



ClientAlert

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 P2P Lending, administrative violations for breaches against the competition law and in the use of dangerous chemicals, export zone taxes, new rules governing alcohol use, distribution, and marketing, insurance activities, international trade, construction costs and copyright matters.

As always, we hope you find this month's Client Alert helpful and wish you a prosperous Year of the Rat. We look forward to working with you.

Kind regards,
Indochine Counsel

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Towards a Legal Framework for P2P Lending in Vietnam

In the context that peer-to-peer lending (“**P2P Lending**”) has taken root in the region, the State Bank of Vietnam (the “**SBV**”) is studying international models of P2P Lending for a new management framework. On 8 July 2019, Official Letter No. 5228/NHNN-CSTT (the “**OL 5228**”) was issued by the SBV. While this OL 5228 seems to be solely intended for credit institutions and foreign bank branches (“**CIs**”), there are several matters that other business entities should be aware of, notably, companies who have *de facto* operated as P2P Lending service providers. Below are some key matters set out under the OL 5228.

Regulatory Framework for P2P Lending in Vietnam

As recognized by the SBV, P2P Lending is designed and developed on digital technology platforms, directly connecting borrowers with lenders or investors without the participation of financial intermediaries. Despite this distinction, several P2P Lending companies have registered and proclaimed themselves as financial consultancy or financial brokerage firms.

Through OL 5228, the SBV formally confirmed that Vietnam doesn't yet have a regulatory framework for P2P Lending. Nonetheless, the SBV remained silent on whether such an industry is prohibited from implementation in practice.

Relevant Practices and Potential Negative Impacts

As an additional channel for accessing financial resources that can contribute to financial literacy, P2P Lending may indeed create socio-economic advantages, such as contributing to the diminution of the concerned issue of "black credit". It also contains potential perils and risks including those related to lending activities, money laundering, misleading information, cyber security, etc.

The SBV also took the initiative to issue warnings about relevant practices of P2P Lending companies. From the SBV's standpoint, several companies may be taking advantage of the P2P Lending business model to commit illegal activities such as black credit operations, loan sharking, disguised pawn lending schemes, and multi-level financial activities. From the legal perspective of the SBV, there are signs that some P2P Lending companies may have been acting in the form of credit extension, which is recognized as banking activities, and accordingly would be a violation of the applicable laws.

Recommendations to CIs

For the purpose of ensuring the safety of the banking system, the SBV recommends that CIs on their potential engagement in P2P Lending business:

1. Be cautious in signing and implementing cooperation agreements with P2P Lending companies to ensure such agreements, execution and performance of such agreements are

- in accordance with the applicable laws, do not affect the operation and reputation of CIs and the reputation and safety of the banking system; thereby ensuring the safety of the financial and banking system and social security as well; and
2. Consider requesting P2P Lending companies to fully, transparently and truthfully publish information regarding their cooperation and transaction transmitted to end users and *concerned* parties. CIs should regularly follow up with the publication of their cooperation with P2P Lending companies to promptly detect information published by P2P Lending which is inaccurate, incomplete and possibly harmful to consumers and related parties (if any), and then take appropriate measures.

Administrative Penalties for the Violations of the Competition Law

To implement Articles 110 and 111 of the new 2018 Competition Law (the “**2018 Competition Law**”), the Government has released Decree No. 75/2019/ND-CP, dated 26 September 2019, stipulating administrative sanctions in the sector of competition (“**Decree 75**”) which supersedes Decree No. 71/2014/ND-CP dated 21 July 2014 (“**Decree 71**”). Decree 75 came into effect on 1 December 2019, and has the applicable subjects matching those stated in the 2018 Competition Law, i.e. (i) business enterprises, including enterprises engaged in production or supply of public utilities, enterprises conducting business in State monopoly industries and sectors, public professional entities and foreign enterprises operating in Vietnam; (ii) industry and professional associations operating in Vietnam and (iii) related domestic and foreign agencies, organizations and individuals.

