

NEWSLETTER

Edition 4, 2012



Dear Readers,

We welcome our readers to the latest edition of the Frasers Newsletter for 2012, with some interesting updates on recent legislation and developments within Frasers.



Frasers is delighted to announce the strengthening of its Hanoi office by the relocation of Chris Robinson, a senior Australian qualified lawyer, from Ho Chi Minh to Hanoi. Chris, who was elevated to the role of Special Counsel, joins the experienced team in Frasers' Hanoi office including senior associates Pham Ba Linh and Nguyen Viet Ha, in order to develop and strengthen client relationships. Chris' presence in Hanoi further enhances our client service capabilities, ensuring Frasers' clients receive the best service wherever they are located.

In this edition of the newsletter, we cover the following topics:

- two new circulars (Circulars 03 and 07) on loans issued in foreign currencies, when they are permitted and regulations further limiting banks' permitted foreign currency positions as a percentage of total equity;
- an important announcement by the Governor of the State Bank of Vietnam reducing further the ceiling interest rates on short term deposits to 9%;
- Decree 11 providing important new regulations on secured transactions, refining definitions and particularly introducing new categories of property which may be used as security in any transaction;
- in the banking sector, regulation under Circular 02 of interbank foreign exchange transactions; and
- further clarity on the processes for registering and operating foreign non-governmental organisations in Vietnam, under Decree 12.

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.

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.

New Regulations On Foreign Currency Control

For the purpose of effective control over the foreign currency market, the State Bank of Vietnam (***the SBV***) has issued two new circulars on foreign currency lending and on the foreign currency position.

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Further restrictions on foreign currency loans

On 8 March 2012, the SBV issued Circular No. 03/2012/TT-NHNN regulating lending in foreign currency by credit institutions and foreign bank branches to borrowers being residents (***Circular 03***).

Pursuant to Circular 03, credit institutions and foreign bank branches authorised to conduct foreign exchange activities may make short, medium and long-term loans in foreign currency to borrowers being residents in order to remit payment overseas for the import of goods and services, provided that the borrower has sufficient foreign currency from projected production and business revenue to repay the loan. For other cases, credit institutions and foreign bank branches may make loans in foreign currency to borrowers being residents for capital requirements particularly as follows:

- Short-term loans to facilitate overseas payments for the import of petrol subject to the SBV's written consent.
- Loans for capital requirements, subject to the SBV's written consent in each specific case, on the basis of:
 - the foreign currency loan capital requirements of the borrower to implement goods production – by reference to a business plan or project in sectors prioritised by the Government; and where
 - the credit institution or foreign bank branch has already evaluated the borrower and is assured that its production/business plan or project is feasible and efficient and the client satisfies borrowing conditions prescribed in the relevant regulations on lending and is able to repay the loan on time.

Circular 03's predecessor legislation (Circular 07/2011/TT-NHNN dated 24 March 2011 of the SBV regulating lending in foreign currency by credit institutions to borrowers being residents), permitted other cases where credit institutions and foreign bank branches could grant foreign currency loans to borrowers being residents including:

- short-term, medium-term and long-term loans to make payment to overseas parties for the import of goods and services where the borrower would obtain foreign currency by purchasing from the lending credit institution or another credit institution under a written agreement; and
- short-term loans to implement production and business plans for the export of goods through from Vietnam where the borrower would obtain sufficient foreign currency to repay the loan from its export revenue.

The goal of the new regulations may be to prevent abuse of the much lower lending rates in USD compared to Vietnam Dong (***VND***), as well as an attempt to fight against dollar hoarding and restrain the "dollarization" of the market. The two cases above are no longer permitted under Circular 03, further restricting the circumstances in which borrowers being residents may take out foreign currency loans.

Furthermore, on 2 May 2012, the SBV promulgated Decision No. 857/QD-NHNN regulating short-term lending in foreign currency by credit institutions and foreign bank branches to borrowers being residents (***Decision 857***). Compared with Circular 03, Decision 857 adds one more case when credit institutions and foreign bank branches may make loans in foreign currency to borrowers being residents, namely short-term loans for domestic capital requirements to implement production and business plans for the export of goods through from Vietnam where

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the borrower would obtain sufficient foreign currency to repay the loan from its export revenue. However, according to Decision 857, this case will only be applied until the end of 2012, after which it will cease.

