Indochine Counsel
Business Law Practitioners

ClientAlert

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Introduction

Dear Reader,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover numerous topics including ride hailing services, issuance of valuable papers, new regulations on co-operative groups, and the law on animal husbandry. We've also prepared a special report on the EVFTA/EVIPA trade deals between the European Union and Vietnam and what they mean for investors in the two markets.

As always, we hope you find this month's Client Alert helpful and hope you have been able to find an appropriate mask to avoid the dreaded Covid-19. So far we're looking good in Vietnam with very few new infections this last week. Maybe we can get through this social distancing after all. We look forward to working with you.

Kind regards,
Indochine Counsel

In this issue

New rules for auto-transport business and ride hailing

The significant growth of ride hailing services in Vietnam has widely been considered a major breakthrough in the transportation industry. Nevertheless, it has not been formally regulated under the current laws of Vietnam and the operation of ride hailing services by cars has caused several obstacles in terms of management.

Seeing this need, on 17 January 2020 the Government promulgated Decree No. 10/2020/ND-CP ("**Decree 10**"), which came into effect on 1 April 2020 and repeals Decree No. 86/2014/ND-CP dated 10 September 2014 ("**Decree 86**") regulating auto transport business and business conditions.

Decree 10 provides a clearer legal framework for ride hailing platforms which associated with automobile transport as distinct from "traditional" auto transport services, and also supplements several requirements which appear to be stricter than those under Decree 86, for the operation of auto transport services.

Differentiation of Ride Hailing Platform Providers and Transportation Service Providers

Decree 10 gives an explicit definition of transportation services via cars (*"kinh doanh vận tải bằng xe ô tô"* in Vietnamese). It is stipulated as the implementation of at least one of the main stages of transportation operation as follows:

1. directly managing vehicles and drivers which is management by the transportation service providers who assign drivers to perform the passenger/cargo transportation service via one of the following means: (a) application software assisting transport interconnection; (b) the delivery order; (c) the transport service contract or (d) the transport documents); or
2. determining transportation fares; and
3. with the aim to transport passengers or goods by road for profit making purposes.

Automobile ride hailing platform providers, which are formally legalized under Decree 10, will only be allowed to provide their digital platforms or software applications for connection activities, and shall be subject to certain restrictions, including not to perform any of the main steps of transportation activities as aforementioned (i.e. directly managing vehicles and drivers, or determining the transportation fares). Otherwise, they may be treated as automobile transportation services providers.

Stricter requirements for business in contract-based passenger transportation

Under Article 7 of Decree 10, for vehicles operated by enterprises doing business in passenger transportation pursuant to contract (*"xe ô tô kinh doanh vận tải hành khách theo hợp đồng"* in Vietnamese) which are associated with the ride hailing platforms, more requirements are set out by the Government as follows:

(a) Such vehicles shall have a “CONTRACTED VEHICLE” badge fixed to the inside of the windshield, and a badge reading “CONTRACTED VEHICLE” made of reflective material must be publicly attached on the windshield and rear windows of the vehicle with a minimum size of 6 x 20 centimeters; and
(b) Requirement for local badge identity (as detailed below).

Within a month, the number of trips with the same overlapping departure and destination point operated by each vehicle shall not exceed 30% of its total trips.

Requirement for local badge identity

Being new under Decree 10, if an automobile vehicle operated for passenger transport, regardless of whether it is passenger transport per contract or passenger transport by taxi, has more than 70% of total operating time in a month in a locality, a local badge (in such locality) must be obtained. The total operating time shall be determined by way of using the data obtained from its vehicle tracking system.

Installation of cameras on transport vehicles

Prior to 1 July 2021, the following transport vehicles must have cameras installed that may (and it must be ensured that such cameras may) record and store images of the driver (for goods transport vehicles) or the driver as well as the whole length and breadth of the interior of the vehicles (for passenger transport vehicles) during traffic:

(a) Passenger transport vehicles with nine or more seats (including driver);
(b) Vehicles transporting goods by container with a trailer or semi-trailer.

Cameras must be able to maintain records of at least 24 hours for autos with itineraries up to 500km and of at least 72 hours for autos with the itinerary of more than 500km, and must be provided to the competent police departments, traffic inspectors and licensing authorities for the purpose of ensuring transparency and fair public supervision.