Maximum fines for an administrative breach

- Breach of regulations on unfair competitive practices: the fine is increased from VND200 million to VND2 billion (applicable to organizations);
- Breach of regulations on agreement in restraint of competition, abuse of dominant market position or monopoly position: maximum fine will be calculated as 10% of the total revenue of an enterprise in breach in the relevant market in the fiscal year immediately preceding the year of committing the breach, but less than the lowest penalty applicable to an offender as stipulated in the Criminal Code. If the total revenue of such year is zero, the fine shall be determined in the range of from VND100 million to 200 million;
- Breach of regulations on economic concentration: maximum fine is 5% of the total turnover of the enterprise in breach in the relevant market in the financial year immediately preceding the year of the breach. If the total revenue of such year is zero, the fine shall be determined in the range of from VND100 million to 200 million; and
- Breach of other regulations: maximum amount of fine is VND200 million.

Additional penalties and measures for remedying consequences

Decree 75 also specifies the period for applying additional sanctions of deprivation of the right to use licenses, practicing certificates or suspension of operation ranging from six to 12 months. No time limit for applying such sanctions was provided in Decree 71. Violations which are subject to the additional sanctions comprise: acts of disrupting business activities of other enterprises, or illegally inducing the customers, or providing information, mobilizing, calling, forcing or coercing others or arranging for an enterprise to commit an act or practice in restraint of competition or unfair competition (in accordance with Articles 19 and 20 and 25 of Decree 75).

Other additional penalties include confiscation of the exhibits or facilities used to conduct the breach; confiscation of profit gained from the breach, and/or revocation of the enterprise registration certificate or equivalent document. In addition to measures for remedying consequences provided by Decree 71, the following are newly provided by Decree 75: (a) control by the competent State agency over the purchase and sale price of goods or services or over other trading conditions in contracts of an enterprise receiving a merger, of an acquiring enterprise or of a newly formed enterprise after an economic concentration; (b) compulsory provision of all information and documents; and (c) restoration of the original status.

New Rules for CIT Deductible Expenses for Enterprises in Industrial / Economic Zones

On 12 July 2019, the Ministry of Finance promulgated Circular No. 43/2019/TT-BTC (“**Circular 43**”) on the implementation of Article 24.4 of Decree No. 82/2018/ND-CP dated 22 May 2018 issued by the Government on the management of industrial zones and economic zones (“**Decree 82**”). The circular came into effect on 26 August 2019.

Expenses of enterprises having an investment project in industrial zones or economic zones for construction, operation or lease of apartments and social infrastructure facilities for workers in industrial zones or economic zones shall be deducted upon the determination of taxable incomes for corporate income tax (“**CIT**”) purposes as follows:

- For fixed asset value: such expenses shall be calculated in the value of the works and depreciated into deductible expenses when determining CIT taxable income if they satisfy the conditions on fixed assets regulated by the Ministry of Finance in provisions of the regime on management, use and calculation of depreciation of fixed assets; and
- For expenses (other than those provided in Item a above): such expenses shall be included in deductible expenses in accordance with the Law on CIT.

In addition, those expenses which arose as from 10 July 2018 shall be implemented in accordance with Article 24.4 of Decree 82 and the guidelines in Article 1 of Circular 43.

New Law on Alcohol Harm Prevention

Vietnam will welcome the new year 2020 with a new Law on Alcohol Harm Prevention (the “**LAHP**”). The LAHP, which was passed on 14 June 2019 by the National Assembly, sets out regulations which would have great impacts on the Vietnamese society.

The LAHP is aimed at reducing and preventing traffic accidents caused by alcohol and beer (collectively, the “**alcoholic beverages**”) in Vietnam. For the first time, the National Assembly has set strict prohibitions for vehicle controllers to take alcoholic beverages prior to and during their participation in traffic. The act of controlling traffic vehicles while having alcohol concentration in blood or breath is also expressly specified in Article 5 of the LAHP, being a prohibited conduct.

The LAHP also sets out certain rules for alcoholic beverages manufacturers, providers and advertisers.

According to Article 32.7 of the LAHP, as from the effective date of the LAHP, it is prohibited to establish a new selling point for on-the-spot use (e.g. beer shops, restaurants serving beer, etc.) (the “**selling point**”) within a 100-meter radius from medical facilities, kindergartens, nursery schools, pre-schools and general education establishments.

As also set out in Article 32, it is compulsory for selling points to post a notice that selling alcoholic beverages to individuals under the age of 18 is strictly prohibited. In case of doubt about the age of buyer, the seller has the right to request the buyer to present proper documents evidencing their age. Furthermore, selling points should assist customers to hire or use public transportation after consuming alcoholic beverages.

