



NEWSLETTER

Edition 7, 2012



We welcome you to the latest edition of our regular newsletter.

In this edition, you will find information pertaining to three regulations which, in our opinion, significantly affect the operation of enterprises and their investors in Vietnam. They are:

- A summary of the laws recently passed by the National Assembly;
- A brief overview of the Law on Trade Unions 2012, with more responsibilities for employers regarding trade unions;
- A summary of certain features of a new decree implementing the Law on Securities; and
- An overview on the complaints procedures under the new Law on Complaints.

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. Please feel free to email us with your comments and suggestions at 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.

Arguably the leading and authoritative guide to law firms in Vietnam is contained in The Asia Pacific Legal 500. The latest annual edition has just been released and Frasers has once again been ranked as a top tier firm in Vietnam, and in particular has been recommended in the following practice areas:

- Banking and Finance
- Corporate and M&A
- Projects and Energy
- Real Estate and Construction
- Technology, Media and Telecommunications (*TMT*)
- Capital Markets
- Dispute Resolution
- Insurance
- Intellectual Property
- Tax



NEWSLETTER

Edition 7, 2012



We would like to take this opportunity to thank all our clients and friends of the firm who acted as referees during this research process. We are very grateful for your support and appreciate that we are nothing without our clients. We are constantly considering ways in which we can further improve our service to our clients and would be grateful for your candid comments on ways in which we can better serve you. Please feel free to contact us at any time with your comments on our services by sending an email to feedback@frasersvn.com.

The fourth meeting of Session XIII of the National Assembly finished on 23 November 2012. The National Assembly discussed six draft laws and passed nine laws. The laws which have been passed include:

- Law on Amendment of and Addition to the Law on Personal Income Tax;
- Law on Amendment of and Addition to the Law on Electricity;
- Law on Amendment of and Addition to the Law on Tax Management;
- Law on Publications (amended);
- Law on Cooperative (amended);
- Law on Amendment of and Addition to the Law on Lawyers;
- Law on Amendment of and Addition to the Law on the Prevention of and fight against Corruption;
- Law on National Resources; and
- Law on the Capital City.

Immediately after the above laws are officially promulgated by the President of Vietnam, we will update you on important regulations.

MORE RESPONSIBILITIES FOR ENTERPRISES REGARDING TRADE UNIONS UNDER THE LAW ON TRADE UNIONS 2012

Trade unions in Vietnam have long been encouraged and supported by the Government as a means of protecting the legal rights of employees.

In an effort to address the shortcomings of the 1990 Law on Trade Unions, a new Law on Trade Unions was passed by the National Assembly on 20 June 2012 (*the New Law*), superseding the existing Law. Coming into effect on 1 January 2013, the New Law is expected to reinforce the role of trade unions by setting out additional obligations for employers in respect of the operation of trade unions and the role of its officers. Below is a summary of some notable changes contained in the New Law.

NEWSLETTER

Edition 7, 2012



Employer Obligations to Trade Union Officers

In principle, an employer is not obliged to establish a trade union at his/her enterprise. However, where a trade union at an enterprise has been set up (by the trade union of the relevant district or industrial zone), the employer is required to support this trade union by arranging a workspace and the necessary amenities required for the activities of the trade union.

The New Law also provides provisions on the roles of trade union officers as follows:

- **Part-time trade union officers:**

A part-time trade union officer is an employee working for an enterprise and who joins a trade union as an officer, elected to the position of deputy head of a trade union group at a Trade Union General Meeting or appointed by the Executive Committee of a Trade Union.

Under the new law, part-time trade union officers are entitled to spend from 12 to 24 working hours per month on trade union business, subject to his/her title in the trade union, and still receive a regular salary. The Executive Committee of the trade union at the enterprise can negotiate and agree with the employer on additional time if necessary. Furthermore, when part-time trade union officers are required to participate in trade union meetings or training sessions convened by the superior level trade union, the employer is required to approve the officer's leave and pay wages during that time.

- **Full-time trade union officers:**

Full-time trade union officers are recruited and paid a salary by a trade union and appointed to undertake regular work in a trade union organisation (including trade unions at enterprises).

Where a full-time trade union officer is appointed to conduct trade union activities at an enterprise, he/she is entitled to the same collective benefits as employees working in such enterprise.

Termination of Employment for Part-time Trade Union Officers

The New Law provides new provisions that protect employees who are also part-time trade union officers.