For the purposes of the legislation a resident includes (regardless of nationality of the individual or principal investor):

- an economic institution established and carrying on business activities in Vietnam; and
- person residing in Vietnam for a duration of 12 months or more, except for foreign nationals coming to Vietnam for study, medical treatment, tourism or to work for diplomatic representative offices, consulates or representatives of foreign organisations in Vietnam.

Shrinking foreign currency position

As another tool against dollar hoarding, on 20 March 2012, the SBV promulgated Circular No. 07/2012/TT-NHNN regulating the foreign currency positions of credit institutions and foreign bank branches (***Circular 07***).

Under Circular 07, the total positive foreign currency position at the close of a day of a credit institution or foreign bank branch must not exceed 20% of its equity and the total negative foreign currency position at the close of a day of a credit institution or foreign bank branch must not exceed 20% of its equity.

Foreign bank branches in Vietnam with equity of USD25 million or less are permitted to apply the following limits on total foreign currency position:

- The total positive foreign currency position at the close of a day converted into US dollars shall not exceed USD5 million.
- The total negative foreign currency position at the close of a day converted into US dollars shall not exceed USD5 million.

In special cases, the Governor of the SBV may consent to a credit institution or foreign bank branch maintaining foreign currency positions outside the limits prescribed above.

The most notable change provided in Circular 07 is the shrinking of both positive and negative foreign currency positions from 30% to 20%. Such adjustment may arise from the practice in recent times, by some credit institutions exploiting the current wider range of negative foreign currency positions (i.e 30%), to convert their foreign currency into Vietnamese Dong in order to receive higher interest rates when lending in Vietnamese Dong.

Both Circular 03 and Circular 07 came into force on 2 May 2012.

Further Reductions To The Maximum Deposit Rates

Stop press news: the Governor of the State Bank of Vietnam, Nguyen Van Binh, issued an announcement on 7 June 2012 effecting a reduction in the cap on ceiling interest rates for Vietnamese Dong short term deposits from 11% down to 9%, effective from 11 June 2012.

This measure, the fourth in the preceding three months amounting to a total reduction of 5% on the ceiling rate, is designed to increase liquidity in banks and stimulate availability of capital to encourage lending to businesses.

However, whilst the new measure came into effect on 11 June 2012 many banks in Vietnam had already been cutting rates on short term deposits for some time, to around or below this new ceiling.

The SBV has further announced that the current ceiling rate will apply at least until the end of 2012, whilst many are speculating that the rates for long term (i.e. 12 months or greater) deposits will rise, encouraging banks to restructure their capital sources.

New Decree Providing Guidance On The Law Relating To Secured Transactions

The use of security to ensure the due performance of obligations is common, e.g. in the form of mortgages or pledges. However, the legislation in Vietnam has not always kept up with the development of commercial practice both within and outside Vietnam. Since the issue on 29 December 2006 of Decree No. 163/2006/ND-CP on secured transactions (**Decree 163**) the need for revisions and developments to the law has become pressing. To supplement and amend Decree 163, the Government issued Decree No. 11/2012/ND-CP dated 22 February 2012 (**Decree 11**) which came into force on 10 April 2012.

Firstly, Decree 11 brings a clearer and more precise definition of *Securing Party*. A *Securing Party* means a party using assets owned by it, for example land use rights, its reputation or by undertaking to perform work with the Secured Party in order to secure the performance of a civil obligation of the Securing Party or of another person.

The definition of *Secured Party* has not been amended by Decree 11 and continues to mean a party that has rights in a civil relationship, where the rights are secured by one or more secured transactions and includes a pledgee, mortgagee, beneficiary of a guarantee, etc.

Decree 11 contains many further new regulations and further clarifies the contents of secured transactions. The most notable of which we review below:

Secured property and obligations in the future

Under Decree 11, the definition of *Secured property* is widened to mean current property or future property which the law does *not prohibit* from being traded, instead of "*must be permitted*" as previously stated in Decree 163 and under the Civil Code. Given this wider definition, more types of property are likely to be usable as secured property compared to the previous legislative framework.