In the spirit of reducing the consumption of alcoholic beverages in Vietnam, the LAHP also sets out certain rules regarding advertising this type of product. Apart from the strict prohibition of advertising alcohol with a concentration of 15% per volume or above, Article 12 provides new rules on prohibition of advertising alcohol with the concentration of less than 5.5% per volume in the following cases:

- The event, advertising facilities or the product for persons under 18 years old, for students, young persons or pregnant women;
- Advertising by means of transportation;
- Advertising on audio or video newspaper immediately before, during and immediately after any program for children; advertising from 6pm to 9pm, except for advertisements which are available in sports programs of which copyright has been obtained to be relayed from a foreign live broadcast and other cases as regulated by the Government; and
- Outdoor advertising which violates regulations on size, distance from the campus of educational establishments, establishments used for taking care of, raising or serving recreation for persons under 18.

Where the demand for alcoholic beverages in Vietnam may significantly increase during the holiday season (i.e. the New Year, Tet Holiday, etc.), the LAHP is expected to cause a positive effect in reducing consumption. It is also expected to reduce the number of traffic accidents during the holiday season, and in general. However, in consideration of the cultural habit of Vietnamese people, the LAHP may face certain challenges as to its enforcement.

The LAHP took effect on 1 January 2020.

Administrative Penalties: Chemicals and Industrial Explosive Materials

On 30 August 2019, the Government promulgated Decree No. 71/2019/ND-CP on penalties for administrative violations against regulations on chemicals and industrial explosive materials (“**Decree 71**”) which replaces Decree No. 163/2013/ND-CP, dated 12 November 2013 (“**Decree 163**”).

Decree 71 deals with administrative violations, the forms and levels of penalties and remedial measures and the authority to impose penalties in respect of chemicals and industrial explosive materials.

Decree 71 provides a more specific definition of organizations, besides Vietnamese and foreign individuals, subject to penalties, e.g. the economic organizations established under laws on investment, enterprises, co-operatives and also other public entities.

According to Decree 71, applicable entities in breach shall be subject to a primary penalty, including warning and fine. The maximum fine imposed upon an individual is VND50 million and VND100 million for a violation against regulations on chemicals and industrial explosive materials respectively. The fines double when applied to an organization which commits the same administrative violation as the individual.

An offender may, depending on the nature and seriousness of the breach, also be subject to one or more additional penalties in certain cases as follows:

- Deprivation for a specified period of rights to use the certificate of eligibility to manufacture or sell conditional industrial chemicals; the license to manufacture or sell industrial chemicals restricted from manufacture and sale; the license to manufacture chemicals listed in Schedule 1, Schedule 2 and Schedule 3, DOC chemicals or DOC-PSF chemicals; licenses and certificates of eligibility for management and use of industrial explosive materials or explosive precursors;
- Suspension for a specified period of a whole or a part of (i) chemicals activities; (ii) manufacture, sale, import and experimentation of insecticidal and germicidal chemicals and

- preparations for household and medical use; (iii) provision of preparation-based insect and germ control services; and (iv) industrial explosive material-related activities; and
- Confiscation of the exhibits and instrumentalities used to commit administrative violations.

and several measures for remedying consequences of the violation as stated in Article 3.3 of the decree.

Decree 71 came into effect on 15 October 2019.

Guidelines for Insurance Agency Activities of Credit Institutions and Foreign Bank Branches

On 31 December 2019, the State Bank of Vietnam issued Circular No. 37/2019/TT-NHNN (“**Circular 37**”) guiding insurance agency activities of credit institutions and foreign bank branches for insurance companies, pursuant to the Law on Insurance Business No. 24/2000/QH10 dated 9 December 2000, as amended in 2010 and 2019, respectively.