- If the labour contract of an employee expires during his/her tenure as a part-time trade union officer, it must be extended in accordance with his/her term in the trade union. While this provision does not appear to be consistent with the Labour Code, after reviewing a report submitted to the National Assembly in the process of passing the New Law, we understand that this provision was drafted to encourage employees to join trade unions. According to the Charter of the Trade Union of Vietnam of 5 November 2008, the tenure of a trade union officer will correspond with the timing of the General Meeting of the trade union at an enterprise, which convenes twice every five years.
- If an employer decides to legally terminate the labour contract of or dismiss an employee who is a part-time trade union officer, the employer is required to obtain written approval from the Executive Committee of the trade union at the enterprise or above. Under the current law, trade union consent is compulsory for any employment termination or dismissal of a part-time trade union officer. However, the New Law

NEWSLETTER

Edition 7, 2012



stipulates that if an employer and the trade union are unable to reach an agreement, the two parties must report the termination or dismissal to the competent authorities and the employer can then terminate/dismiss the employee 30 days later.

Funding Trade Unions

According to the Vietnam General Confederation of Labour, as of May 2012, there were approximately 113,000 enterprises with trade unions, equivalent to 24.36% of the total number of enterprises in Vietnam.

Currently, those enterprises are required to contribute the equivalent of 1% of salaries payable for Vietnamese employees to the operation of its trade union (applicable to foreign-invested enterprises established by foreign investors; Vietnamese enterprises with more than 49% equity held by foreign investors; and operating offices of foreign parties who have entered into a business cooperation contract in Vietnam). All other types of enterprises (which have a trade union at their enterprise) are required to contribute 2%.

With effect from 1 January 2013, all employers, including the remaining 75.64% of enterprises in Vietnam which have no trade union at their enterprise, will be required to pay the 2% of their payroll which is used to calculate the base payment for social insurance premiums to support the trade union's budget. We are waiting for guidelines from the Government on the procedures for contribution to the trade union's budget at those enterprises which do not have a trade union.

NEW DECREE IMPLEMENTING THE LAW ON SECURITIES

On 20 July 2012, the Government of Vietnam promulgated Decree 58/2012/ND-CP, implementing a number of provisions on the Law on Securities (**Decree 58**). Decree 58 took effect on 15 September 2012, replacing a number of legal instruments, including Decree 14/2007/ND-CP (**Decree 14**), Decree 84/2010/ND-CP and Decree 01/2010/ND-CP (**Decree 01**).

While Decree 58 has introduced significant changes to the regulation of securities in Vietnam, this article focuses on those provisions affecting public companies.

Private Placements

Decree 01 provided for deemed registration of a private placement application if no response was received from the relevant authority within 30 days of filing a valid application dossier. Such deeming mechanism no longer appears in Decree 58, with private placements now due to be registered within 15 days of filing by a notice from the relevant authority, as follows: for non-public credit institutions, the relevant authority is the State Bank of Vietnam (**SBV**); for non-public insurance companies, the relevant authority is the Ministry of Finance (**MOF**); and for public companies, the relevant authority is the State Securities Commission (**SSC**). Despite there being a time limit of 15 days, it would be prudent for the relevant parties in a private placement to take into account the possibility of a delay from the relevant authority during the registration of a private placement.

Decree 58 has also dispensed with the requirement under Decree 01 for subscription monies to be deposited into an escrow account until completion of the private placement.

NEWSLETTER

Edition 7, 2012



Employee Share Schemes

Decree 58 now confirms that Vietnamese employees who are working for an offshore entity in Vietnam may hold bonus securities issued by the offshore entity, provided that the employee complies with Vietnamese foreign exchange control regulations and the bonus securities are not traded on the Vietnamese securities market. Whilst this regulation only applies to “Vietnamese employees working for an offshore entity in Vietnam”, there is still uncertainty whether Vietnamese employees working for a foreign invested company may receive bonus securities issued by a parent company offshore. We look forward to seeing an official clarification with respect to this issue.

Share Swaps

Decree 58 now provides specific conditions for a company to issue new shares in consideration for the swap of shares in another company, subject to the issuer’s receipt of shareholder approval, compliance with any applicable foreign ownership limits and mandatory tender offer (or takeover) requirements and appropriate documentation where the vendors are identifiable.