The definition of *Future property* is also amended by Decree 11, under which it is specifically listed, and includes:

- (a) Property formed from loan capital;
- (b) Property currently in the phase of formation or which is currently being legally created at the time of entering into the secured transaction;
- (c) Property already formed but in the category for which ownership must be registered, and whose

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registration will take place after entering into the secured transaction.

However, future property does not include a land use right.

Decree 11 also includes a new provision relating to the grant of security for the *performance of future obligations*. Under Decree 11, unless there is some other agreement or the law stipulates otherwise, where security is provided for the performance of a future obligation, the parties are not required to reach a specific agreement on the scope of the secured obligation, nor on the deadline for performing the secured obligation.

This provision may benefit the Secured Party, because the security will not be defeated by any inability to define, at the time of entering into an agreement, the precise terms of an obligation that will happen in the future. However, from a practical perspective this would seem to give rise to the potential for confusion and disputes as to whether an obligation has actually been performed. This will be particularly pertinent for the Securing Party, and we advise anyone considering giving security for a future obligation to include specific agreement on these points, where possible.

Furthermore, when the obligation is formed, the parties are not required to register changes to the registered items of the secured transaction (i.e. the security itself).

Better information about secured transactions

Decree 11 also updates the requirements for notification of mortgages on certain forms of transport vehicles. Under Article 7a, where the mortgage of a motorised means of road transport (e.g. automobile or motorcycle), internal waterway craft or means of rail transport (**Transport Vehicle**) is *registered* or *de-registered*, after payment of the fees for a request for issuance of a copy of such certificates, the secured transactions registration body will send one copy of the registration certificate to the State authority responsible for the registration of Transport Vehicles to update its records. The updated information is required to be registered on the same day as receipt of the information.

Where the pledged property is any type of security in a category which must be registered and deposited (for example, a share certificate), then registration of the pledge at the secured transactions' registration authority shall be conducted in accordance with the Law on the Registration of Secured Transactions, and the registration and deposit of the securities at the Securities Depository Centre shall be conducted in accordance with the Law on Securities.

Regulations on realisation of secured property

Under Decree 11, the person realising secured property (**the realisor**) may rely on the contents agreed in the security contract in order to realise the secured property without requiring a power of attorney from the securing party to realise the property. Provided that the security contract is properly drafted, this will make it much easier for a realisor to realise security.

With respect to investment in mortgaged property in order to increase the value of such property, a mortgagee is not permitted to restrict such investment by a mortgagor or by a third party (**the investor in the mortgaged property**). On realisation of any additions to the property created by such investment, where that part is not used to secure performance of civil obligations, but is unable to be detached from the mortgaged property

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without loss or reduction in the value of such property, then the investor in the mortgaged property will not have the right to detach the additional-part from the mortgaged property. However, the investor in the mortgaged property will have priority for payment with respect to the additional-part unless there is some other agreement. Again, a properly drafted agreement will assist in avoiding confusion and disputes.

With respect to land use rights: In the case of a mortgage of a land use right, where property attached to land is not also mortgaged, if:

- the land user is also the owner of the property attached to the land, then the property attached to the land shall be realised at the same time as the land use right, unless there is some other agreement; or
- the land user is not also the owner of the property attached to the land, then on realisation of the land use right, the owner of the property attached to the land is entitled to continue to use the land in accordance with the agreement between the land user and the owner of the property attached to the land, unless there is some other agreement.

Decree 11 specifies the methods of realisation of secured property, notably selling the secured property other than by auction or receiving the actual secured property in lieu of performance of the obligation. Until Decree 11 it has been difficult for the Secured Party to do this in practice because of the lack of provisions dealing with these courses of action under Decree 163.

Greater fairness for the parties?