Circular 37 provides guidelines for insurance agency activities of credit institutions and foreign bank branches for life insurance enterprises, non-life insurance enterprises, health insurance enterprises, re-insurance enterprises, and branches of foreign non-life insurance enterprises (hereinafter all referred to as “**insurer**”). Accordingly, credit institutions may conduct insurance agency activities for insurers as follows:

- (i) *Introducing/referring customers:* credit institutions may introduce / refer customers wishing to purchase in order for the insurer to offer insurance to the customers;
- (ii) *Offering insurance:* credit institutions may offer directly or explain terms and conditions of insurance products to customers wishing to purchase insurance; or may offer insurance via electronic methods, online insurance, or by other methods consistent with provision of law;
- (iii) *Arranging signing of insurance contracts:* credit institutions may guide and assist customers in preparation of insurance contracts, in receiving application files for insurance cover and in arranging the signing of insurance contracts as agreed upon in the insurance agency contract with the insurer and in accordance with provisions of the law on insurance business;
- (iv) *Collecting insurance premiums:* credit institutions may collect insurance premiums from customers as agreed upon in the insurance agency contract with the insurer;
- (v) *Arranging resolution of claims for compensation / insurance indemnity on occurrence of an insured event:* credit institutions may assist and guide customers on the procedures for claiming insurance benefits, and may receive claim files for compensation / insurance

indemnity from customers and transfer the same to insurers to appraise and issue decisions on payment of compensation / insurance indemnity. When authorized by an insurer, a credit institution may also pay the compensation / insurance indemnity amount to customers; and

- (vi) *Other activities* relevant to performance of insurance agency contracts in compliance with the law on insurance business and authorization from the insurer.

Credit institutions performing insurance agency activities must lodge a report on their insurance agency activities to the State Bank of Vietnam no later than the twenty-fifth day of the last month of each quarter.

Circular 37 will take effect from 2 March 2020.

Combating Origin Frauds and Illegal Goods Transshipment

Thanks to new-generation Free Trade Agreement (“FTA”) memberships, the majority of made-in-Vietnam goods have benefited from import duty exemption (under specific schedule) when exported to other members of the FTA. As a result, trade remedies have been built up to restrain export capabilities of countries on which duties are imposed. Some enterprises attempt to falsify goods origin and / or exploit Vietnamese origin of goods to enjoy duty incentives or to evade trade remedies illegally. Furthermore, due to the US – China trade war, US-bound Chinese goods such as plastics, optical items, and electronics that are subject to US anti-dumping duties have decreased in volume, but transshipment of such goods to the US via third countries, including Vietnam, is surging. To tackle this situation, the Government of Vietnam on 31 December 2019 issued Resolution No. 119/NQ-CP on emergency measures to strengthen the State management regarding prevention of origin fraud and illegal goods transshipment.

The resolution was issued to:

- Prevent frauds of goods origin, illegal transshipment in import and export activities, to proactively detect and strictly handle cases;
- Promote the development of domestic production, protect the legitimate rights and interests of Vietnamese manufacturers; maintain export growth in a sustainable manner; attract cooperation and foreign investment in high value-added and high-tech projects with spillover effects, and connect global production and supply chains;
- Improve the efficiency of the international economic integration process, especially the implementation of new generation FTAs, ensuring the serious and effective implementation of commitments in multilateral frameworks and ratified FTAs; and
- Protect Vietnam's rights and interests in international trade.

To accomplish the above objectives, the Government requests close cooperation between the

Ministry of Industry and Trade as the focal body, Ministry of Finance, Ministry of Science and Technology, Ministry of Public Security, Vietnam Chamber of Commerce and Industry (VCCI) and other competent authorities.

The Ministry of Industry and Trade is to amend or replace Decree No. 124/2015/ND-CP dated 19 November 2015 on amendments to Decree No. 185/2013/ND-CP providing the penalties on administrative violations in commercial activities, production of, trade in counterfeit or banned goods and protection of consumer rights. Such amendments will increase levels of sanctions imposed on origin frauds and fabricated product labeling for warning purposes. Finally, the determination of goods origin (i.e. issuance of preferential C/O and non-preferential C/O) shall be more strictly supervised in the future.

Management of Construction Investment Costs

On 14 August 2019, the Government promulgated Decree No. 68/2019/ND-CP on management of construction investment costs ("**Decree 68**"), replacing Decree No. 32/2015/ND-CP dated 23 March 2015.

In addition to projects using state budget funds and off-budget state funds as previously prescribed, Decree 68's new governing scope also covers projects in the form of Public-Private Partnerships (PPP).

Principle of management of construction investment costs

Four principles are retained in Decree 68 i.e. assurance of the investment objectives and effectiveness of approved projects, State's competence to manage construction investment costs, responsibility of investors, and the inspection / audit of construction investment costs.