Issuance of valuable papers by credit institutions and foreign bank branches

On 31 December 2019, the State Bank of Vietnam (the “**SBV**”) issued Circular No. 33/2019/TT-NHNH (“**Circular 33**”) providing amendments to Circular No. 34/2013/TT-NHNN (“**Circular 34**”) on issuance of domestic promissory notes, bank notes, deposit certificates and bonds (“**Valuable Papers**”) by credit institutions and foreign bank branches (hereinafter collectively referred to as the “**Credit Institutions**”).

Circular 33 amended several regulations related to the interest rates and payment of Valuable

Papers. In particular:

(a) The interest rates of Valuable Papers shall be determined by Credit Institutions in accordance with the applicable regulations on interest rates issued by the SBV. However, for bonds interest rates must also comply with regulations of the Law on Securities, Decree No. 163/2018/ND-CP ("**Decree 163**") and other guiding regulations of the Law on Securities. The calculation method of the interest rate of Valuable Papers must be in compliance with regulations issued by the SBV.

(b) The payment method of principal and interest of Valuable Papers shall be determined by the Credit Institution in accordance with the relevant laws and must be informed to buyers before issuing such Valuable Papers.

(c) The ownership of Valuable Papers shall be transferred in forms of sale, purchase, donation, exchange and inheritance in accordance with relevant laws.

In terms of bonds issued by the Credit Institutions, Circular 33 also provides certain amendments on the issuance of bonds. Particularly:

(a) In case of issuance of private bonds, Credit Institutions must comply with Decree 163, Circular 34, and relevant laws. The issuance of public bonds must comply with the Law on Securities and relevant laws;

(b) The private bond issuance plan must be approved by the competent body in accordance with Decree 163. With respect to public bonds, an issuance plan shall be approved by the competent body of Credit Institutions and the SBV;

(c) As required by Circular 33, the plan for issuance of bond swaps and bonds with security rights must include the required contents as provided by Article 24.1 of Circular 34 (as amended by Article 1.9 of Circuar 33). In addition, for the conversion of convertible bonds into shares or the excercise of share purchase rights for bonds with security rights, the Credit Institutions and the buyers must comply with regulations issued by the SBV on the procedure and application dossier for charter capital increase of credit institutions.

Circular 33 took effect as from 19 February 2020 and repealed Articles 2.5, 2.6, Schedule 01 and 02 of Circular 34; Circular No. 16 /2016/TT-NHNN on amendment of several regulations of the Law on Credit Institution.

Law on Animal Husbandry

On 21 January 2020, the Government issued Decree No. 13/2020/ND-CP on detailed guidance for the Law on Animal Husbandry ("**Decree 13**").

(a) Decree 13 provides the list of animal breeds in need of conservation and the list of animal breeds prohibited for export. In addition, the Ministry of Agriculture and Rural Development is responsible for annually reviewing and preparing the list of animal breeds in need of conservation and list of animal breeds prohibited for export;

(b) The procedure for obtaining a certificate of conformity to the national technical regulation on facility ("**Facility Conformity Certificate**") is replaced by the procedure for obtaining a certificate on eligibility for production of animal feed product (the "**Animal Feed Production Certificate**"). Accordingly, animal feed production facilities whose Facility Conformity Certificate expires from 5 March to 31 December 2020 have the right to conduct production for a maximum period 12 months from the expiry date of their Facility Conformity Certificate. After such time, they must obtain the Animal Feed Production Certificate to continue their production;

(c) Decree 13 provides criteria applied for young domestic animals to use feeds containing antibiotics. In addition, as prescribed by Article 12.2 of Decree 13, antibiotics shall only be used in production of complete formulated animal feed for certain types of animals only.

Furthermore, for the use of antibiotics in prevention of livestock diseases, it is required that:

(i) If any veterinary medicine containing antibiotics recorded in the list of critical important antibiotics for human medicine recommended by the World Health Organization (WHO) and which have been licensed for sale for animal disease prevention purposes, such medicine shall be sold and used until 31 December 2020;

(ii) If any veterinary medicine containing antibiotics recorded in the list of very important antibiotics for human medicine recommended by the WHO and which have been licensed for sale for animal disease prevention purposes, such medicine shall be sold and used until 31 December 2021;

(iii) If any veterinary medicine containing antibiotics recorded in the list of important antibiotics for human medicine recommended by the WHO and which have been licensed for sale for animal disease prevention purposes, such medicine shall be sold and used until 31 December 2022; and

(iv) If any veterinary medicine containing antibiotics other than those prescribed above and which have been licensed for sale for animal disease prevention purposes, such medicine shall be sold and used until 31 December 2025.