Tender Offers

Under Circular 194/2009/TT-BTC dated 2 October 2009 of the Ministry of Finance (**Circular 194**), shareholders who had accepted a tender offer could withdraw their acceptance at any time during the offer period. In contrast, Decree 58 stipulates that accepting shareholders can only withdraw their acceptance if the offer conditions change or an alternative offer is made.

Under Circular 194, the tender offer price for a listed company could not be lower than the average reference price of such listed company published by the applicable stock exchange for the 60 consecutive trading days prior to registration of the offer. Decree 58 now adds a pricing cap, requiring that the offer price not be lower than the highest price offered by the tender offeror during the preceding 60 trading days.

Depository Receipts

Decree 58 now enables Vietnamese companies to issue new shares under an offshore depository receipts program subject to the issuer’s satisfaction of Vietnamese public offer regulations and applicable foreign depository receipt program rules, compliance with any applicable foreign ownership limits and the receipt of the approval of the issuance and application of proceeds plans by shareholders or directors.

NEWSLETTER

Edition 7, 2012



Listings

Decree 58 introduces much tougher listing conditions as follows:

| ISSUE | DECREE 14 | DECREE 58 |
|---|---|---|
| HoSE (Ho Chi Minh City Stock Exchange) | | |
| Minimum paid-up capital | VND80 billion | VND120 billion |
| Profitability | For two (2) consecutive years immediately preceding the year of listing: <ul style="list-style-type: none"> profitable; and no accrued losses. | For two (2) consecutive years immediately preceding the year of listing: <ul style="list-style-type: none"> maintained company status; Return on equity (ROE) of at least 5%; profitable; no single debt outstanding for over 12 months; and no accrued losses. |
| Spread | Minimum of 100 shareholders holding at least 20% of voting shares. | Minimum of 300 shareholders holding at least 20% of voting shares. |
| HNX (Hanoi Stock Exchange) | | |
| Minimum paid-up capital | VND10 billion | VND30 billion |
| Profitability | For one (1) year immediately preceding the year of listing: <ul style="list-style-type: none"> profitable; and no single debt outstanding for over 12 months. | For one (1) year immediately preceding the year of listing: <ul style="list-style-type: none"> maintained company status; ROE of at least 5%; profitable; no single debt outstanding for over 12 months; and no accrued losses. |
| Spread | Minimum of 100 shareholders holding voting shares. | Minimum of 100 shareholders holding at least 15% of voting shares. |

NEWSLETTER

Edition 7, 2012



Delisting

In addition to the cases listed in Decree 14, Decree 58 provides that securities shall be delisted if:

- the listed company is late in lodging its annual financial statements for three (3) consecutive years;
- the SSC or applicable stock exchange discovers that the listed company provided false or misleading information in its listing application; and
- the listed company breached its disclosure obligations or other circumstances arose, which the applicable stock exchange or the SSC consider sufficiently serious to warrant delisting.

Decree 58 now requires voluntary delistings to be subject to approval by at least 50% of voting shareholders who are not majority shareholders, with the delisting to take effect at least two (2) years after the date of listing.

Public Company Deregistration

Pursuant to Decree 58, a public company must now notify the SSC within 15 days of the date it first fails to satisfy the applicable conditions of a public company. Except in cases of consolidation, merger, bankruptcy, dissolution, a change in the form of the enterprise or acquisition by another entity, the SSC shall consider deregistration one (1) year after the date that the company first failed to satisfy such conditions. It is important to note that the company must continue to fully comply with public company regulations until the SSC announces that the company has been deregistered.

NEW LAW ON COMPLAINTS

Background

In 1998, with a view to formalise the procedures surrounding complaints and denunciations, the Law on Complaints and Denunciations was issued. Until 2011, though they were different, complaint and denunciation provisions were always stipulated together in relevant pieces of legislation.

In 2011, these two regimes were split and two new laws were issued - the Law on Complaints and the Law on Denunciations - providing clearer, more transparent and enforceable provisions.

In this article, we focus on the new Law on Complaints. This new law is significant for businesses operating in Vietnam as recently, we are aware of numerous companies who are frustrated with State authorities' decisions which, in view of such companies, are inconsistent with the laws, and materially adversely affect their business activities.

Key Information and New Issues

Just over a year ago, the Law on Complaints No. 02/2011/QH13 was passed (**Law on Complaints**). This law came into effect on 1 July 2012 and was followed by Decree 75/2012/ND-CP of the Government, which came into effect on 20 November 2012 and provides guidelines on the Law on Complaints (**Decree 75**).