Decree 11 contains some additional provisions amending Decree 163 which are noteworthy for investors in Vietnam. In the case of a secured transaction which was entered into prior to reorganisation (i.e. division, demerger, consolidation, merger or conversion) of a legal entity and which is still legally valid, the parties are not required to re-enter into such secured transaction when the entity undergoes reorganisation. Registration of the change is required with respect to a registered secured transaction, and the new (reorganised) entity must produce documentary evidence of the reorganisation.

If the mortgaged property is an aircraft, a ship or a Transport Vehicle as defined above, the mortgagor will hold the original certificate of ownership of the aircraft, or the certificate of registration of the Vietnamese ship, or the certificate of registration of the transport vehicle during the effective term of the mortgage contract.

Where the mortgaged property is held pursuant to Article 416 of the Civil Code (dealing with liens over property in bilateral contracts), the rights of the holding party have priority. However, the holding party must hand over the property to the mortgagee for realisation after the mortgagee or the obligor has fully performed any obligations owed to the holding party.

New Regulations On Interbank Foreign Exchange Transactions

On 27 February 2012, the State Bank of Vietnam (**SBV**) issued Circular No. 02/2012/TT-NHNN (**Circular 02**), replacing the provisions concerning the foreign exchange transactions between the SBV and credit institutions under the Regime on Organization and Operation of the Interbank Foreign Exchange Market, together with Decision 101/1999/QĐ-NHNN13 dated 26 March 1999. Circular 02 focuses on regulations regarding the

conditions, contents, process, and remedies to deal with breaches in the foreign exchange transactions between the SBV and credit institutions, as well as foreign bank branches operating in Vietnam (hereafter referred to as **Forex Transactions**).

Conditions to establish Forex Transactions

A forex transaction, according to Circular 02, involves the purchase, sale, or swap of foreign currency and other types of transactions in the forex market in Vietnam. To be involved with the SBV in these transactions, the credit institutions and foreign bank branches must satisfy the following conditions:

- (a) be established and operating in accordance with the Law on Credit Institutions;
- (b) be licensed to operate and provide foreign exchange services in the forex market in Vietnam; and;
- (c) be equipped with tools, machines, and means for Forex Transactions such as the Reuters system or other means of transaction accepted by the SBV from time to time.

Where a foreign bank has more than one branch operating in Vietnam, the SBV will deal with only one branch of the bank. The Central Banking Department must notify the credit institution or foreign bank branch in writing of the approval of, request for additional records, or denial of the Forex Transactions within seven working days, from the date of receiving a full and legal application.

Some specific regulations about the contents of Forex Transactions

Circular 02 bases its regulations on the use of two currencies: the US Dollar and Vietnam Dong, or such other currencies chosen by the SBV from time to time. The forex rates between the US Dollar and Vietnam Dong will be determined in accordance with the provisions of the forex rates and regulations issued by the SBV from time to time. With regard to the conversion of the other currencies, which are not the US Dollar, the forex rates will be determined on the basis of the cross-rate between the rates of the US Dollar and Vietnam Dong, and those of the US Dollar and the other currencies in the international market on the date of the transaction.

Circular 02 sets out the forms of Forex Transactions regulated:

- immediately-delivered transactions: This type of transaction is executed by both trading parties to purchase or sell certain foreign currencies at a certain rate at the time of the transaction. The payment for this type of transaction will be made within the next 2 business days;
- timed transactions: This type of transaction is a commitment made by both trading parties to purchase and sell certain foreign currencies at a rate determined at the time of the transaction. The payment for this transaction will be a fixed time in the future. The term for this type of transaction, which is a 3 to 365 day window, will be agreed upon between the SBV and credit institution or foreign bank branch;
- swap transactions: This type of transaction involves the purchase and sale of the same amount of foreign currencies offered (only two types of currency may be used in this type of transaction) to the same trading party. In a swap transaction, there is one immediately-delivered transaction and one timed-transaction. The term for this type of transaction, which is a 3 to 365 day window, will also be agreed upon between the SBV and the credit institution or foreign bank branch;

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- other types of transactions as will be regulated by the SBV from time to time.