(d) Decree 13 also provides regulations regarding the production of animal feed products; the import and export of animal products, animal feed products, and live animals; regulations on the resolution of animal waste.

Decree 13 took effect on 5 March 2020.

New regulations on Co-Operative Groups

On 10 October 2019, the Government promulgated Decree No. 77/2019/ND-CP ("**Decree 77**") to replace Decree 151/2007/ND-CP dated 10 October 2007 ("**Decree 151**"), with major changes in establishment and operation conditions of the co-operative groups ("tổ hợp tác" in Vietnamese).

Decree 77 provides regulations on establishment, organization, operation and cessation of operation with regard to co-operative groups. Under Decree 77, co-operative groups shall not be considered legal entities. Members to co-operative will voluntarily establish, contribute assets and efforts to carry out production and business activities appropriate and not prohibited by the laws of Vietnam, on the basis of mutual benefits and responsibilities. The new decree paves the way for co-operative groups to be entitled to preferential policies similar to co-operatives ("hợp tác xã" in Vietnamese).

A civil transaction made by a co-operative group shall be executed by its representative whose authorised powers shall be agreed by all of the members of the co-operative group.

Establishment of co-operative groups

Co-operative groups operate on the ground of a co-operation contract. In the past, the co-operation contract under Decree 151 must be authenticated by communal People's Committee. Under Decree 77, the leader of the co-operative group must notify the communal People's Committee regarding the establishment of the group, pursuant to which the aforementioned People's Committee will set up a logbook to update the operation and changes of co-operative groups.

Participation in and withdrawal from co-operative groups

Compared to Decree 151, in which only individuals can participate in Co-operative groups, Decree 77 now recognizes legal entities as eligible members of co-operative groups. This means that under Decree 77, enterprises and organizations can join and take part in co-operative groups. Also, the number of members required for establishment of co-operative groups was reduced from three to two members.

For co-operative groups already established, an individual or organization needs the consent of more than 50% of the total members to add its name in the co-operative contract. When an individual or organization wants to voluntarily terminate their membership, they have the right to withdraw from the co-operative group provided that

(i) they have a legitimate reason and receive the consent of more 50% of the total members or
(ii) the termination satisfies the conditions agreed in co-operative contract.

In addition, members must also perform their obligations by complying with the provisions of the co-operative contract and are obliged to pay compensation for the damage they cause.

Decree 77 took effect on 25 November 2019.

Vietnam and The EU soon to enjoy the fruits of groundbreaking treaties

This last week the European Union completed its procedures for enacting two major trade deals with Vietnam. It is expected that Vietnam's procedures will be completed this summer and the deals will be enacted and enforced moving forward.

The EVFTA and EVIPA are the fruit of over eight years of negotiation between Vietnam and trade representatives of the European Union. The overall agreement consists of two parts, the free trade agreement (EVFTA) - which outlines the reduction of tariffs on goods and services between the two countries - and the investment protection agreement (EVIPA) - which codifies investment protections in each country and creates a dispute resolution mechanism for disputes regarding the two agreements and for investors whose rights as guaranteed by the agreements are violated by a host government - which work together to create one of the most liberal free trade agreements signed to date.

Signed last year and still in the process of receiving the final approvals from legislative bodies in the two countries, it is anticipated that the two agreements will enter into force sometime later this year. For Vietnam, these agreements mark the opening wide of an important and powerful trade partner while for the EU, this agreement - coming on the heels of their agreement with Singapore - is the next step in coming to terms with ASEAN as a whole market.

This article will examine the specifics of each agreement and outline relevant mechanisms that will affect investors and businesses across the two markets. It will first examine the EVFTA - though not looking at specific commitments in goods or services - and then the EVIPA and its mechanism for resolving investor / state disputes in relation to the two agreements.

EVFTA

The EVFTA is what it sounds like, a free trade agreement. According to the European Commission it is the "most ambitious free trade deal ever concluded with a developing country". It covers individual tariff commitments across almost all goods and services sectors as well as other aspects important to liberalized trade.

Ultimately, the bread and butter of the agreement is the near complete removal of all tariff barriers - over 99% of customs duties - on exports to both markets to be phased in over the next decade. In addition to tariff relief, the agreement addresses non-tariff barriers to trade such as compliance with and acceptance of international standard certifications. This is especially important in the motor vehicle and pharmaceutical sectors where Vietnam has required country specific testing.