Decree 68 also regulates two additional management principles:

- (i) For specialized construction works classified as state secrets and works constructed under urgent orders, it is required to apply the method of determining construction investment costs, construction norms, unit prices and price indexes as the basis for determining the value of establishment of public property. The appraisal and approval of construction management costs of these works must be conformable to relevant provisions on management of construction of specialized construction works; and
- (ii) For infrastructure construction facilities under the national target programs for sustainable poverty reduction and new-style rural area development, the principles and methods for determination of construction investment costs prescribed in Decree 68 will be applied as suitable to their nature and characteristics.

Total construction investment costs

Decree 68 specifies the costs constituting the total construction investment costs, which includes:

- (i) Compensation, assistance and resettlement costs including compensation costs for land, houses, works on land, assets attached to the land and on water surface and other compensation costs; assistance amounts upon land recovery by the State; resettlement costs; cost of organizing compensation, assistance and resettlement; cost of land use/lease during the period of construction (if any); costs for removal of and payment for technical infrastructure items which have been constructed (if any), and other relevant costs;
- (ii) Construction costs include construction costs of works and work items; temporary works and auxiliary works serving the construction process; costs of demolition of the works outside the scope of site clearance for which the costs have been included in compensation, assistance and resettlement costs;
- (iii) Equipment costs include costs of purchase of construction and technological equipment; costs of management of purchase of construction equipment; costs of purchase of software copyrights used for construction and technological equipment (if any); costs of training and technology transfer (if any); costs of processing and manufacturing non-standard equipment (if any); costs of installation, testing and tuning; costs of testing following technical requirements; costs of transportation and insurance; taxes, fees and other relevant costs;
- (iv) Project management costs include costs of performance of project management from the preparation stage, execution stage and completion stage to bring the project into use. Regarding PPP projects, project management costs include project management costs of competent authorities, operating costs of project management boards under the competent authorities and project management costs of investors;
- (v) Construction investment consultancy costs include costs of consultancy for survey costs; costs for preparing pre-feasibility study reports, reports for investment policy proposal with respect to projects listed in group B or C, feasibility study report and eco-technical report; design costs, construction supervision consulting costs and other relevant costs;
- (vi) Other costs include necessary costs for detecting and removing mines and explosive objects; insurance costs of the works during the time of construction; charges and fees for appraisal of projects, designs and construction estimates; costs for audit, due diligence and approval of the investment capital and other costs; and
- (vii) Contingency costs include the contingency costs for unexpected workloads and contingency costs for price escalation factors during the project execution period.

Decree 68 took effect on 1 October 2019. It is expected to facilitate the management of construction

investment and tackle current shortcomings for PPP projects.

Process of Judicial Assessment on Copyrights and Copyrights-Related Rights

On 5 July 2019, much-awaited Circular No. 02/2019/TT-BVHTTDL providing regulations on the process of judicial assessment on copyrights and related rights (“**Circular 02**”) was issued by the Ministry of Culture, Sports & Tourism of Vietnam (“**MCST**”). The judicial assessment on copyrights and related rights shall be conducted under a request from competent authority or person conducting proceedings or person lodging the request.

As provided in the Circular 02, the judicial assessment organizations on copyrights and related rights comprise the MCST, the Department of Culture, Sports and Tourism, the Department of Culture and Sports at provincial or municipal level, relevant judicial assessment offices and lawfully eligible ad-hoc judicial assessment institutions. The experts conducting judicial assessment on copyrights and related rights comprise judicial experts or lawfully eligible ad-hoc judicial performers having relevant profession on the cultural aspects (collectively the “**expert**”). Subject to the complexity of the case and the decision of the judicial assessment organization in charge, an assessment may be conducted by an expert (individual assessment) or a group of experts (collective assessment) containing at least 3 experts.

During the process of assessment, the expert in charge may collect samples (specific items being the factor of infringement or the subject matter of protected copyright and copyright-related rights) to be assessed by herself or ask the assessment requester to provide her with such samples. The contents of the assessment may comprise:

- Subject matters of the copyrights / copyright-related rights;
- Infringing elements;
- The value of the copyrights / copyright-related rights and of damages; and
- Other related contents.

The expert in charge shall be responsible for a timely, full and honest record of the assessment process and assessment results in documents. The assessment dossier must be handed over to the authority or requester.

Circular 02 came into effect on 1 September 2019.

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.

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