Forex Transactions will be conducted between the SBV and credit institutions or foreign bank branches via the Reuters system, telephone or other means of transaction which is accepted by the SBV from time to time. In the event that a Forex Transaction is conducted over the phone, the credit institution or foreign bank branch must then ensure that a record of the transactions will be created and stored. Forex Transactions will be conducted either in Vietnamese or English. Circular 02 establishes that a Forex Transaction will not be changed unless the two trading parties reach an agreement to modify or cancel the transaction.

Circular 02 also provides for further regulations about means of settlement and deadlines for making settlement payments, with high interest rates levied for late payments.

Reporting and Compliance Responsibilities

Under Circular 02, credit institutions and foreign bank branches, are liable to the state authorities for:

- reporting and notification of:
 - the status of Forex Transactions of the credit institution or foreign bank branch to the Central Banking Department at 2 pm at the latest each weekday;
 - prior to the effective date of any changes, representative change, name change, headquarter or branch location change, code change for means of transaction, standard payment instructions, list of authorized signatories for credit institutions or foreign bank branches in documents relating to Forex Transactions with the SBV, list of transactions clerks, and other related changes; and
 - within five working days from the date of sending records to the relevant State agencies, the split, separation, amalgamation, consolidation, merger, acquisition, conversion of legal form, dissolution and bankruptcy of a credit institution, or from the date of the decision by the competent State agency where the foreign bank's headquarters are located, the split, separation, amalgamation, consolidation, merger, acquisition, conversion of legal form, dissolution and bankruptcy, or revocation of license and suspension of that bank's operations.
- authenticating the authority of the officers involved in Forex Transactions, the completion, accuracy, legality, and timing requirements for documents and records sent to the SBV;
- ensuring officers' competence to conduct Forex Transactions business;
- ensuring the Forex Transaction process, risk management system and strict internal control as well as assurance of strict management of Forex Transactions; and
- complying with the regulations on forex status and other regulations on safety in Forex Transaction operations as provided by the SBV.

Penalties for Violations

Subject to the level and nature of the violation, the SBV has the authority to apply the following penalties for breaches of the provisions of Circular 02:

- (a) **Warning:** applied where the credit institution or foreign bank branch commits three violations, of the following kind:
- failure to send reports in a timely manner;
 - failure to send reports; or
 - failure to send accurate reports.
- (b) **Temporary suspension of transactions** from one to three months where the credit institutions and foreign bank branches are:
- in receipt of at least three warning notices;
 - in violation of the obligation to notify a split, separation, amalgamation, consolidation, merger, acquisition, conversion of legal form, dissolution and bankruptcy, or revocation of license and suspension of the credit institution or the foreign bank; or
 - being placed in special control status and operating limited or suspended Forex Transactions.
- (c) **Cancellation of Forex Transactions** for serious violations of monetary and banking activities, as determined by the SBV (Banking Supervisory Agency).
- (d) Other forms of administrative sanctions in accordance with the relevant laws.

Circular 02 came into effect on 12 April, 2012. Credit institutions and foreign bank branches which were already recognized by the SBV as members of the interbank forex market prior to this date are allowed to continue to conduct their Forex Transactions with the SBV in, accordance with Circular 02, without re-registration. These organisations are still obligated to update their registration records for Forex Transactions pursuant to Circular 02 within 30 days from the effective date of Circular 02.

Management Of Foreign Non-Governmental Organisations In Vietnam Under Decree 12

To encourage and facilitate foreign Non-Governmental Organisations (**NGO**) to carry out humanitarian activities in Vietnam, the Government issued Decree 12 dated 1 March 2012 on the registration and management of the operations of foreign non-Governmental organisations in Vietnam (**Decree 12**). Decree 12 applies to non-Governmental organisations, non-profit organisations, social funds, private funds and other forms of social and non-profit organisations established in accordance with foreign law, the purpose of whose operations is the provision of developmental assistance or humanitarian aid, for non-profit making purposes or for other purposes, in Vietnam.

A foreign NGO may be issued with a registration certificate in one of three forms, namely:

- a registration certificate for operations;
- a registration certificate for the establishment of a project office; or

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- a registration certificate for the establishment of a representative office.