The agreement also opens each market's government contracts to bidding by providers from the other market. Both markets will also make it easier for service suppliers to operate in the other's territory, removing barriers to registration and certification.

One of the most important aspects of the agreement is Vietnam's commitment to comply with international standards in several sustainable development sectors. From labor law to intellectual property, Vietnam will strive to improve its enforcement and compliance in order to protect EU investments in the country.

Finally, the EVFTA will open up some previously closed sectors to investment from the EU. These sectors include manufacturing of food, tires, and construction materials. And while the EVFTA provides the bulk of line-item commitments, perhaps the most innovative part of the combined treaties lies in the EVIPA.

EVIPA

The first substantial commitment of the EVIPA is the National Treatment clause. This is a common element in trade treaties, but it also creates a major guarantee for foreign investors from each of the parties. Both the EU and Vietnam agree to grant treatment to investors of the other party "no less favourable than that it accords, in like situations, to its own investors and to their investments".

The other commitment here that harks back to the Unequal Treaty System in China is the Most Favoured Nation Treatment. This guarantees that both parties to the EVIPA will treat the investors from the other party at least as well as they treat investors from any other country. This means that if Vietnam enters into a trade treaty with, say, the United States, it cannot offer better terms than are included in the EVFTA without also granting those improved terms to investors from the EU.

Each party's government, in treating with investors from the other party, must act fairly and equitably. De facto violations of this standard include the following actions by a government against investors from the other party:

(a) a denial of justice in criminal, civil or administrative proceedings;
(b) a fundamental breach of due process in judicial and administrative proceedings;
(c) manifest arbitrariness;
(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; and
(e) abusive treatment such as coercion, abuse of power or similar bad faith conduct.

Furthermore, the EVIPA guarantees that a party will not expropriate or nationalize an investment of an investor from the other party unless.

(a) for a public purpose;
(b) under due process of law;

(c) on a non-discriminatory basis; and
(d) against payment of prompt, adequate and effective compensation.

All of these elements must be met in order for the expropriation not to be in violation of the party's commitments in the EVIPA. One party's government cannot arbitrarily expropriate an investment of the other party's investors without being in violation.

Finally, the EVIPA guarantees that investors may transfer funds cross border without restriction for most any legitimate purpose, and that an investor may transfer rights assigned to it under contract to any party of its choosing and that such subrogation will be recognized by the authorities of the host party's government.

The above guarantees and commitments provide the basis upon which the dispute resolution mechanism is enforced. A violation of the above guarantees and agreements will trigger the dispute resolution mechanism and provide investors the ability to pursue reparations from the violating government.

The EVIPA provides for two types of dispute resolution. If one of the Parties violates the EVFTA the wronged party may proffer notice to the party perceived in violation and initiate consultation. Consultation may escalate to mediation. Mediation may escalate to arbitration. This is consistent with contractual relations and not terribly innovative as concerns Vietnam.

The second type of dispute resolution, however, is new to Vietnam and may prove a major driver for institutional change in the country. This mechanism is for disputes between investors and the party itself. This provides that, for example, an investor from Germany that invests in Vietnam may institute dispute resolution proceedings against the government of Vietnam for certain violations of the investment protections.

If one of the parties violates the investment protections set out in the EVIPA, then the investor may attempt negotiations with the government in violation. They are also, if the violation results in damages, to have attempted action in the courts in the territory of the violating party, however, if such a violation exists it is likely that the courts will not provide relief. Assuming such attempts at relief have been exhausted, the investor may sue for consultation with the party it deems in violation.

At any point in the process the parties may turn to mediation. Mediation will not affect either party's legal standing to pursue any other remedy available under the EVIPA.

Failing resolution through consultation, the investor may submit a claim. Claims are brought before the ICSID under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Using the Additional Facility Rules, an arbitration tribunal is established and procedures are followed according to UNCITRAL rules which will, eventually, lead to an arbitral award.

In order to implement this arbitration procedure, the parties equally fund the establishment of a nine person tribunal which oversees the resolution of disputes between investors and a party. This tribunal shall be supplemented by an appeals tribunal, also set up and funded in cooperation between the parties.

This dispute resolution process creates an atmosphere to foster bilateral cooperation. It also protects foreign investors from one party investing in the other party from expropriation and other evils that have been seen commonly to occur. It is the first time that Vietnam has allowed for investor action against its government in an FTA and may well prove the beginning of a new era in FDI in Vietnam.

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 45 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

Indochine Counsel advises clients in the following areas:

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