working days as counted from the date of submission of a valid application dossier. For other forms of vocational institutions, the timeline for such review and issue is 15 working days, and the Directors of the provincial-level Departments of Labour, Invalid and Social Affairs will be the competent licensing authorities.

Circular 29 further stipulates that the Vocational Training Directorate must send a copy of this certificate to the Department of Labour, Invalids and Social Affairs of the province or city where the vocational training establishment is based, within 10 working days as from the date of issuance of such certificate.

Circular 29 will come into effect on 1 January 2012 and replaces Decision 72/2008/QĐ-BLĐTBXH.