Issuance of a registration certificate

- *To apply for a registration certificate for operations*, the NGO must be a legal entity duly formed under foreign law, have a clear charter setting out its operations and principles, and a plan for humanitarian aid or development in Vietnam via a programme, project or non-project aid in compliance with the socio-economic developmental policy of the State of Vietnam. The NGO must also provide details in its application dossier of its financial resources and capability; its programme, project and/or plan of activities in Vietnam; and undertake to comply strictly with the laws of Vietnam and to respect Vietnamese traditions and customs. The certificate of registration for operations is granted by the Ministry of Foreign Affairs and is valid for three years as of the date of issuance (but not exceeding the expiry date of the NGO's registration in the foreign country). This certificate is renewable subject to completion of renewal procedures.
- *To apply for a registration certificate for the establishment of a project office*, the NGO must be issued with a certificate of registration for operations for a programme/project approved by the competent Vietnamese authority where the size and nature of such programme/project requires on-site executive operation and regular supervision. The registration certificate for the establishment of a project office is granted by the Ministry of Foreign Affairs and is valid for five years as of the date of issuance (but not exceeding the expiry date of the NGO's registration in the foreign country). This certificate is renewable, subject to the completion of renewal procedures.
- *To apply for a registration certificate for the establishment of a representative office*, the NGO must be issued with a certificate of registration for operations and provide a commitment to operate long-term via programmes or projects approved by the relevant Vietnamese authority. The NGO must have already operated in Vietnam for at least two years. A representative office may only be located in one of: Hanoi, Danang or Ho Chi Minh City. The registration certificate for the establishment of a representative office is granted by the Ministry of Foreign Affairs and is valid for five years as of the date of issuance (but not exceeding the expiry date of the NGO's registration in the foreign country). This certificate is renewable, subject to completion of renewal procedures.

As indicated above, an NGO must obtain a certificate of registration for operations before it is possible to obtain the other two types of registration certificates. Pursuant to Decree 12, where an NGO has been issued with a certificate, either for registration of establishment of a project office or of a representative office, the original registration certificate of operation will cease to exist.

However, there are still some further questions for legislators: whether or not a NGO may set up a representative office if it currently holds a valid registration certificate for the establishment of a project office, not a registration certificate for operations; or if a NGO had operated effectively in Vietnam for two years or more under a registration certificate for operations but later suspended its operations for a period.

The procedure and dossier for issuance, amendment, supplement, re-issuance or extension of a registration certificate is clearly set out in Decree 12.

Operations of an NGO in Vietnam

A NGO must operate within the boundaries of the provisions stipulated in its certificate of registration. Within forty-five days after issuance, extension, supplement or amendment to its certificate of registration, the NGO must notify the provincial or municipal People's Committee where such NGO proposes to operate. The Vietnamese authorities require that the NGO comply with reporting requirements on a six-monthly and annual basis.

A NGO is permitted to lease an office and to recruit both Vietnamese and foreigners to work in its office with written approval from the state authority, however, fees for the issuance of work permits are not payable by NGOs.

NGOs are strictly prohibited from organising, conducting or participating in any activities which are inconsistent with the interests of Vietnam; with profit-making purposes, without humanitarian aid or developmental objectives; activities connected with money laundering or terrorism; anything which infringes social ethics, morals and good customs, national traditions and the national identity; or is contrary to the laws of Vietnam. The operations of a NGO may be partially or wholly suspended, or be terminated pursuant to a decision of the Ministry of Foreign Affairs where the NGO:

- breaches such prohibited provisions;
- allows its registration certificate to expire, without making an application for an extension;
- deliberately falsifies the application file on registration; or
- fails to begin operating within 12 months after issuance of the registration certificate.

Decree 12 came into effect on 1 June 2012 and repeals Decision 340-TTg of the Prime Minister of the Government dated 25 May 1996 promulgating Regulations on the operation of NGOs in Vietnam.

Any NGO already issued with a registration certificate for the establishment of a project office or representative office, or a registration certificate of operation in Vietnam under the preceding legislation which wishes to register its operations in accordance with the equivalent forms simulated in Decree 12 is not required to be reconsidered, but must supplement or amend its file in accordance with the provisions of Decree 12, within 90 days from the effective date of Decree 12.