NEWSLETTER

Edition 7, 2012



The Law on Complaints covers grievances about administrative decisions, administrative acts of a State administrative entity or of an empowered person in a State administrative entity. The law provides guidelines on the management and supervision of a complaint resolution; citizens meetings; and a procedure for government officials to challenge a disciplinary decision made against them.

NOTE: *“Complaints made by foreign entities, organisations and individuals in Vietnam and their resolutions”* will principally be governed by the Law on Complaints, except where otherwise provided for by international treaties to which the Socialist Republic of Vietnam has signed or acceded.

An important change which we consider favourable is the revised definition of an *“administrative decision”*, which eliminates previous confusion as to what constitutes a decision by altering the wording as follows: *“a written document issued by a State administrative agency or a competent person in a State administrative agency”* (Article 3), regardless of whether it is in the name of a decision, instruction, notice, official letter, resolution, etc.

Settlement of Complaints

With respect to the procedures for settlement of complaints, previously, the complainant would need to first lodge with the State authority which has issued the administrative decision which is the subject of the complaint prior to initiating any administrative proceedings at the People’s Court. Under the Law on Complaints and the Law on Administrative Proceedings, administrative proceedings may now be initiated at any stage of the complaint resolution process (Article 7) and the once lengthy process has been eliminated. However, one cannot lodge a complaint and initiate administrative proceedings at the same time. A complainant must choose one or the other.

The statute of limitation of a complaint is 90 days¹ from the date of receipt of an administrative decision or learning of an administrative act. The first complaint (***the First Complaint***) is considered for acceptance within 10 days from the date it has been submitted. In the next 30 days, from the date of acceptance (or 45 days, in special cases), the First Complaint should be reviewed through interviews with relevant persons and a decision should follow (***the First Decision***). Interviews at this stage are no longer compulsory while the new law clearly stipulates that the First Decision should be communicated to the complainant within three (3) days of the date the First Complaint has been submitted.

If the complainant is dissatisfied with the First Decision or the lack of a decision resolving the First Complaint by the end of the 30 days, the complainant will have 30 days (or 45 days, in special cases) to lodge a second complaint or initiate administrative proceedings.

Similarly, the second complaint (***the Second Complaint***) should also be considered for acceptance within 10 days from the date of its receipt, and should be resolved within 45 days from the date of acceptance (or 60 to 70 days, in special cases). At this stage, the resolution process must also include interviews with relevant persons and verification of the issues which are the subject of the complaint. The Law on Complaints provides a period of seven days for the decision on resolution of the second complaint (***the Second Decision***) to be communicated to the complainant.

¹ “Day” stipulated in the Law on Complaints is a normal calendar day, not a working day or business day.

NEWSLETTER

Edition 7, 2012



If the complainant is dissatisfied with the Second Decision or lack of a decision by the end of the 45 days, the complainant is entitled to initiate administrative proceedings.

Inconsistencies with the Law on Land

At present, the majority of complaint cases in Vietnam relate to the administration and use of land². However, the Law on Complaints and the Law on Land 2003 (*Law on Land*) have quite different provisions in this regard.

We draw your attention to an example that the Law on Land provides a statute of limitation of only 30 days from the date a person learns of an administrative decision or administrative act relating to land use, for which he/she wishes to lodge a complaint. Meanwhile, since the Law on Complaints also states that "*if other legislation has different provisions in relation to complaints, then those provisions shall be applicable*", meaning the provisions of the Law on Land shall take precedence. Although such application is correct, we do not find any reason for such a discrepancy between these two statutes of limitation. Perhaps, future amendments to the Law on Land will contain a change to the statute of limitations thereunder to ensure consistency with the Law on Complaints.

Moreover, according to the Law on Land, if a complainant does not agree with the decision on resolution of the First Complaint, he/she is entitled to initiate an administrative court case or lodge the complaint with the Chairman of the People's Committee at the provincial level, whose decision is final. However, Article 42 of the Law on Complaints affirms that this decision could still be subject to administrative proceedings. We also believe that this difference could be amended and unified in future amendments to the Law on Land. However, in the interim, there appears to be a certain level of inconsistency between the Law on Land and the Law on Complaints which potentially causes difficulties for citizens and the State authorities alike.

² Pursuant to the supervisory results of the Standing Committee of the National Assembly.